

## How To Save Our Courts

By Justice Sandra Day O'Connor

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In my work as a Supreme Court justice, I was required by the Constitution to fairly and impartially apply the law—not the law as I wanted it to be but the law as it was. Now, as a private citizen, I am anxious about the state of the judiciary in America.

I am not concerned about particular judges or cases, nor am I concerned about the judiciary shifting right or left. What worries me is the manner in which politically motivated interest groups are attempting to interfere with justice.

The rule of law in the U.S. includes statutes and constitutional provisions. It also involves precedent, which is a previous judicial ruling on a matter. A judge typically defers to precedent. Like good cooking, good judging requires taking ingredients and procedures used successfully in the past and adjusting them to the case at hand. New legal recipes—or rules—can have major ramifications. So if a judge comes up with a new way to apply the law, her opinion may be reviewed by state or federal appellate courts to ensure that it is a correct interpretation of the law. If it's not, it's overturned.

Thus, our judicial system has safeguards to ensure consistency and preservation of the law. But it is threatened when judges ignore settled law and make decisions according to personal or public preferences.

The judiciary currently is experiencing unprecedented pressure from interest groups to make decisions that are based on politics. In Washington, D.C., we hear a lot about federal judges, and they have a critical role in upholding the Constitution. But having been a state judge and a state legislator, I know that the vast majority of law is state law. Ninety-five percent of litigation takes place in state courts. Many legal issues are primarily decided there, including divorce, property rights, employment law, product liability and medical malpractice.

Political pressure is a big problem in a number of our state courts. More than 89% of state judges go through some form of election process. Many of these elections recently have become full-fledged political battles, fueled by growing sums of money spent by candidates and special-interest groups to attack, defend and counterattack.

The money can be spent in polarizing ways. When Bill Cunningham was running for the Kentucky Supreme Court in 2006, one opposing campaign ad implied that he was responsible for letting six rapists out on parole. It said: "One had been on parole for only 12 hours when he raped a 14-year-old and made her mother watch."

This story was very misleading. Cunningham, then a lower-court judge, did rule to change the sentences of several rapists from life without parole to life with the possibility of parole, but these men all stayed in jail. And the rape referred to in the ad occurred 20 years earlier, before

Cunningham was even a judge.

Sue Bell Cobb remembers speaking to a reporter the day after she won the election for chief justice of the Alabama Supreme Court in 2006. Chief Justice Cobb expected to be asked how it felt to be the first woman in that job. Instead, the reporter asked: “How does it feel to be the victor of the second most expensive judicial race in U.S. history? How will you convince the people of Alabama that the campaign contributions you sought will not impact how you rule? How can we convince people their courts are not for sale?”

I imagine she answered much like Illinois Supreme Court Justice Lloyd Karmeier did after he won the most expensive judicial election in American history in 2004. That race cost the candidates \$9.3 million, a sum greater than what was spent in more than half of the U.S. Senate races that year. Karmeier said of the money: “That’s obscene for a judicial race. What does it gain people? How can anyone have faith in the system?”

Good questions. When so much money goes into influencing the outcome of a judicial election, it is hard to have faith that we are selecting judges who are fair and impartial. If I could do one thing to solve this problem, it would be to convince the states that select judges through partisan elections—that is, when a Democrat and Republican run against one another—to switch to merit selection instead. Under this plan, currently used in states such as Colorado and Nebraska, an independent commission of knowledgeable citizens recommends candidates to the governor, who appoints one of them as judge. After several years on the bench, the judge’s name is submitted to the electorate, who vote on whether he should keep his position. This method decreases the importance of money and politics in the process while still allowing voter input on retaining each judge.

I believe the long-term solution to the politicization of the judiciary process is education. Children, voters, policymakers and lawyers all should be informed about the importance of a fair, impartial judiciary. Judges should write their opinions in plain English so that the public can understand what the law is.

You also should educate yourself, an especially important task if you live in one of the 39 states that holds elections for judges. Take these steps:

- First, learn about the candidates. That you agree with a person’s policy positions is irrelevant to whether he or she would make a good judge. Evaluate them based on their ability to be fair, impartial and competent. Look for unbiased sources—many states offer voter guides and performance evaluations.
- Second, be suspicious if a candidate makes a promise about how he or she would rule in a particular case. Every case is different and should be judged according to how the law applies to that situation. If a judge decides a case based on a campaign promise, he or she has not upheld the pledge to be fair and impartial.
- Third, vote. Judicial elections tend to garner little attention. This is increasingly problematic, because interest groups often can be the main source of information. The only way to counteract this is to research the candidates, know where your information is coming from and vote.

I'm working with Georgetown University and Arizona State University on two programs on this subject. One is called Our Courts and will be an online civics experience for children. They'll be able to step into a judge's shoes so they can better understand what he or she does. The other program, the Sandra Day O'Connor Project on the State of the Judiciary, will create a dialogue between experts and law practitioners on the court system and report on the best ways to safeguard its role.

I hope I can make a lasting contribution to protecting our courts. We must preserve our system of government, a system for which I have the utmost respect as I reflect back on my Supreme Court career.

### **What To Know About Our Courts**

*Courts in the United States are divided into two separate systems: federal and state.*

**The U.S. Supreme Court** is the highest federal court in the country, followed by 13 **U.S. Courts of Appeals**, then by 94 **district courts**. Federal judges are appointed by the President and serve until they retire or die.

**State court systems** vary; each state structures its courts in a slightly different way. In 39 states, some or all of the judges are chosen through elections. To find out more about the court system in your state, visit [www.judicialselection.us](http://www.judicialselection.us).

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