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I Was Alabama's Top Judge. I'm Ashamed by What I Had to Do to Get There. - POLITICO Magazine

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Lincoln Agnew

## ON THE BENCH

**I Was Alabama's Top Judge. I'm Ashamed by What I Had to Do to Get There.**

How money is ruining America's courts.

By SUE BELL COBB | March/April 2015



**I FELT TRAPPED. I HAD MADE IT TO THE TOP OF MY** profession. I was the chief justice of Alabama, the first woman to head the state Supreme Court. It was, for a lawyer like myself, the pinnacle of achievement. And I'd earned it the hard way. To get to the justice's chambers, I had won the nation's most expensive judicial race that year. But at what cost?

I had needed \$2.6 million to win—and that money had to come from somewhere. My opponent had raised even more, nearly \$5 million in all. It's terribly awkward and

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uncomfortable for a judge to have to ask for campaign money. But how are you going to win without it? My biggest concern is how shameful all of this looks to the public.

Two days after my election in 2006, I was with my daughter, Caitlin, on a school field trip when my cellphone rang. A reporter from a national legal publication was calling. Would she ask, I thought, about my election as Alabama's first female chief justice? Or my plans for reform after holding court in some 40 of Alabama's 67 counties over 25 years?

"Judge Cobb," she asked, "how does it feel to be the victor of the most expensive judicial race in the United States this year? And how can you assure the people of Alabama that the contributions you sought are not going to impact how you rule? And how can you convince the people of Alabama not to believe that their courts are for sale?"

I was mortified. And while I was proud of the work I did for the next 4 1/2 years, I never quite got over the feeling of being trapped inside a system whose very structure left me feeling disgusted. I assure you: I've never made a decision in a case in which I sided with a party because of a campaign donation. But those of us seeking judicial office sometimes find ourselves doing things that feel awfully unsavory.

No one is immune from these pressures. Not even me.

The reporter's questions were valid in 2006. And they still are. How do we convince Americans that justice isn't for sale—when in 39 states, it is?

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**The phone calls always started with chitchat:** *How's the family? How's your law practice going?* It was fun catching up with old friends and acquaintances until the point when I had to steer them toward the real reason I was calling.

"I'd very much appreciate your support for my campaign," I'd say, religiously avoiding the "ask" and handing the phone to my finance director when it came time to talk real money.

The money was important. In Alabama, you don't get to mete out justice without spending millions of dollars. I had my money; my opponent had his. The race for dollars reached new heights when a poll showed that I had a real chance of winning despite being a Democrat and the underdog, leading my opponent and his supporters to significantly increase their fundraising. And I had to answer in the best way I could—by trying to raise more money—or risk falling woefully behind. The amounts are utterly obscene.

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In Alabama, would-be judges are allowed to ask for money directly. We can make calls not just to the usual friends and family but to lawyers who have appeared before us, lawyers who are likely to appear before us, officials with companies who may very well have interests before the court. And I did.

Where do you draw the line? If you ask for money from lawyers who appear in your court, it's untenable for you. It's also untenable for them. I may not have directly asked for money or collected the check, but in my heated campaign to become chief justice, I did reach out to everyone and anyone I could.

The simple fact is: I had to. Judicial elections have become just as overwhelmed by money as all the other contests in American politics, even if we tend to forget that in Alabama and 38 other states, judges have to stand for election. And if you're running for office, it means you have to raise money. Lots of money. And that meant phone calls. Lots of phone calls.

The money, as it flowed in to me—check after check for as little as \$5 from an individual donor to more than \$200,000 from the Alabama Democratic Party to \$638,000 from a well-known PAC that accepted money from a variety of businesses and law firms—went to the same place that it goes in other political races: to feed the TV ads and the consultants who make them.

Yes, to run for judge means pitching yourself to the public just as if you were running for dogcatcher. Many ads for judicial candidates I've seen are downright terrifying, with would-be judges bashing opponents as if they were evil incarnate. These candidates were portrayed as judges who, if given the chance, would release child molesters and murderers and order them to move in next door. Nothing could be further from the truth. But dignity and fairness are too often the first casualties in these kinds of endeavors. How else to explain a campaign ad from the late 1990s in which one candidate for the Alabama Supreme Court, who was revered by many in the bench and bar, nevertheless gave in to pressure from his campaign consultants and ran an ad comparing his opponent to a skunk? The ad opens with the image of the animal and is replaced by a photograph of the opponent as the narrator explains, "Some things you can smell a mile away. ... You can smell how bad this man's ideas are no matter where you live in Alabama."

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I worked for years with former state Representative Jeffrey McLaughlin to eliminate partisan races for judicial office that often make these campaigns overtly and inappropriately political and tend to drive up the amount of money spent by outside groups. And each time—whether the legislature was controlled by Democrats or Republicans—we couldn't make headway. McLaughlin even recounts how one Republican legislator threatened lawmakers of his own party that if they voted to eliminate partisan judicial races, he would ensure they would face primary opponents in their next campaigns. Here's the thing: Donors want clarity, certainty even, that the judicial candidates they support view the world as they do and will rule accordingly. To them, the idea of impartial and fair judges is an abstraction. They want to know that the investments they make by donating money to a candidate will yield favorable results. For businesses, this means judges who are skeptical of, or hostile to, malpractice suits and product liability claims. For unions, it translates to backing those who see business, especially Big Business, as the enemy.

Opposing sides frequently give lip service to seeking justice, but that's not what they mean. They're not thinking about the fact that our rulings bind not just those who appear before us but every resident of the state, whether it's a matter involving an allegedly faulty product or an unpaid worker's comp claim or a property owner's fight against a government entity trying to seize his building. No, what these special interests want is simply to win. This helps to explain why judicial elections have become awash in money, with some \$275 million spent on such campaigns since 2000, as each side tries to stack the bench with judges it trusts are on their team.

But public trust is eroded when judicial candidates are forced to court big donors and spenders. And outright corruption can occur too, as we saw in Arkansas recently when a former state circuit judge pleaded guilty to having reduced a jury's negligence award against a health care business in exchange for a campaign bribe. It was no coincidence, it turns out, that the owner of the business had funneled thousands of dollars to the judge's campaign fund just as the judge had an epiphany: He slashed to \$1 million the jury's \$5.2 million award because the original amount "shocked the conscience." That's not the only thing shocking about this case.

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**When a judge asks a lawyer** who appears in his or her court for a campaign check, it's about as close as you can get to legalized extortion. Lawyers who appear in your court, whose cases are in your hands, are the ones most interested in giving. It's human nature: Who would want to risk offending the judge presiding over your case by refusing to donate to her campaign? They almost never say no—even when they can't afford it.

Here's how I know: Although Alabama allows me to press potential donors for specific amounts of money, I had my own personal ban on directly asking for checks during my race for chief justice. When I phoned an attorney and secured a pledge of support, my finance director would take over to ask for a promise of a specific dollar figure and when it could be expected. I made the initial contact because it was more likely that the would-be donors would take my call—someone they often knew personally or had heard of through the media or court appearances; it would have been much easier not to pick up or return the calls of a stranger.

More times than I can remember, a prospective donor would say, "Judge, I want to help. How much do you need?" Yet when talking to my finance director, the tune would change. The lawyer was more frank about his inability to pay. When this happened, it was painfully clear to me that the prospective donor felt compelled to give, even if he or she couldn't fulfill the pledge. I accepted hundreds of contributions from lawyers and lobbyists for a total of close to \$2 million in my 2006 race. I'm sorry to say that some of them surely gave because they felt they had no choice.

Imagine how much worse it gets when a judge or candidate has no qualms about applying pressure. Take for instance, these examples from Texas—a state where judges may solicit money directly. All are drawn from a friend-of-the-court brief I joined at the U.S. Supreme Court, which is weighing a Florida ban on direct judicial solicitation for money:

- One judge emailed a small group of partners at a prominent firm to point out contributions made by other firms. "[A]ll the Top 10 firms are committed to maxing out as a firm: \$30,000 total," the judge wrote, requesting that their firm "do the same." "At most of the firms, they are designating a senior partner ... to bundle dozens of relatively small-\$ contributions ... until they reach the target," the judge explained, promising, "Bottomless thanks!"
- Another judge, soon after winning election, sent a personal email to a local lawyer that stated in part: "I trust that you will see your way clear to contribute to my campaign account in an amount reflective of the \$2,000 contribution you made towards my defeat ...

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and the fact that by their very nature post-election contributions are tardy and in very few realms does tardiness not incur an up-charge.”

• A third sent personally addressed letters to selected local attorneys, explaining that “Liberal ... special interest groups ... have targeted [my] court ... for a Democrat take-over. Tort reforms ... are at risk if we lose this court. ... I have already reached the maximum allowable PAC contributions, and now can only accept personal or law firm contributions. I need your help. Please let me hear from you today.”

These overtures are shameful. They're embarrassing. And they're perfectly legal.

It is also not unlawful for big special interests on both sides of the political aisle to play by existing rules to buy the best judges they can for their respective sides. Here's how U.S. Chamber of Commerce President Tom Donohue once put it: “We're clearly engaged in hand-to-hand combat, and we've got to step it up if we're going to survive.” Unions and trial lawyers—generally perceived to be aligned with Democrats—aren't any less shy about their plans to target the bench as a way to achieve political ends: “We figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators,” as an Ohio AFL-CIO official put it.

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**In my experience on the bench**, I saw plenty of cases in which I was certain that campaign money played no role in the outcome.

But I also saw cases in which I was concerned that fellow justices consistently ruled a certain way because business community backing alone had brought them to the court. For example: A justice I will not name, in considering 46 appeals of jury verdicts for plaintiffs, voted to reverse the verdict in full or in part 38 times. For those who don't follow appellate courts closely, it's worth pointing out that this is an astonishing record.

Another example: In 2005, shortly before I joined the Alabama Supreme Court, the justices heard appeals in 18 cases in which businesses had been hit with jury verdicts. The court—dominated by Republicans backed by business interests—threw out 17 of these verdicts. I don't think that the justices who voted to overturn these cases were corrupt. My take is that they were genuinely ruling according to their beliefs. But what this proves is how proficient special interests have become at identifying and then supporting candidates who are reliable votes for their cause.

What could possibly be wrong with that? Quite a bit, actually.



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Judges are meant to be impartial. They're supposed to apply the settled law against the facts and evidence of the case before their court. Yet being consistently and easily predictable suggests that the judge isn't applying the law so much as reflecting his or her personal views. The courts—and therefore justice—are also skewed when one side has far more money to support its candidates. Alabama is about as red a state as there is, and Republican candidates rarely have to worry about money; they're often recruited and funded by business interests, many times through the Business Council of Alabama. There are groups in the state that support Democratic candidates and causes, but the coffers are far more modest.

I ran as a Democrat, and if you believe the conventional wisdom, I should have been inundated with contributions from personal injury and plaintiffs' lawyers. I received my fair share, but I also heard time and again from lawyers who said they couldn't afford to give because the state's appellate courts, including the Supreme Court, had thrown out or gutted the verdicts they had won at trial. And they were seeing companies far less interested in settling cases because they were confident the Republican-dominated courts would come to the rescue. Could these lawyers have been exaggerating to get out of giving? Sure, but based on my observations, I thought they were being truthful.

Would I feel differently about judicial campaigns in my state if my fellow Democrats had the upper hand? Not at all. My point is not to see more Democrats elected, but to see the best qualified, politically unhampered individuals ascend to the bench and fairly dispense justice. I have supported Republicans running for judicial office when I thought they were smart and well-qualified and intellectually honest. This didn't always sit well with fellow Democrats.

The money and politics that engulf judicial campaigns have other deleterious effects. The American Constitution Society worked with Joanna Shepherd, an Emory University law professor, on a recent study that suggested that attack ads accusing judicial candidates of being soft on crime can affect an elected judge's votes. "The more TV ads aired during state Supreme Court judicial elections in a state, the less likely justices are to vote in favor of criminal defendants," the study concluded.

Here's a very different example of how applying the law without fear or favor can hurt a judge—in this case, me. During my campaign for chief justice, a supporter of mine gave a substantial amount of money to a state PAC, with instructions that the money should go to my campaign. He didn't give directly for two reasons: He could give an unlimited sum and not be identified publicly, and several of his clients backed my Republican opponent. But the money did not show up because the man who ran the PAC had an issue with me: As an

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appellate judge, I had authored an opinion—joined by my four Republican colleagues—that overturned the conviction of a defendant charged with assaulting and robbing a member of the PAC director's family. Is it any wonder that some judges would think twice before issuing such an opinion for fear that it could be used against them? (The donation finally arrived, but only after much effort, and after it was refunded to the donor, who made the contribution through another PAC.)

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**When I ran for chief justice**, my campaign aired a TV ad featuring me playing piano and a children's choir singing "This Little Light of Mine." It was intended to counter my opponent's claims that I was out of touch with the values of Alabama voters.

During my statewide travels, a senior voter approached me, saying that he had "just one question." It wasn't about the death penalty, prayer in schools or abortion. He wanted to know, "Do you really play the piano at church?" as the ad showed. I told him I did—that I had played for my church's children's choir for years. His response: "That was all I wanted to know." He simply wanted to be sure that I was the person my ads had portrayed me to be.

But I have to admit that there was one segment in another ad that I am not particularly proud of. In the ad, titled "Only," I'm heard saying that "I'm the only candidate for chief justice who spent a lifetime keeping troubled kids out of jail, who has sent hundreds of criminals back to death row ... who's locked up murderers and child abusers. And I'm the only wife and mother."

Here's the sentence in that ad that bothers me: I'm "the only candidate not supported by insurance corporations or oil money." I'm shown flipping a cue card that has "Insurance Corp." written on one side and "Oil \$" written on the other. I argued against including this scene. Wouldn't it suggest that I would be hostile to the interests of these two industries should they ever appear before me? That I wouldn't or couldn't give them a fair shake? But I was talked into it by my advisers, who said it would illustrate my independence from big money and help shine a light on the fact that my opponent had been strongly supported by big businesses. It didn't feel right to me, but I went along, thinking they understood the political marketplace better than I did. I regret it to this day.

There isn't a perfect system for selecting judges, but there certainly is a better one. Let's start with nonpartisan elections, the public financing of judicial campaigns—which was successful in North Carolina until the legislature killed it in 2013—and merit-based



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selection of judges, a system that can include nonpartisan screening commissions, gubernatorial appointment and retention elections.

Judges are not, and should never be, like ordinary politicians. We cannot and should not promise anything for those who elect us, but to be fair.

Until we act, the phone calls will continue. *How's your family? How's the law practice going? And by the way...*