



DOCKET NO. A-2006-1

IN RE: § Before the
HONORABLE NATHAN HECHT § Special Court of Review
JUSTICE, TEXAS SUPREME COURT § Appointed by the Supreme Court

CONCURRING OPINION

“Thirty-seven hundred judges want to know what to do.” With these words, the Examiner for the Commission has asked us to clearly draw the lines and articulate the boundaries of the Texas Code of Judicial Conduct. At the outset, let me dispel any notion that this court of review is about politics. Politics may well have initiated the debate. It plays no role in the resolution. The three members of this panel are not affiliated with the same political party. But as judges, we unanimously agree that we must preserve the independence, integrity, and impartiality of the judiciary. I don’t believe that Justice Hecht, a well-respected member of the state’s highest civil court, would contend otherwise. How we do that within the confines of the canons and the constitution is the issue. If we as judges do not honor and respect the office and the public trust, we can hardly expect lawyers and litigants to do so. Nor can we expect the recurrent attacks on the judiciary to subside.

The majority perceives no violation of either Canon 5(2) or Canon 2B. I disagree. But because I believe the canons in issue are unconstitutional, I concur in the judgment.

**CHARGE I
THE “ENDORSE” CLAUSE**

Charge I alleges that Justice Hecht authorized the public use of his name and title to support¹ or endorse his close friend, Harriet Miers, a candidate for public office, which actions constituted willful and/or persistent violations of Article V, Section 1-a(6) of the Texas Constitution and Canon 5(2) of the Texas Code of Judicial Conduct. Canon 5(2) provides:

A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

TEX. CODE JUD. CONDUCT, Canon 5(2), *reprinted in* TEX. GOV'T. CODE ANN., tit. 2, subtit G, app. B (Vernon 2005). We must determine (1) whether Miers was “a candidate;” (2) whether Justice Hecht “endorsed” her; and (3) whether he authorized the public use of his name and office in doing so. The answer to all three of these inquiries is a resounding, “Yes.”

Was Miers a Candidate?

Justice Hecht argues that while Miers was a nominee for a lifetime appointment to the United States Supreme Court, she was not a candidate for a public office within the meaning of Canon 5(2). He contends that the prohibition relates only to endorsement of a political candidate for an elected office and does not prohibit him from expressing his support of a person seeking an appointed judicial position. The Code of Judicial Conduct does not define the term “candidate” and it does not have a specialized meaning; therefore, it should be given its ordinary meaning. TEX.GOV'T CODE ANN. §312.002 (Vernon 2005). Webster defines “candidate” as “one that aspires to or is nominated or qualified for an office, membership, or award.” *Webster's Ninth New Collegiate Dictionary* 201 (9th

¹ Canon 5(2) does not expressly utilize the term “support” but “endorse” is commonly defined as meaning “to give support or approval to; sanction”. *Webster's New Universal Unabridged Dictionary* 600 (2nd Ed. 1972).

ed. 1987). The Examiner references the Merriam-Webster Online Dictionary, which defines “candidate” as “[o]ne that aspires to or is nominated or qualified for an office, membership, or award.” See <http://www.merriamwebster.com/dictionary/candidate>. Even the current version of the Texas Election Code makes no distinction between persons who take affirmative action for the purpose of gaining nomination to public office and those who take affirmative action for the purpose of election to public office. TEX.ELEC.CODE ANN. §251.001 (Vernon Supp. 2006). More *à propos* to our discussion, however, is the definition contained in the American Bar Association Model Code of Judicial Conduct. “Candidate” is defined as “a person seeking selection for or retention in judicial office by election or appointment.” MODEL CODE OF JUDICIAL CONDUCT, Preamble and Canons 5A, 5B, 5C, and 5E. Finally, the record reveals that Justice Hecht himself has referred to nominees for various federal courts, including the United States Supreme Court, as “candidates,” just as he considers a position on the United States Supreme Court to be “a public office.”

Did Justice Hecht’s Comments Constitute An “Endorsement”?

Justice Hecht contends that just as “candidate” refers to the elective process, so does “endorsing” as used in the same context. He concedes that although a “judge commenting favorably on the proposed appointment may be said to be ‘endorsing’ the person in the dictionary sense of ‘giving support,’ the judge is not engaging in the electoral political process that Canon 5(2) is aimed at.” Petitioner’s Brief at 18. I must conclude that Justice Hecht “endorsed” for the same reasons I conclude that Miers was a “candidate.” And in his brief, even he candidly admits:

The information [Justice Hecht] provided about Miers’ experience and qualifications certainly supported and thus ‘endorsed’ her nomination among those who valued the kind of background she had, although the information was undoubtedly received negatively among those who did not.

Petitioner's Brief at 19.

Justice Hecht gave numerous media interviews in which he was identified as a justice on the Texas Supreme Court. He provided factual information about Miers' experience and background. In some of the interviews, he offered his personal opinion that Miers' nomination would be "good for the country," that she would make a "good justice," that she would be "a conservative judge" and "a strict constructionist." He also described her as "pro-life." Reasonable minds could differ as to whether these comments constitute an endorsement. The majority concludes that "endorsing" must mean more than "spoken praise." It suggests that Justice Hecht's comments did not constitute a request or an appeal to others to support her nomination. I respectfully disagree.

The Stipulation of Facts reveals that Former White House Deputy Chief of Staff Karl Rove spoke with Justice Hecht on Saturday, October 1, 2005, and asked whether he [Justice Hecht] would be willing to provide factual information to Dr. James Dobson² and "others who might ask" about Miers' background in general and her religious views in particular. Justice Hecht agreed to do so. In a later conversation, Justice Hecht agreed to respond to media calls referred to him by the White House, and he agreed to make daily reports to White House staff concerning the types of questions he had been asked.

President Bush announced Miers' nomination on Monday morning, October 3. That afternoon, someone from Rove's office called Justice Hecht to advise him that he had been invited to participate in a conference call of the Arlington Group. Justice Hecht had not heard of the group but learned that it was composed of conservative religious leaders. He agreed to participate, and

² James C. Dobson, Ph.D., is founder and chairman of *Focus on the Family*, a non-profit conservative religious organization that emphasizes family values.

called in at the appointed time. Dr. Dobson, who participated in the call, later told the press that he had been assured by Rove that Miers was an evangelical Christian but that he did not get reassurances about how she would vote on Supreme Court issues. Examiner's Exhibit 17.

Within the first two days following the announcement, Justice Hecht received nearly 100 media calls and within a week, by his own count, he had responded to some 120 requests for interviews. Included in the record are videotapes, DVDs, and transcripts from various networks, including *Supreme Court Watch* [C-SPAN], *FOX News Sunday* [FOX], *Hardball with Chris Matthews* [MSNBC], and *The Situation Room* [CNN]. *The New York Times* hailed Justice Hecht as Miers' "Spokesman" in an October 6 article.³ Examiner's Exhibit 2. And he himself joked during an interview that he was a "PR office for the White House." Examiner's Exhibit 1.

On October 10, *Texas Lawyer* reported that Justice Hecht categorized his "mission" as filling in the gaps about Miers' background and countering "some conservatives' skepticism about her qualifications." Examiner's Exhibit 1.⁴ He told reporters that conservatives should "rest easy" about Miers' nomination. *Id.* Examiner's Exhibit 3 is a story from *The Dallas Morning News*. It begins:

Like an author on a radio talk-show blitz, Texas Supreme Court Justice Nathan Hecht worked the phones Tuesday on a mission authorized at the highest levels of the White House: lending his conservative stamp of approval to Harriet Miers, his long time friend, churchmate and fellow Dallas lawyer.

³ The *Times* article is captioned, "Texas Justice, With Ties to Bush and His Supreme Court Choice, Serves as Her Spokesman." It offers the following reason: "For the right audiences, Justice Hecht, 55, is known as one of the most conservative jurists on the Texas Supreme Court....He has become so well known in his home state that this year he was named by Texas Monthly as one of 25 most powerful people in Texas politics."

⁴ Exhibit 1 is the *Texas Lawyer* article that formed the basis for the complaint received by the Commission. The majority correctly explains that the Commission's conclusions and findings were based on the *Texas Lawyer* and *The New York Times* articles only. Since this Special Court of Review is a *de novo* proceeding, additional media reports were introduced into evidence and are part of the record before us.

Justice Hecht never sought a retraction of these or other media reports. He voluntarily participated in rallying public support for Miers' nomination and in convincing conservative religious leaders that she was an acceptable candidate. He spoke about her religious beliefs and convictions, her faith, and her pursuit of deeper meaning and greater purpose through evangelical Christian teachings. In responding to a media report that he had "embarked on a media blitz," Justice Hecht quipped that he "embarked, the same way a fishing boat embarks into a tsunami." Little wonder that he characterized his experience as "seismic." Based upon the record before us, and even applying the interpretation that the majority has adopted, I conclude that Justice Hecht endorsed Miers.⁵

Did Justice Hecht Authorize the Public Use of His Name and Office?

I also disagree with the majority as to whether Justice Hecht authorized the public use of his name and office. As I have already mentioned, the White House sought his help in reassuring Dr. Dobson, the Arlington Group, and other religious conservatives that Miers was pro-life and a strict constructionist. The White House wanted to refer media calls to him and asked him to report daily on the types of questions he was asked. He expressly agreed. These are facts to which Justice Hecht has stipulated. Examiner's Exhibit 2, *The New York Times* article, reported that "[t]he Republican

⁵ Justice Hecht also takes issue with the fact that other members of the judiciary spoke publicly about Miers without facing judicial sanctions. It is true that United States Supreme Court Justice Antonin Scalia, United States District Judge Ed Kinkeade of the Northern District of Texas, Justice Elizabeth Lang-Miers of the Court of Appeals for the Fifth District of Texas, and State District Judge Jim Parsons all publicly supported Miers and spoke well of her credentials and qualifications. Of course, the Texas Canons of Judicial Conduct do not apply to federal judges. TEX. CODE JUD. CONDUCT, Canon 6A, *reprinted in* TEX. GOV'T. CODE ANN., tit. 2, subtit G, app. B (Vernon 2005). And the mere fact that other state judges felt unencumbered by the canons neither justifies nor condones their conduct, nor does it lead me to the conclusion that Justice Hecht did not violate them. *Sardino v. State Commission on Judicial Conduct*, 58 N.Y.2d 286, 291, 448 N.E.2d 83, 85, 461 N.Y.S.2d 229, 231 (N.Y.1983) (each judge is personally obligated to act in accordance with the standards of judicial conduct; if a judge disregards or fails to meet these obligations, the fact that others may be similarly derelict can provide no defense). I offer no opinion on the stipulated fact that the Commission has filed no charges against any of these individuals. Nor do I address the apparently contested issue of whether the Commission could *sua sponte* investigate their conduct in the absence of a complaint.

National Committee put him on at least one conference call with evangelical pastors and conservative organizers. Progress for America, a group that promotes President Bush's agenda, has also been working to make Justice Hecht available for interviews." While Justice Hecht complained to another reporter that the *Times* article was misleading, he sought no retraction.

The majority contends that a violation of Canon 5(2) requires proof that the judge gave permission for others to publicly use the judge's name in endorsements of the candidate. The record shows precisely that. Justice Hecht appeared on several television programs to debate conservatives who opposed Miers' nomination, clearly articulating the difference between legal issues and personal viewpoints⁶. The following exchange occurred during an interview with Chris Wallace of *FOX News Sunday*:

Chris Wallace: Does she regard abortion as murder?

Justice Hecht: Well, I don't know that we've ever talked in exactly those terms. But she is pro-life. I mean, you press around it all you can, but she is pro-life, and she has been for 25 years.

Q: If she does believe that, Justice, how could she possibly vote to uphold *Roe v. Wade*⁷, if she believes that abortion is murder?

A: Because it's easy. Legal issues and personal issues are just two different things. Judges do it all the time. In fact, a judge is going to take an oath that says I'm going to judge rightly in cases, which means that you have to set aside your personal views in deciding the case. And if you don't do that, you're either a bad believer in your views, a bad judge or both.⁸

⁶ "[E]very good judge is fully aware of the distinction between the law and a personal point of view." *Republican Party of Minnesota v. White*, 536 U.S. 765, 798 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (Kennedy, J., concurring).

⁷ *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

⁸ In a separate interview with *The Dallas Morning News*, Justice Hecht explained the distinction further. "The mistake is trying to extrapolate from those personal principles, even if they're extremely important to a person, into how you're going to decide a case." According to the article, Justice Hecht "noted that Justice Antonin Scalia,

Gary Bauer⁹: Look, I'm confused here. I can't tell whether Judge Hecht is arguing that [Miers] is going to overturn *Roe* or she's not going to overturn *Roe*. If he wants to reassure his fellow pro-life conservatives, that's the last argument he should be making, the argument that he just made.

Examiner's Exhibit 10. Justice Hecht responded similarly to Chris Matthews and Pat Buchanan¹⁰ on MSNBC's *Hardball with Chris Matthews*:

Chris Matthews: Karl Rove gave you the OK to begin giving interviews like this. And we very much appreciate, Justice, you coming on, because no one else can talk about her from that Texas perspective, that longtime perspective. Are you surprised Karl Rove has basically unleashed people to come out and talk about her, that they're not more careful about making sure there's less talked about her than more?

Justice Hecht: You know, I really don't know the history on that. And I don't know what their usual policies are....But I'm happy that people are, because I think there is going to be a pretty solid consensus of view from people talking about her.

* * * * *

Pat Buchanan: The president has asked us to elevate a blank slate to the Supreme Court to sit opposite people like Roberts and Scalia, when we have outstanding jurists who have taken a stand, been cut and blooded for their beliefs. And so, I think this is why she has got to sell herself to the country, to the conservative movement and Republican Party. And if she does not, Chris, I would urge conservatives to recommend a no-vote on this, if she does not persuade that committee that she is Supreme Court material.

Examiner's Exhibit 13. *The New York Times* article reported that “[w]hen the White House named Harriet E. Miers for a seat on the United States Supreme Court this week, Republicans turned to

one of the Supreme Court's most conservative justices, wrote an opinion declaring a free-speech right to burn an American flag. 'Can you imagine [sic] Justice Scalia burning a flag? It's not going to happen,' he said. 'But what does the Constitution say, can you do it or not? Yes, the Constitution says you can do it.'" Examiner's Exhibit 3.

⁹ Gary Bauer is the president of the American Values Group and is a former presidential candidate.

¹⁰ Pat Buchanan is an NBC political analyst and a former presidential candidate.

Justice Nathan L. Hecht of the Texas Supreme Court to make her case.” Examiner’s Exhibit 2.

Following suit, *The Dallas Morning News* wrote:

“If you have somebody like Nathan Hecht, whose anti-choice, right-wing credentials are so solid, and he says you’re going to like her, she’s one of us, that sends a pretty clear signal to that wing of the Republican Party,” said Sarah Wheat, executive director of NARAL Pro-Choice Texas.

Examiner’s Exhibit 3. All of this evidence leads me to conclude that Justice Hecht expressly and quite affirmatively authorized the public use of his name and office to sell the Miers’ nomination.

CHARGE II THE “PROMOTE” CLAUSE

Charge II alleges that Justice Hecht lent the prestige of his judicial office to advance the private interests of his close friend, Harriet Miers, which actions constituted willful and/or persistent violations of Article V, Section 1-a(6) of the Texas Constitution and Canon 2B of the Texas Code of Judicial Conduct. Canon 2B states in pertinent part: “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others...” TEX. CODE JUD. CONDUCT, Canon 2B, *reprinted in* TEX. GOV’T. CODE ANN., tit. 2, subtit G, app. B (Vernon 2005).

Did Justice Hecht’s Conduct Promote a Private Interest?

Justice Hecht contends, and the Examiner concedes, that the nomination of Harriet Miers to the United States Supreme Court and the ensuing debate over her qualifications were matters of public concern. But the sanction imposed requires a finding that Justice Hecht’s very public conduct promoted Miers’ very private interests. The Examiner counters that there is a real and personal private interest at stake – that of political ambition – including a candidate’s desire for lifetime tenure, prestige, and power, which motivates a candidate to seek a life-time appointment to the federal bench in the first place. Examiner’s Brief at 9.

The Commentary to the ABA Model Code indicates that a judge may participate in only a limited fashion in the process of judicial selection. “Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship.” MODEL CODE OF JUDICIAL CONDUCT, Canon 2B, cmt. Justice Hecht could have answered inquiries from the White House regarding his knowledge of Miers, and he could have testified at the Senate confirmation hearing, since that proceeding obviously constitutes an official inquiry about the person being considered for a judgeship.¹¹ But his activities went beyond the limited participation contemplated by the canon and its commentary. I do not question Justice Hecht’s loyalty to and friendship with Miers. He considered himself a “central repository of information” about her. That’s precisely the point. He spoke because of his personal and private relationship with her. He spoke because the candidate was “Harriet,” not former State Bar of Texas President Miers, not former Locke Liddell & Sapp managing partner Miers, not former Dallas City Councilwoman Miers. If the candidate had been a different former bar president or a different firm leader or a different city representative whom he had known in years past, he may well have spoken privately to individuals vetting the candidate or agreed to testify during Senate confirmation proceedings. But he would have been more circumscribed in his comments. He wouldn’t have jumped on board the “media train” and he wouldn’t have joked about running “PR for the White House.” These events happened because they involved “Harriet.”

Did Justice Hecht Lend the Prestige of His Office to Promote that Interest?

¹¹ Justice Hecht was, in fact, contacted by staff attorneys for the Senate Judiciary Committee, who asked him to testify at Miers’ confirmation hearing. He was out of the office at the time of the call, and Miers had withdrawn her nomination before he could return it.

The evidence supports a finding that Justice Hecht lent the prestige of his judicial office to advance Miers' private interests in violation of Canon 2B. I must reject his argument that he was contacted by the media not because of his position as a justice on the Texas Supreme Court but because of his thirty-year relationship with Miers. That may well have been the motivation behind press inquiries. But every time the media carried the story, the "source" was clearly identified, captioned, and addressed as "Justice Hecht."

In a public statement issued in 2000, the Commission cautioned Texas judges that "it is virtually impossible for a judge, at least in the eyes of the public, to separate himself or herself from the judicial office; therefore it is immaterial to the issue of misconduct that a judge does not use his judicial title or refer to his judicial position in a public endorsement of a candidate for public office." Public Statement PS-2000-2. The Examiner argues in its brief that contrary to his claims, Justice Hecht used, and allowed others to use, his position as a judge, and a Texas Supreme Court justice in particular, to influence, sway, and convince public opinion and conservatives who questioned the President's decision to nominate Miers. Examiner's Brief at 14. Because the Examiner proved these facts by a preponderance of the evidence, I agree.

WERE THE VIOLATIONS WILLFUL?

The Commission must prove by a preponderance of the evidence that Justice Hecht willfully committed the charged violations. *In re Davis*, 82 S.W.3d 140, 142 (Tex. Spec. Ct. Rev. 2002); *see* TEX.GOV'T CODE ANN. §33.001(b)(2)(Vernon 2004); *see also In re Bell*, 894 S.W.2d 119, 131 (Tex. Spec. Ct. Rev. 1995). Willful conduct requires a showing of intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment or lack of diligence. *Davis*, 82 S.W.3d at 148; *Bell*, 894 S.W.2d at 126. A judge need not have formed the specific intent to violate the

Code; as long as he intended to engage in the conduct for which he is disciplined, he is guilty of a willful violation of the Code. *See In re Barr*, 13 S.W.3d 525, 539 (Tex. Rev. Trib. 1998, pet. denied). There is no dispute whatsoever that Justice Hecht intended to engage in the conduct for which he is disciplined. Although he defines willful as, “you know it’s wrong and you do it anyway,” he also testified that “if I had it to do over again, I’d do it again.” In my view, the evidence supports a finding that Justice Hecht willfully violated the canons.

ARE THE CANONS CONSTITUTIONAL?

I turn now to the broader constitutional concerns. Justice Hecht challenges the constitutionality of Canon 5(2) (the endorse clause), both facially and as applied to him. Similarly, he challenges Canon 2B (the promote clause) as applied. Both complaints allege the canons violate the First Amendment. Citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (*White I*), he argues that these provisions do not withstand strict scrutiny analysis. The first issue is whether strict scrutiny analysis applies.

Does Strict Scrutiny Apply?

In *White I*, the Supreme Court applied the strict scrutiny analysis because the intermediate court of appeals had done so and the parties did not dispute the issue. *White I*, 536 U.S. at 774. Some legal scholars suggest that the political activity canons should not be subjected to a strict scrutiny analysis. *See* J.J. Gass, *After White: Defending and Amending Canons of Judicial Ethics*, Judicial Independence Series, Brennan Center for Justice at NYU School of Law at p. 18 (2004). The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984); *Texas Department of Transportation v. Barber*, 111

S.W.3d 86, 92 (Tex. 2003). But the Supreme Court also has recognized that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); *Barber*, 111 S.W.3d at 92. Both written and oral expression may be subject to reasonable time, place, and manner restrictions. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *Barber*, 111 S.W.3d at 92. When reviewing regulations on speech, we engage in a two-tier analysis. *Barber*, 111 S.W.3d at 92.

For the higher tier, "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content," the court applies "the most exacting scrutiny." *Barber*, 111 S.W.3d at 92, quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Such content-based regulations are presumptively invalid, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), and they can withstand strict scrutiny only if precisely drawn to serve a compelling state interest. *Consolidated Edison Company of N.Y., Inc. v. Public Service Commission*, 447 U.S. 530, 540, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980); *Barber*, 111 S.W.3d at 92-93. For the lower tier, "regulations that are unrelated to the content of speech," the court applies an "intermediate level of scrutiny." *Barber*, 111 S.W.3d at 93, quoting *Turner Broadcasting*, 512 U.S. at 642. Content-neutral regulations are valid provided they are narrowly tailored to serve a substantial governmental interest, and they do not unreasonably limit alternative channels for communicating the information. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Clark*, 468 U.S. at 293; *Taxpayers for Vincent*, 466 U.S. at 808; *Heffron*, 452 U.S. at 647-48; *Barber*, 111 S.W.3d at 93.

Determining which tier applies requires a court to determine whether a regulation is content-neutral or content-based. *See Barber*, 111 S.W.3d at 93. This is often not a simple task. *Id.* A content-neutral regulation generally must be both viewpoint neutral and subject-matter neutral. *Id.*, *see Hill v. Colorado*, 530 U.S. 703, 722-23, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). As the Supreme Court has stated, “[r]egulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation.” *Barber*, 111 S.W.3d at 93, quoting *Hill*, 530 U.S. at 723.

To be viewpoint neutral, a regulation must not be based on the ideology of the message. *Barber*, 111 S.W.3d at 93. The prohibitions contained in the canons are not based on ideology since they restrict all speech by a judge or judicial candidate endorsing another candidate. To be subject-matter neutral, a regulation must not be based on the topic of the message. While viewpoint neutral, the canons are not subject-matter neutral as they are certainly based on topic.

I thus conclude that the proper test to determine the constitutionality of the canons is strict scrutiny. Under the strict scrutiny analysis, any restriction on the right of political speech requires a three-pronged analysis: (1) were the statements core political speech? (2) is there a compelling state interest to prohibit that speech? and (3) is the canon narrowly tailored to serve that interest? *White I*, 536 U.S. at 775, *Brown v. Hartlage*, 456 U.S. 45, 54, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982).

What Does *White* Really Say?

In *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (*White I*), the United States Supreme Court considered whether the Minnesota Code of Judicial Conduct violated a judicial candidate’s First Amendment rights by prohibiting him from

announcing his views on disputed legal or political issues.¹² Many states, including Texas, had canons which are generically referred to as “announce” clauses:

[I]t is clear that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions – and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.

White I, 536 U.S. 773.

The Facts

Gregory Wersal first ran for the Minnesota Supreme Court in 1996. He identified himself as a member of the Republican Party, attended and spoke at party meetings, sought its endorsement, and personally solicited campaign contributions. He distributed literature criticizing several decisions of the court on issues such as crime, welfare, and abortion. As a result of this literature, a complaint was filed with the Minnesota Lawyers Professional Responsibility Board. The Board ultimately dismissed the complaint, but Wersal withdrew as a candidate because he feared that other complaints might jeopardize his law license.

Wersal ran again in 1998. This time, he asked the Board for an advisory opinion regarding the announce clause. The Board expressed significant doubts about the constitutionality of the canon, but it did not specifically answer his questions because he had not submitted a list of the “announcements” he wished to make. Wersal responded with a lawsuit against the Board and Suzanne White in her capacity as chair, seeking a declaration that the announce clause violates the First Amendment. Other plaintiffs, including the Republican Party of Minnesota, alleged that the

¹² The court emphasized that the “announce” clause is much broader than the “pledges or promises” clause, which separately prohibits judicial candidates from making pledges or promises of conduct other than the faithful and impartial performance of judicial duties, a prohibition on which it expressed no view. *White I*, 536 U.S. at 770.

announce clause prevented their membership from learning Wersal's views on various legal issues. The district court determined that the announce clause did not violate the First Amendment and the Eighth Circuit affirmed.

White I

The Supreme Court swiftly determined that a candidate's statements regarding his or her own views on political or legal issues is protected speech. The court struggled a bit with an analysis of Minnesota's compelling state interest. Minnesota purportedly enacted the announce clause to promote the impartiality of the judiciary and the appearance of impartiality. The Eighth Circuit agreed that these were sufficiently compelling. The same justifications were argued to the Supreme Court. Although "impartiality" was used throughout the Eighth Circuit's opinion, the briefs, the Minnesota Code of Judicial Conduct and the ABA Model Code, the high court pointedly noted that "none of these sources bothers to define it." *Id.* at 775.

The majority concluded that the goal of "impartiality" could be compelling depending upon the definition assigned. While it rejected a definition of "impartiality" as meaning a lack of preconception regarding legal matters¹³, it accepted the definition of promoting the state's interest in electing judges who are not biased against or in favor of a particular party. Because Minnesota had not demonstrated that the announce clause served that interest, the canon was not narrowly tailored to achieve that goal. "[E]ven if the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny because

¹³ Writing for the majority, Justice Scalia opined that when a case turns on a legal issue on which the judge as a judicial candidate has taken a particular stand, the party advocating the opposing viewpoint is likely to lose, but not because of bias against that party or favoritism toward the other. "Any party taking that position is just as likely to lose." *White I*, 536 U.S. at 776-77 (Emphasis in original).

it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms.” *Id.* at 783 (Emphasis in original). The court left unanswered whether the definition could include the characteristic of open-mindedness¹⁴, but other courts have found that open-mindedness can be a compelling state interest. See *Kansas Judicial Watch v. Stout*, 440 F.Supp.2d 1209, 1230 (D.Kan. 2006), citing *North Dakota Family Alliance, Inc. v. Bader*, 361 F.Supp.2d 1021, 1040 (D.N.D. 2005); *Family Trust Foundation of Ky, Inc. v. Wolnitzek*, 345 F.Supp.2d 672, 695 (E.D. Ky. 2004); *In re Watson*, 100 N.Y.2d 290, 794 N.E.2d 1, 763 N.Y.S.2d 219 (N.Y. 2003).

White I caught the judiciary off guard. Justice Hecht captured the sentiment when he testified, “I would say that *White* case was a bombshell when it hit and that I certainly wasn’t expecting it.” Few of us were.

White II

The Supreme Court remanded to the Eighth Circuit for consideration of the constitutional viability of the “partisan activities” clause and the “solicitation” clause. *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) (*White II*). Pursuant to the Minnesota Code of Judicial Conduct, a judge or judicial candidate may not identify himself or herself as a member of a political organization; attend political gatherings; or seek, accept, or use endorsements from a political organization. The solicitation clause prohibits a candidate from personally soliciting or accepting campaign contributions, although the candidate may establish committees to conduct campaigns, and solicit contributions and public support from attorneys. The committees shall not

¹⁴ “Open-mindedness” demands that a judge be willing to consider views that oppose his preconceptions and remain open to persuasion. This seeks to guarantee each litigant “not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.” *White I*, 536 U.S. at 778 (Emphasis in original).

seek, accept, or use political endorsements or disclose to the candidate the identity of contributors. Relying heavily upon *White I*, the Eighth Circuit held both clauses to be constitutionally infirm.

The court first addressed the partisan activities clause, focusing upon the fact that the canon treated political parties differently than special interest groups. *Id.* at 753 n.7. The court viewed the clause in the context of the state’s interest in ensuring unbiased judges. “[T]he underlying rationale for the partisan-activities clause – that *associating with a particular group* will destroy a judge’s impartiality – differs only in form from that which purportedly supports the announce clause – that *expressing one’s self on particular issues* will destroy a judge’s impartiality.” *Id.* at 754 (Emphasis in original). In other words, “the Supreme Court’s analysis of the announce clause...is squarely applicable to the partisan-activities clause.” *Id.* While a judicial candidate could not consort with a political party, the candidate could align with a special interest group, such as the National Rifle Association, the National Association for Women, the Christian Coalition, the NAACP, or the AFL-CIO.

A judicial candidate’s stand, for example, on the importance of the right to keep and bear arms may not be obvious from her choice of political party. But, there can be little doubt about her views if she is a member of or endorsed by the NRA. Yet Canon 5 is completely devoid of any restriction on a judicial candidate attending or speaking to a gathering of an interest group; identifying herself as a member of an interest group; or seeking, accepting, or using an endorsement from an interest group.

White II, 416 F.3d at 760. Consequently, the partisan activities clause was underinclusive.

The solicitation clause suffered the same fate. Minnesota argued that keeping judicial candidates from soliciting campaign funds served its interest in an impartial judiciary by preventing undue influence. But a number of other scenarios would allow a candidate “to stumble onto the

names of contributors” since campaign finances are reported, publicly available, and widely disseminated. *Id.* at 766.

Bearing in mind the teachings of *White*, I look now to the three prongs of a strict scrutiny analysis with regard to Justice Hecht’s statements.

Were Justice Hecht’s Statements Core Political Speech?

The Examiner contends that the canons do not encroach on Justice Hecht’s right to engage in core political speech. It claims that *White I* extends only to a judge’s comments or opinions in connection with his or her own campaign. Because Justice Hecht was speaking about Miers’ beliefs and values rather than his own, the Examiner argues that no political speech was abridged:

It is not disputed that [Justice Hecht] shared with reporters and interviewers some of his own personal views on issues such as abortion and gay marriage while discussing the Miers’ nomination. However, [Justice Hecht] has never been sanctioned for making those statements, nor has he been charged in this proceeding with violating any provision of the Texas Code of Judicial Conduct by telling reporters those views. To the contrary...[Justice Hecht] was sanctioned for assisting *Miers* and *her* candidacy by publicly expressing what he believed were *Miers’* views on disputed political and legal matters.

Examiner’s Brief at 18 (Emphasis in original). Applying this analytical construct, the Examiner then concludes that Justice Hecht’s oratory “was simply the expression of a personal opinion for which he was not entitled to any heightened First Amendment protection.” *Id.*, citing *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990).

In *Scott*, the Fifth Circuit addressed the First Amendment in the context of a civil rights action brought by a Texas justice of the peace challenging a public reprimand by the Commission. The reprimand stemmed from an open letter written by Judge Scott to county officials attacking the district attorney’s office and the county court at law for dismissing the majority of traffic ticket

appeals. Characterizing the communications as “insensitive,” the Commission found the judge's conduct to be inconsistent with the proper performance of his duties as a justice of the peace and served to cast public discredit upon the judiciary. He was warned to be more restrained and temperate in the future.

Judge Scott ultimately filed suit against the members of the Commission, both individually and in their official capacities, claiming that his letter and comments to the press were protected speech for which he could not constitutionally be subjected to discipline. The district court granted summary judgment in favor of the Commission.

The Fifth Circuit began by noting that public employees occupy a unique position in First Amendment jurisprudence. *Scott*, 910 F.2d at 210. While they do not shed constitutional protections when they enter the workplace, their rights must be balanced against the interests of the state in promoting the efficiency of the public services it performs through its employees. *Id.*, citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). In *Pickering*, the court adopted a two-step approach to evaluate claims of First Amendment violations by public employees. First, the court must determine in light of the content, form, and context of the speech in question, whether it addresses a matter of legitimate public concern. *Scott*, 910 F.2d at 211, citing *Pickering*, 391 U.S. at 571. If so, the court must then “balance the employee’s first amendment rights against the governmental employer’s countervailing interest in promoting the efficient performance of its normal functions.” *Scott*, 910 F.2d at 211. If not, the inquiry must end. The court ultimately determined that Scott’s letters and comments were not simply an expression of the judge’s personal opinion, but addressed matters of legitimate public concern. *Id.*

I first question the continued viability of *Scott* inasmuch as a judge’s ability to offer personal opinions or viewpoints has since been found to be protected speech. Nevertheless, like the Fifth Circuit, I find the content, form, and context of Justice Hecht’s speech to be a matter of legitimate public concern and accordingly, I move to the balancing test, which requires that we balance his First Amendment rights against the state’s countervailing interest.

Is There a Compelling State Interest?

Justice Hecht maintains that the Examiner has failed to articulate that compelling interest. He refers to discovery requests which the Examiner pointedly refused to answer. Yet I believe that the canons themselves identify the compelling state interests:

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us....

Canon 1. Upholding the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved.

TEX. CODE JUD. CONDUCT, Preamble and Canon 1, *reprinted in* TEX. GOV’T. CODE ANN., tit. 2, subtit G, app. B (Vernon 2005).

In the wake of *White I*, the Texas Supreme Court created the Task Force of the Code of Judicial Conduct to “review [the Texas Code of Judicial Conduct] to ensure that the integrity and independence of our judiciary is preserved.” *Order Creating Task Force on Code of Judicial Conduct*, Misc. Docket No. 03-9148 (August 22, 2003). The court asked the Task Force to “make recommendations to th[e] Court for revisions required by law, to make suggestions on improving the

effectiveness of existing canons [sic] and to suggest other modifications consistent with the Code's broad purpose of upholding the integrity, independence and competence of the judiciary." *Id.* The final report and recommendations were delivered in January 2005. The Task Force recommended adding the word "impartial" to both the Preamble and Canon 1 "to underscore the compelling state interest of judicial impartiality."¹⁵ This recommendation has yet to be adopted, although the Texas "announce clause" was repealed.¹⁶

Nevertheless, the state has a compelling interest in preserving the independence and integrity of the Texas judiciary and in maintaining public confidence in our court system. *White I*, 536 U.S. at 793 (Kennedy, J., concurring)(nothing in the court's opinion should be read to cast doubt on the fact that judicial integrity is a "state interest of the highest order"); *In re Raab*, 100 N.Y.2d 305, 793 N.E.2d 1287, 1290 (N.Y. 2003) (preserving the impartiality and independence of the judiciary and maintaining public confidence in the courts are compelling state interests).

Are the Canons Narrowly Tailored?

A narrowly tailored restriction is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could

¹⁵ In both *White I* and *White II*, the term "impartiality" was used interchangeably with "independence." See *White I*, 536 U.S. at 775 n.6; *White II*, 416 F.3d at 753.

¹⁶ As a member of the Supreme Court, Justice Hecht participates in decisions concerning amendments to the Code of Judicial Conduct. For many years, he served as the court's liaison to the Supreme Court Rules Advisory Committee. After *White I*, he concurred in the repeal of the Texas announce clause. Writing separately, he predicted the instant debate: "It is less clear whether other Code provisions relating to judicial speech – Canon 3(B)(10) and the remainder of Canon 5 – are likewise infirm....Therefore I join in the code amendments approved today although I remain in doubt whether they are sufficient to comply with the First Amendment." *Statement of Justice Hecht Concurring in the Amendments to the Texas Code of Judicial Conduct Approved August 21, 2002*, Misc. Docket No. 02-9167.

advance the interest as well with less infringement of speech (is the least-restrictive alternative). *White II*, 416 F.3d at 751. “In short, the seriousness with which the regulation of core political speech is viewed under the First Amendment requires such regulation to be as *precisely* tailored as possible.” *Id.* (Emphasis in original).

Canon 5(2)
(The Endorse Clause)

The Examiner argues that *White I* addressed only the issue of a judicial candidate’s right to announce his or her own views on disputed legal or political issues. The opinion “did not concern itself with whether the First Amendment protects a judicial candidate’s right to endorse other candidates for public office” and consequently, does not apply to this case. Examiner’s Brief at 16. Cautioning that the opinion is now four years old, the Examiner explains that in the intervening period, no court has held that a canon prohibiting endorsements violates the First Amendment. Instead, it continues, the only court to address the issue concluded that an endorsement prohibition is constitutional. *See In re Raab*, 793 N.E.2d at 1289.

State District Judge Ira Rabb admittedly called prospective voters urging their support for a legislative candidate, although he did not give his name or identify himself as a judge. His purpose was to garner goodwill with the Working Families Party in hopes that the party would endorse him as a judicial candidate in his own campaign for the Supreme Court later that year. Three months later, he attended a party candidate screening meeting. He was not scheduled to be interviewed, but he sat with members of the party, participated in the interviews, and asked candidates for both judicial and non-judicial offices if they would publicize the party’s endorsement in their campaign literature. Judge Rabb was ultimately nominated by the Democratic Party, endorsed by the Working Families

Party, and elected to the Supreme Court. He was censured by the New York Judicial Conduct Commission for engaging in improper political activity in the course of a judicial campaign.

The New York Code of Judicial Conduct prohibits judges and judicial candidates from (1) participating in any political campaign for any office or permitting his or her name to be used in connection with any activity of a political organization; (2) publicly endorsing or publicly opposing (other than by running against) another candidate for public office; (3) making speeches on behalf of a political organization or another candidate; (4) attending political gatherings; and (5) soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate. *Rabb*, 793 N.E.2d at 1290, *citing* 22 NYCRR 100.5 (A)(1)(c), (d), (e), (f), (g), (h). The Code allows an incumbent or candidate to participate in his or her own campaign for elective judicial office.

Judge Rabb complained that the rules were both underinclusive and overinclusive. The court rejected his argument, focusing on the “critical” difference between conduct integral to a judicial candidate’s own campaign and activity in support of other candidates or party objectives. *Rabb*, 793 N.E.2d at 1292. The court concluded that by participating in the phone bank and candidate screening, Judge Rabb “went beyond what was necessary or integral to his own judicial races.” *Id.* at 1293.

In response to the Examiner’s argument that *Rabb* is controlling, Justice Hecht recounts the differences between the New York and Texas canons. Texas judges can (1) affiliate with a political party; (2) attend political events; (3) express views on political matters; (4) contribute to political campaigns of other candidates; and (5) criticize a candidate for public office. He points to the ability of Texas judges to criticize other candidates and compares Canon 5(2) with the New York Code of

Judicial Conduct and the ABA Model Code. Both New York and the ABA prohibit a judge from *either* publicly endorsing *or* publicly opposing another candidate. The Examiner responds:

As a matter of clarification, Examiner would point out that [Justice Hecht] is mistaken in his view that a judge would not be sanctioned under Canon 5(2) for criticizing another candidate. There is simply no authority to support his belief that statements that are critical of another candidate for office, aside from the judge's own opponent, would be treated differently than statements in favor of another candidate for office.

Examiner's Brief at 26. But the canons do *not* make that distinction, and the Examiner offers no support for the commentary. I suspect the 3700 judges who await this decision would be disquieted to learn that one could be sanctioned for conduct not delineated in the Code. Nevertheless, the Texas canons differ in other material respects.

Members of the Texas judiciary are permitted to provide factual information or favorable comments, either formally or informally, to screening committees, appointing authorities, and members of the Senate Judiciary Committee. The Examiner concedes this is true. Examiner's Brief at 8, 11. A judge may privately introduce judicial candidates to friends and recommend that the friends vote for the candidates. *See* OP. TEX. ETHICS COMM'N No. 2 (1975). This liberty of private introduction and recommendation has been extended to all candidates for public office. *See* OP. TEX. ETHICS COMM'N No. 13 (1976).

Most significant in my view is the fact that, unlike a member of the New York judiciary, a Texas judge may put his money where his mouth can't go. Simply stated, a judge may make campaign contributions to other candidates – including presidential candidates, congressional candidates, gubernatorial candidates, legislative candidates, county and municipal candidates, and other judicial candidates. In turn, we may accept contributions from these same sources as well as special interest groups. In his brief, Justice Hecht points to several members of the Commission who

have routinely contributed to political campaigns, and he bitingly reveals that one member contributed to Hillary Clinton’s campaign only a month before he [Justice Hecht] was sanctioned:

One wonders how it can be reconciled that a political candidate can be supported by a judge with money, but not words. What’s good for Hillary should be good for Harriet. One would think.

Petitioner’s Brief at 6. His remark is right on the money – it cannot be reconciled. From this, I conclude that Canon 5(2) is underinclusive, and “woefully” so. Because it cannot survive strict scrutiny, it is unconstitutional, both facially and as applied. If the purpose of the endorsement clause is to preserve and protect judicial independence, integrity, and impartiality, it must protect these values from attacks on all fronts. From the standpoint of public perception, one thousand dollars is every bit as compromising as one thousand words.

If the concern is that a judge’s endorsement or support of a candidate for public office will damage that judge’s impartiality apparently because she is seen as aligning herself with the candidate’s view or ideology, that is no less so when a judge contributes to a candidate’s political campaign, which is not prohibited.

Petitioner’s Brief at 34. I agree.

Canon 2B
(The Promote Clause)

Finally, Justice Hecht challenges the constitutionality of Canon 2B as applied. Quoting *White I*, he begins by defining terminology. The canon prohibits a judge from lending the prestige of his office to advance the private interests of another. He defines “prestige” as:

1. the power to impress or influence, as because of success, wealth, etc.
2. reputation based on brilliance of achievement, character, etc.

Webster’s New World Dictionary of the American Language, Second College Edition (1980). He contends that the comments of a Texas Supreme Court jurist would hold little sway with the members

of the Senate Judiciary Committee. Petitioner’s Brief at 39. But Justice Hecht’s assistance was not solicited by Karl Rove and the White House to influence the committee. His help was needed to shore up the conservative base of the Republican Party to whom many committee members owed allegiance. The idea was to have a well-respected, influential and conservative jurist reassure the committee members’ constituents as a means to obtain Senate confirmation. In this context, the promote clause cannot be said to serve the state’s interest in preserving judicial independence, integrity and impartiality. Whether Justice Hecht’s national interviews persuaded individual senators or swayed public opinion, his independence and impartiality would be called into question only if the individuals, entities, or affiliates appeared in a case before him. In that instance, recusal would be the least restrictive alternative. Because Canon 2B is not narrowly tailored to serve the compelling state interests, it is unconstitutional as applied to Justice Hecht.

CONCLUSION

I have previously served as the presiding justice of a formal review tribunal. In upholding the Commission sanction, I wrote for the majority:

Does the Code of Judicial Conduct intrude into a judge’s private life? Most definitely. But that is a path chosen when the decision to seek office is made. A judge must observe the high standards promulgated by the Code of Judicial Conduct both on and off the bench in order to maintain the integrity of the judiciary.

In re Lowery, 999 S.W.2d 639, 657 (Tex.Rev.Trib. 1998, pet. denied). Though today I strike down the enforcement of portions of the Code, the aspirations live on. Judicial accountability arises in part from a justifiable concern for the relationship between judicial conduct and public perception. *Lowery*, 999 S.W.2d at 647. “While the legal profession has historically been considered a noble one,

modern-day portrayals paint a picture of scorn and ridicule. In the courtroom called the media, in the trial by public perception, the image of the judicial system is at an all-time low.” *Id.*

I offer two caveats before I close. First, the Commission is charged with enforcing the provisions of the Code of Judicial Conduct as promulgated by the Texas Supreme Court. I believe it has endeavored to do so in good faith while awaiting action by the Supreme Court on the remainder of the Task Force’s recommendations. Second, the robe means something to me. Every time I slip it on, I remember my oath – a vow “to preserve, protect and defend the constitution and laws of the United States and of this state.” If ever I look in the mirror and see a judge who has ruled on the basis of politics, expediency, or personal gain rather than the rule of law, it is time to remove the robe and leave the bench. The citizens of this state deserve nothing less. As for the 3700 judges who want to know what to do, it is my fervent hope that each one will pause to consider this: Our *ability* to speak does not mean that we *should* speak. I haven’t, and I won’t.

ANN CRAWFORD McCLURE, Justice