

A REPORT TO THE GOVERNOR:

Free and unFree Speech for Judges

Dear Governor Murkowski: Thanks for appointing me to the Judicial Conduct Commission last year; I've completed over a full year. This is an informal report that reflects no one's views but my own. I don't know of any precedent for this free lance effort, but I can't think of any impediment to such a report. Enter the self-designated critic.

The service missions for the three constitutional bodies, the Alaska Court System, the Judicial Council and the Judicial Conduct Commission, are not particularly well understood by these bodies; they're not the only players on the stage. The typical judge is also a figure of constitutional proportion, as are the body of judges, who are both employees of the Alaska Court System and the repository of talent for getting the service missions of the court system accomplished.

Turn to the Judicial Conduct Commission which mostly conceives of its work, in the day to day sense, as cops who cite judges for misconduct, usually by handing out warnings and "have a nice day" greetings at the drive-off. (Exception noted below.) Lessons can be learned from being cited but the body of how-to rules can't be taught with a stick. What I'm looking for is the body that is constitutionally tasked to deploy and develop the talent of judges. The Alaska Court System's mission statement says that the system decides "all cases" which they do by "provid[ing] an accessible and impartial forum for the just resolution of [those] cases". This is done (at least in part) by taking new judges dispatched through the hiring hall (Judicial Council and Governor) and nurturing the talent that the judges must bring to their work resolving their assigned cases.

(There's a messy problem with turning new judges loose on litigants to get their training-on-the-job at the parties' expense; that's the school of "hard knocks" that garners a mention in investiture ceremonies.)

So who owns this talent? The public. Who trustees the talent? The court system. What are the limits on judges putting their talent to work? Judges can't moonlight; judges can't put themselves in the position where lobbyists can get at them. (These are two sides of the same coin, advocacy-unleashed in the wrong venue.) Judges are supposed to be persuaded by

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ones, threes or fives (depending on the court) in public, with both sides having access to the judicial ear. The court system says that it knows something about “accessible and impartial” forums, so if a judge learns something in such a forum she ought to be able to talk about it, if she’s not a lobby victim. When judges got tired of umpiring discovery wars, they complained to anyone who would stand still about the abuse of the justice system. The rules were changed (over the last two decades) and perhaps a significant change in the quality of the product came about. But nobody said (as far as I recall) that judges couldn’t speak out on what the law (here, court rules) ought to be. The judge’s experience came from the courtroom, but the thoughtful expression of that experience belonged to and was paid for by the public. Hence, the judge has a duty to speak out on matters that affect her performance. Back to my point in the very beginning: the court system is training and nurturing judges who deliver just resolutions and who have (spoken or unspoken) thoughtful insights as to the operation of the court system (specifically) and the constitutional bodies listed above (generally).

So a judge who speaks out in public (and we’ll leave the definition of the venue to the misconduct cops for the moment), outside of a situation in which he is aggressed-upon, has the right (and, I argue, the duty) to use his freedom of speech to criticize the law-as-it-is. Take a matter of state constitutional import: the public has to accept the fact-of-life that a pitch for a change of constitutional direction will almost always mean that the judge has to stand by the precedents and vote against the change which she finds desirable, but that is also because the people have to find their voice and get the state constitution changed, as their right and responsibility.

Stare decisis yields the floor to *vox populi*; but what should slap people up alongside the head is an occasional, thoughtful, well-reasoned out-of-court statement by a judge on issues where the judge has something to say (excepting the situations in which the judge is speaking when lobbied at, or firing off counter-spam, or while being buttonholed). True, the public has to accept that judges might say the law should be so-and-so, and the judge then doesn’t change the law; true, a judge who continually whines that the law isn’t up to her standards should probably get another job; ditto, judges who want to recuse themselves from deciding cases that are distasteful to them.

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And yes, the public has to get used to hearing a single solitary voice of a judge arguing for better law, and reading the transcribed decision that affects both parties and non-parties. They're not the same effort but the public has the right and duty to hear each opinion in its own context. And resignation is an honorable, often courageous act and is, as I argue, one of the ultimate acts of civil obedience.

I don't think it's going to be an everyday occurrence that judges – in a public forum – tell us that the law we're responsible for (keeping to my state constitutional example) needs improvement and therefore the citizenry should stop being lazy and change it, which is where Article XIII, Sec. 1 plays its role. But a judge shouldn't be cashiered because he raises his voice to tell us what he thinks and, presumably, how being a judge supports his insights.

Now to the pay-off. I have heard it said that you were dissatisfied with the Judicial Council's role in nominating judges. How do judges feel about the merit selection and retention systems? Do retention elections chill judges from expressing their views as to what the law regarding selection and retention should be? If those inside the system were given a free voice, would they provide as much support for merit selection and retention as its supporters claim? Why not do a mandatory exit interview at retirement, to find out what a judge really thinks of the system he served, when he does not risk the pension and gold watch? Isn't that what the people earned by training their judges?

(I omit the obvious, which is that a body such as the Judicial Conduct Commission should poll judges and find out how well *it's* doing.)

As for what forums are permissible for judicial free speech, that's where the commission you appointed me to can play a role in defining permissible conduct. The Judicial Conduct Commission already vets the wording of invitations at fundraisers, poses the judges in the photographic record of these shindigs, prescribes the tab-and-blather aside published pictures. But a constitutional commission that can steer a judge through a hotel ballroom (with Canon 4 as its guide) can tell a judge the *how's* and *where's* involved in sounding off and still doing her job right. It might surprise people to know what judges think; but it might surprise people more

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to know what laws are being enforced in their name and, perhaps more importantly, that judges are rarely in a position to save people from their own misjudgments. For which, thank 1776, 1787 and all that.

Apparatus

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