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KENTUCKY 2006 JUDICIAL ELECTIONS

Al Cross & William H. Fortune ***

This Article is a short report on the impact of *Republican Party of Minnesota v. White* on the 2006 Kentucky judicial campaigns and elections.[1] The series of events leading up to the 2006 elections can be traced to at least 1988.

In 1988, Canon 7(B)(1) of Kentucky's Code of Judicial Conduct followed the 1972 ABA Model Code in stating: A candidate for judicial office "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; (or) announce his views on disputed legal or political issues . . . ."[2] At this time, a successful candidate for the state supreme court made campaign statements and was sanctioned after the election.[3] The Judicial Conduct Commission found that he had announced his views on disputed issues in violation of the canon and suspended him without pay for three months.[4] The justice appealed to the court on which he was sitting, and the governor appointed replacement justices who held that the "announce" clause violated his First Amendment rights.[5] The "regular court" amended the canon to correspond to the 1990 ABA Model Code, dropping the announce clause and adding a "commit" clause that mandates judicial

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1. Republican Party of Minn. v. White, 536 U.S. 765 (2002).

2. J.C.J.D. v. R.J.C.R., 803 S.W.2d 953, 955 (Ky. 1991) (quoting KY. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(C) (1978)).

3. *Id.* at 954.

4. *Id.*

5. *Id.* at 957.

candidates "should not . . . make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."[6]

In *Deters v. Judicial Retirement and Removal Commission*, however, the Kentucky Supreme Court seemed to construe the commit clause as an announce clause.[7] While campaigning for district judge, Deters stated he was a pro-life candidate.[8] The court upheld the commission's finding that this statement appeared to commit him to a position on minors' parental bypass petitions for abortion and other matters, such as abortion protests, which might come before the court.[9] Justice Wintersheimer dissented in part on the basis of the values expressed in the case from the 1988 supreme court race—the voters' right "to know any candidate's views and to obtain the information that is relevant to them in making their final electoral choices."[10]

While Deters did nothing more than say he was "pro-life," the candidate in *Summe v. Judicial Retirement and Removal Commission* approved a letter implying that she would not sentence child abusers to probation.[11] The letter recited the facts of a case in which her opponent had placed an abuser on probation, and ended with the following plea: "Please join me in stopping the abuse and vote for a person who will let no one walk away before justice is served."[12] The supreme court interpreted this statement as a commitment on an issue—the probation status of a child abuser—which was likely to come before the court.[13]

In *White*, the United States Supreme Court held that the announce clause in Minnesota's judicial canon violated the First Amendment rights of candidates for judicial office; the Court did not, however, address the constitutionality of Minnesota's commit clause.[14] For the benefit of the judicial candidates in the fall 2002 elections, the Kentucky Judicial Conduct

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6. Deters v. Judicial Ret. & Removal Comm'n, 873 S.W.2d 200, 202 (Ky. 1994) (quoting KY. CODE OF JUDICIAL CONDUCT Canon 7(B)(1)(C)(1991)).
7. Deters v. Judicial Ret. & Removal Comm'n, 873 S.W.2d 200, 203 (Ky. 1994).
8. *Id.*
9. *Id.*
10. *Id.* at 206 (Wintersheimer, J., concurring in part & dissenting in part).
11. Summe v. Judicial Ret. & Removal Comm'n, 947 S.W.2d 42, 46 (Ky. 1997).
12. *Id.*
13. *Id.* at 47.
14. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002).

Commission issued a memorandum which stated that *White* did not impact the Kentucky canon because the announce clause had been replaced by the commit clause.[15] The Ethics Committee of the Kentucky Judiciary issued a similar memorandum.[16]

Two years later, the Family Trust Foundation of Kentucky sent questionnaires to judicial candidates in the fall 2004 elections, asking them to respond to a series of "I believe" questions—such as "I believe that the Kentucky Constitution does not recognize any right to destructive human embryo research or human cloning ___ agree ___ disagree ___ undecided ___ decline to respond".[17] The preface to the questionnaire stated in bold letters, "YOUR RESPONSES INDICATE YOUR CURRENT VIEW ON THE LEGAL ISSUES AND DO NOT CONSTITUTE ANY PLEDGE, PROMISE OR COMMITMENT TO RULE IN ANY PARTICULAR WAY IF THE LEGAL ISSUE COMES BEFORE YOU FOR DECISION."[18]

Most candidates discarded the questionnaire, but eight candidates returned the survey and declined to answer the questions because, they wrote, they were prohibited from doing so by (some combination of) the 2002 opinion of the Judicial Conduct Commission and the 2002 Opinion of the Ethics Committee.[19] Based on these responses the Family Trust Foundation of Kentucky filed suit in federal court against the Judicial Conduct Commission and the Kentucky Bar Association.[20] The suit alleged that the Kentucky Supreme Court, the Judicial Conduct Commission, and the Judicial Ethics Committee were interpreting the commit clause as if it were an announce clause, in violation of the First Amendment as construed by the United States Supreme Court in *White*.[21]

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15. Memorandum from the Ky. Judicial Conduct Comm'n to Justices, Judges, and Judicial Candidates, Republican Party of Minn. v. White (Aug. 5, 2002) (on file with authors).

16. Memorandum from the Ethics Comm. of the Ky. Judiciary to Justices, Judges, and Judicial Candidates, Republican Party of Minn. v. White (Oct. 10, 2002) (on file with authors).

17. Letter from Sarah Foster, Project Coordinator, Family Trust Found. of Ky., to Ky. Judicial Candidates, Ky. Candidate Information Survey—Judicial (2004) (on file with authors).

18. *Id.*

19. *See, e.g.*, Letter from Audra J. Eckerle, Jefferson County District Court Judge, to Sarah Foster, Project Coordinator, Ky. Candidate Information Survey (July 29, 2004) (on file with authors).

20. Family Trust Found. of Ky., Inc. v. Wolnitzek, 345 F. Supp. 2d 672, 682 (E.D. Ky. 2004).

21. *Id.* at 691–94.

Judge Reeves enjoined enforcement of the canon.[22] The Court of Appeals for the Sixth Circuit refused to stay Judge Reeves's order,[23] leaving Kentucky without a canon regulating judicial candidates' speech during November 2004 elections.

Meanwhile, the Ethics Committee of the Kentucky Judiciary issued another opinion, reiterating the view that *White* did not impact Kentucky's canon because Kentucky had replaced the announce clause with the commit clause.[24] In response, the Kentucky Supreme Court initiated a review of the opinion, known as JE-106, *sua sponte*, and ordered the Ethics Committee to file a brief setting forth a standard that would comply with the First Amendment.[25]

The Kentucky Supreme Court asked James Bopp, Jr. the Family Trust attorney, to file a response to the Ethics Committee's brief in JE-106. Mr. Bopp accepted the invitation, and one of his associates participated in oral argument held by the court in May 2005. The court held a public hearing on the issue at the summer 2005 Kentucky Bar Association convention and, on September 15, 2005, decided the appeal in JE-106 by replacing the canon with the following:

> A judge or candidate for election to judicial office shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule in a certain way on a case, controversy or issue that is likely to come before the court; and shall not misrepresent a candidate's identity, qualifications, present position, or other facts.[26]

In February 2006, the court added the following commentary to the revised canon:

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22. *Id.* at 711.

23. Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n, 388 F.3d 224, 226–27 (6th Cir. 2004).

24. Ethics Comm. of the Ky. Judiciary, Formal Op. JE-106 (2004), *available at* http://courts.ky.gov/NR/rdonlyres/944879DA-6D48-4B7C-8038-8B6FB0811812/0/JE106.pdf.

25. Order entered October 20, 2004 (on file with authors). William Fortune, one of the co-authors of this article, wrote the brief for the Ethics Committee and represented the Ethics Committee in the oral argument; the issue for the court was how to revise the canon, and the members of the court asked counsel for both sides to suggest wording.

26. *In re* Amendment to the Rules of SCR 4.300 Kentucky Code of Judicial Conduct—Canon 5(B)(1)(c), 2005-9, at 3 (Ky. 2005), *available at* http://apps.kycourts.net/ Supreme/Rules/2006-3ORDERAMENDING.pdf.

> Section 5(B)(1)(c) prohibits a candidate for judicial office from intentionally or recklessly making a commitment, or creating the appearance of a commitment, to rule in a certain way on cases, controversies or issues likely to come before the court. The section was changed in 2005 to conform to the United States Supreme Court's holding in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), and the federal district court's holding in *Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004).[27]
>
> An independent judiciary requires judges to be open-minded and to not prejudge matters that might come before them. A candidate who promises to rule in a certain way on a case or matter is essentially saying to the electorate that the judge is "spoken for" on that matter and will not decide the case on the facts and law presented at the time the case arises. The electorate has no legitimate interest in such promises, and candidates may not make them. Candidates may, however, inform the electorate of their judicial and political philosophies and their thoughts on points of law so long as the candidates make it clear they will decide matters on the facts and law as presented and developed in the cases that come before them.
>
> The canon applies to those who intend to commit or create the appearance of committing to a particular ruling on a particular issue, and to those who recklessly create the appearance of a commitment. As used in the canon, recklessly is used as the Supreme Court used the word in *New York Times v. Sullivan*, 374 U.S. 254, and as it is commonly used in the criminal law—a conscious disregard of a substantial and unjustifiable risk that the result will occur." A candidate who makes a public statement that the candidate intends to be taken as a commitment (i.e., "If elected I will never probate a defendant in a drug case") violates the canon. In addition, a candidate violates the canon if the candidate knows that the statement may reasonably be perceived as a commitment. (cf. Kirschner v. Louisville Gas & Elec. Co., 743 S.W.2d 840 (Ky. 1987). However, a candidate who innocently or negligently makes such a statement does not violate the canon. Summe v. Judicial Retirement and Removal Comm'n, 947 S.W.2d 42 (Ky. 1997).
>
> The second clause of the canon, which was not amended in 2005, should also be construed to require the mental state of intent or

27. *In re* Adoption of Commentary to SCR 4.300 Kentucky Code of Judicial Conduct—Canon 5(B)(1)(c), 2006-03, at 1 (Ky. 2006), *available at* http://apps.kycourts.net/ Supreme/Rules/2006-3ORDERAMENDING.pdf.

> recklessness. The First Amendment protects innocent or negligent false statements about an opponent made in the course of a campaign. Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

The *White* case was addressed in remarks made by Chief Justice Joseph Lambert at Murray State University in which he voiced concern about the 2006 election, when all but two Kentucky judgeships would be on the ballot.[28] He opined that the *White* decision would likely encourage judicial candidates to compromise their independence by promising results, a future he called a "dismal reality."[29]

Concerned by the prospect of a free-for-all election in 2006, Chief Justice Lambert brought together a citizens' group that incorporated in November of 2005 as the Kentucky Judicial Campaign Conduct Committee (KJCCC). The KJCCC is a citizens group of lawyers and non-lawyers[30] with the following missions: To educate the public about judicial races, to encourage candidates to run dignified races and resist the temptation to make promises to get votes, to monitor judicial races, to consider complaints of unethical campaigning, and to make public statements when appropriate.[31] The KJCCC is a non-profit organization with no public support or affiliation with the Kentucky Supreme Court, Kentucky Bar Association, or any other official entity.[32] It added members not in the original group recruited by Chief Justice Lambert, and chose its own chairman.[33] It is supported by private contributions.[34]

The KJCCC took several steps to publicize its existence and its intended role in the upcoming elections. Al Cross, co-author of this

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28. *See* Joseph E. Lambert, *Contestable Judicial Elections: Maintaining Respectability in the Post-*White *Era*, 94 KY. L.J. 1, 12 (2005) (stating "judicial elections are getting worse and worse.").

29. *Id.* at 13.

30. KY. JUDICIAL CAMPAIGN CONDUCT COMM., ELECTING JUDGES IN KENTUCKY 2006 (2006), *available at* http://www.lwvky.org/JCCC-Brochure-09-06.htm [hereinafter KJCCC 2006 BROCHURE]. At present, the KJCCC is made up of two retired judges, seven lawyers, and eight non-lawyers. One of the lawyers represents *The Courier-Journal*, the largest newspaper in the state. Two past presidents of the Kentucky Bar Association are on the board, one of whom is the secretary of the American Bar Association. The board also includes a law professor and a journalism professor. Among the non-lawyers are a representative of the League of Women Voters, the head of the League of Cities, a social worker, a librarian, and a bank vice-president. All regions of the state are represented.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

Article, wrote a short piece for the *Bench and Bar*, the organ of the Kentucky Bar Association, describing the KJCCC as follows:

> The Kentucky Judicial Campaign Conduct Committee is not part of any official enforcement mechanism designed to enforce the canons of conduct. The committee was formed to protect the pubic interest in having a fair, impartial, dignified and respected judiciary. It will do that by encouraging judicial candidates to conduct campaigns that protect those values, and discouraging campaign tactics that erode those values.
>
> The committee plans to accomplish its goals in several ways, including meetings with judicial candidates; . . . speeches to civic groups; interviews with the news media, and public statements about campaign conduct that it considers inappropriate.[35]

As soon as the filing date passed for the fall elections, the KJCCC sent a letter to every candidate who had filed in the more than one hundred contested judicial races, describing the committee and encouraging candidates to run dignified campaigns.[36] Chief Justice Lambert added his voice through a newspaper article under the headline, *Keeping Judicial Campaigns Judicious*:

> Some candidates may attempt to curry favor with perceived voting blocks by broadly declaring their views on the controversial issues of our time. If this occurs, politicians and special interest groups will succeed in harming our constitutional tradition of fair and impartial courts.[37]

Over the next eight months, the KJCCC took several steps to educate voters and encourage candidates to conduct dignified campaigns consistent with the independence of the judiciary. First, it sent letters to all candidates warning them that their responses to interest group questionnaires might be interpreted as commitments. A press release was issued on this point.[38]

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35. Al Cross, *Kentucky Judicial Campaign Conduct Committee*, 70 BENCH & B. 4, 4 (2006).

36. Letter from Spencer Noe, Chairman, Ky. Judicial Campaign Conduct Comm. (Jan. 2006) (on file with authors).

37. Joseph E. Lambert, *Keeping Judicial Campaigns Judicious*, COURIER-JOURNAL (Louisville), May 21, 2006, at H1.

38. KY. JUDICIAL CAMPAIGN CONDUCT COMM., KENTUCKY JUDICIAL CAMPAIGN CONDUCT COMMITTEE INC. ADVISES JUDICIAL CANDIDATES TO BE WARY

Additionally, the KJCCC sent letters to all candidates urging them to sign an agreement to conduct their campaigns in accordance with the Kentucky Code of Judicial Conduct, and "to disavow advertisements that use false or misleading information and/or accusations to impugn the integrity of the judicial system, the integrity of a candidate, or erode public trust and confidence in the independence and impartiality of the judiciary."[39] A press release was issued and the names of those who signed the agreement were posted on the KJCCC website.[40]

The KJCCC also authored and widely distributed a brochure on judicial campaigning titled *Electing Judges in Kentucky 2006*.[41] Brochures were available at libraries, courthouses, and the state fair, and given to lawyers at the annual bar convention. The KJCCC maintained an active web site and responded to requests for information about judicial campaigning.[42] Moreover, the KJCCC held six regional meetings for candidates in late August and early September of 2006.[43] Members of the KJCCC also spoke to several citizen groups. Through press releases and personal contacts, the KJCCC had good publicity in local papers throughout the state, including an op-ed piece Al Cross authored on judicial campaigning and the work of the committee.[44]

In its contacts with voters and the candidates, the KJCCC took the position that even though *White* allows judicial candidates to campaign on disputed social, political, and legal issues, candidates who do so are likely to compromise their independence.[45] The KJCCC brochure states:

OF QUESTIONNAIRES ABOUT ISSUES (Apr. 8, 2006), http://www.judicialcampaignconduct.org/committees/Electronic%20Committee%20Files/KY%20misc/KY_JCCC_press_release1.pdf.

39. News Release, Ky. Judicial Campaign Conduct Comm., More than One-Third of Kentucky Judicial Candidates with Opposition in this Year's Elections Sign Pledge on Campaign Conduct (Jan. 19, 2007), http://www.loubar.org/JCCC/KJCCChome.htm.

40. *Id.*

41. KJCCC 2006 BROCHURE, *supra* note 34.

42. Ky. Judicial Campaign Conduct Comm., http://www.loubar.org/JCCC/KJCCChome.htm (last visited Apr. 15, 2007).

43. News Release, Ky. Judicial Campaign Conduct Comm., KJCCC Hosted Six Educational Meetings (Jan. 19, 2007), http://www.loubar.org/JCCC/KJCCChome.htm.

44. AL CROSS, JUDICIAL ELECTIONS MAY BE DIFFERENT THIS YEAR, BUT THEY'RE STILL NOT LIKE OTHER ELECTIONS 1 (2006), http://www.politicskentucky.com/JudicialElections.pdf.

45. *See, e.g.*, KJCCC 2006 BROCHURE, *supra* note 34.

> In 2002, the U.S. Supreme Court ruled that the First Amendment to the U.S. Constitution allows judicial candidates to state their views on disputed legal and political issues. However, the Court said states may prohibit candidates from saying how they would rule on matters that might come before them if elected — in other words, require judges to keep *an open mind and not to pre-judge issues.* Judges who appear to have pre-judged an issue might be required to step aside if the issue comes up. When a candidate says he or she is "pro-life" or "pro-labor," the question is whether or not the candidate appears to be committing to rule a certain way. We think candidates should be wary of making such statements and of voicing opinions on legal and political issues.[46]

The KJCCC adopted policies and procedures that included staying out of disputes that were being litigated, which kept the organization out of a case that stemmed from the August 2, 2005 ruling of the U.S. Court of Appeals for the Eighth Circuit in *Republican Party of Minnesota v. White (White II)*—the *White* case on remand from the U.S. Supreme Court.[47] On First Amendment grounds, the court of appeals struck down two provisions of the Minnesota canon—the partisan-activities clause and the solicitation clause.[48] Like Kentucky, Minnesota elects its judges on a non-partisan basis, and the partisan-activities clause prohibited a candidate from running openly as a Democrat or Republican.[49] Like Kentucky, Minnesota also prohibited judicial candidates from personally soliciting campaign funds.[50] The Eighth Circuit held that the clauses violated judicial candidates' First Amendment rights of association and speech,[51] and the U.S. Supreme Court declined to review the decision.[52]

On June 9, 2006, James Bopp, Jr. filed an action against the Kentucky Judicial Conduct Commission and the Kentucky Bar Association on behalf of Marcus Carey, a northern Kentucky candidate for the state supreme court.[53] Carey claimed that the Kentucky canons violated his First

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46. *Id.*

47. Republican Party of Minn. v. White (*White II*), 416 F.3d 738 (8th Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 1165 (2006).

48. *Id.* at 766.

49. *See id.* at 745.

50. *See id.*

51. *Id.* at 744.

52. *Id.* at 738.

53. Complaint at 1, Carey v. Wolnitzek, No. 3:06-36-KCC, 2006 WL 2916814 (E.D. Ky. Oct. 10, 2006).

Amendment rights.[54] The complaint alleged that the revised speech canon was vague and overbroad, and, relying on *White II*, argued the partisan-activities clause and the solicitation clause violated the First Amendment.[55] The KJCCC had taken note of Carey's campaigning, which seemed to appeal to Republican partisans, but did not involve itself in the race because it was a topic of litigation. Consistent with the revised canon and its commentary—and with Judge Caldwell's opinion in the case—Carey could have announced his views on such matters, but he sought to create the impression that he had been muzzled by the canon and the judge's ruling. Following his unsuccessful challenge to the commit clause, Carey complained to the press that voters were being deprived of "their right to know" his views on abortion, the right to bear arms, and gay marriage.[56]

With the *Carey* suit in the news, Rick Johnson, a western Kentucky candidate for another supreme court position, began to campaign on disputed legal, social, and political issues.[57] Johnson, who was a Kentucky Court of Appeals judge, wrote a law review article in 2003 that set forth a balanced analysis of the Kentucky cases, *White*, and the reaction to *White*.[58] The article did not praise or condemn *White*, but rather concluded:

> While it is impossible to predict the full extent of *White's* impact on judicial campaign speech in Kentucky, there can be no doubt that *White* will serve as a catalyst for action at every juncture along the way

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54. *Id.* at *2.

55. *Id.* at *3. Carey also attacked the disqualification clause and the endorsement clause. *Id.* Judge Caldwell applied the Eighth Circuit's rationale to the partisan-activities and solicitation clauses, but ruled that Carey lacked standing to challenge the revised commit clause because Carey had not shown he faced a credible threat of prosecution for the statements that he wanted to make (the complaint did not specify what Carey wanted to say that would be chilled by the revised canon). *Id.* at *14. Judge Caldwell also ruled Carey lacked standing to challenge the recusal provision and he faced no credible threat of prosecution for violation of the endorsement clause because the clause on its face applies to endorsements *by* a judicial candidate, not to endorsements *of* a judicial candidate. *Id.* at *14–16.

56. Posting of Michael Stevens to Kentucky Law Review, Judicial Politics and Kentucky Making the Nations News in Story, "Relaxed Campaign Rules Put Judicial Candidates in Political Arena," http://www.kentuckylawblog.com/2006/11/judicial_politi.html (Nov. 2, 2006, 07:17 EST).

57. *See, e.g.*, News Release, Ky. Judicial Campaign Conduct Comm., Johnson Ad Misrepresents Cunningham's Record (Jan. 19, 2007), http://www.loubar.org/JCCC/KJCCChome.htm (discussing television advertisements aired by Johnson during his campaign).

58. Rick A. Johnson, *Judicial Campaign Speech in Kentucky After* Republican Party of Minnesota v. White, 30 N. KY. L. REV. 347, 347–48 (2003).

of the popular election of judges.[59]

As a candidate for the Kentucky Supreme Court, Johnson warmly embraced the opportunity to speak out on disputed legal, social, and political issues at Kentucky's Fancy Farm Picnic.[60] Held the first Saturday of August to kick off the fall election season, the Fancy Farm Picnic has been a Kentucky tradition since the 1880s.[61] People come from all over the state to eat barbecue, listen to country music, and cheer and heckle the candidates' old-fashioned stump speeches.[62] At the Fancy Farm Picnic in 2006, Johnson gave public voice to his conservative views on abortion, marriage, gay rights, prayer in schools, and the death penalty.[63] One Kentucky newspaper cited Johnson's speech as an example of the new rules for judicial campaigning,[64] and the KJCCC took the opportunity to commend the newspaper's reporting and to address the issues involved.[65] On October 11, 2006, the committee issued a press release stating in part,

> We think Judge Johnson's view of judicial campaigns is off the mark, and not in keeping with the campaign agreement that we offered to candidates this summer—an agreement that he signed.
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> . . . .
>
> We believe that many voters who hear judicial candidates take sides about disputed public issues would reasonably expect those candidates to rule on the same side if some facet of the issue came before them. Likewise, candidates who make such declarations may feel an obligation to rule that way, especially if they have received a lobbying group's endorsement.
>
> Judge Johnson may have a First Amendment right to make such statements . . . . But while candidates now enjoy broader rights to

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59. *Id.* at 414.

60. Larry Dale Keeling, *Judicial Campaigns Taint Impartiality*, LEXINGTON HERALD-LEADER, Aug. 20, 2006, at D1.

61. Brian Courtney, Politics & Barbecue Run Freely . . . in Fancy Farm, Kentucky (July 22, 2000), http://www.fancyfarm.net/politicalspeaking.html.

62. *Id.*

63. Keeling, *supra* note 64, at D1.

64. News Release, Ky. Judicial Campaign Conduct Comm., Committee Cautions Judicial Candidates Against Making Statements that Erode Independence, Integrity and Dignity of the Court System (Oct. 11, 2006), *available at* http://www.loubar.org/JCCC/KJCCChome.htm.

65. *Id.*

> comment, they should couple that with the responsibility to uphold the independence and integrity of the judicial system . . . . Judicial candidates who publicly state their views on disputed issues inevitably create the impression that such views would affect how they would rule from the bench, and that runs counter to the principle of judicial independence.[66]

Johnson's opponent, Circuit Judge Bill Cunningham, appeared to have finished first in the primary even though the ballot included an incumbent who withdrew too late to get his name off the ballot. When county clerks tabulated the votes, totals showed Cunningham ahead of Johnson. Being the top vote-getters, both Cunningham and Johnson began their campaigns for the general election.[67] The race turned nasty, with charges and counter-charges of unethical campaigning, while Johnson continued to preach about his "Kentucky values." T.R. Goldman of *Legal Times* followed Johnson on the campaign trail and reproduced a portion of a speech Johnson gave at a rally in Franklin, Kentucky: "'I want you, the voters, to know that I oppose abortion. . . . I support having the Ten Commandments in our schools and courthouses. . . . The rules have changed. I agree with the new rule [from *White*] because I believe the old system kept the voters in the dark and was arbitrary and elitist.'"[68] The audience in Franklin reacted warmly to Johnson's views on these hot-button issues.[69] Goldman quoted Johnson's listeners as saying, "[H]e thinks like we do, that allows a person to know him when they don't know him. . . . We elect a judge mainly on moralistic issues. So it's hard to vote for a judge if you don't know what he stands for. I appreciate his honesty."[70]

In the two weeks before the general election, the KJCCC received numerous complaints of unethical campaigning.[71] One of the most serious involved Johnson, the only judicial candidate who had campaigned on prominent social issues. Ironically, it was Johnson's complaint against

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66. *Id.*

67. Kentucky holds primary elections for judicial office when more than two candidates file for a seat, and the top two vote-getters meet in the general election.

68. T.R. Goldman, *Midwest Judges Get Out Their Soapboxes*, LEGAL TIMES, Nov. 6, 2006, at 14.

69. *Id.*

70. *Id.*

71. The committee received two complaints against Johnson alone. News Release, Ky. Judicial Campaign Conduct Comm., Committee: Johnson Ad Misrepresents Cunningham's Record (Oct. 27, 2006), *available at* http://www.loubar.org/JCCC/ KJCCChome.htm.

Cunningham that resulted in the committee's condemnation of Johnson. Johnson complained about Cunningham's accusation that Johnson had run a television ad that distorted Cunningham's actions in a rape case.[72] The committee concluded that Johnson had, in fact, misrepresented Cunningham's actions.[73] As a result, the KJCCC issued a strongly-worded press release the week before the election condemning Johnson's ad.[74] The press release, which received news coverage in western Kentucky, might have contributed to the size of Johnson's defeat.

Marcus Carey and Rick Johnson, the two "*White*" candidates, were defeated by big margins: Bill Cunningham defeated Johnson 77,763 to 49,165 in the Kentucky Supreme Court's First District; and Wil Schroder defeated Carey 84,467 to 46,666 in the Sixth District.[75] However, their defeats are probably unrelated to *White*. Carey ran against a respected court of appeals judge and was deemed "not qualified" by almost half the respondents in a Northern Kentucky Bar poll.[76] Johnson ran against a respected and popular judge, who he had trailed since the primary, and was probably hurt by the negative press following the KJCCC press release concerning his television ad.

The committee received complaints about one other appellate court race, for the seventh district court of appeals seat in eastern Kentucky, between incumbent David Barber and challenger Janet Stumbo, who had lost her supreme court seat two years earlier in a race where her opponent arguably distorted her record.[77] The first complaint came from Barber, alleging that Stumbo continued to say that some of Barber's property-tax bills were delinquent after he had paid them in July, using the amount he had owed as a fund-raising device.[78] While that complaint was being sorted out, Stumbo filed a complaint against Barber about one of his television

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72. *Id.*

73. *Id.*

74. *Id.*

75. Ky. State Bd. of Elections, Report of "Official" Election Night Tally Results (Dec. 1, 2006), http://www.elect.ky.gov/NR/rdonlyres/50EDBBE9-5767-4D3C-8F44-8B605ADDEB4F/92027/STATE.txt.

76. Posting of Michael Stevens to Kentucky Law Review, Ky. Judicial Races: Carey Takes a "Hit" in Northern Kentucky Judicial Poll, http://www.kentuckylawblog.com/2006/10/ky_judicial_rac.html (Oct. 25, 2006, 06:55 EST).

77. News Release, Ky. Judicial Campaign Conduct Comm., Committee Finds Judge's Ad Misrepresents Opponent's Record (Oct. 27, 2006), *available at* http://www.loubar.org/JCCC/KJCCChome.htm.

78. *Id.*

ads, alleging that it misrepresented opinions she wrote while on the Kentucky Supreme Court.[79]

The KJCCC said in a news release that Barber's ad "'seriously and inappropriately misrepresents' two opinions" of Stumbo's, and "that Stumbo kept outdated information on her Web site that may have given voters the mistaken impression that Barber had not paid his delinquent taxes."[80] The committee "said the issue of Barber's TV ad is more serious, and is the kind of advertising the committee was created to discourage and prevent."[81]

The KJCCC also cited one of its earlier, general statements, still posted on its website:

> Records of candidates are fair game in campaigns. But the records of judges, and of lawyers who want to be judges, can be easy to distort or misrepresent. Judges make hundreds of decisions during a term of office, and it's inevitable that some will be unpopular—or turn out to be, or seem, mistaken. The easiest way to campaign against someone who has served on the bench is to pick out a few decisions and focus attention on them, or even on only one decision. And a lawyer's legal career cannot always be defined by one case or a set of cases.[82]

Stumbo defeated Barber 77,152 to 46,386.[83] While newspapers in the district reported the KJCCC's findings, the committee believes that its activity had only a modest effect on the race because Barber was an incumbent at a disadvantage. The Stumbo name is perhaps the most politically potent in the region, being held by a respected physician who made two races for governor and was state Democratic chairman, and by the state attorney general, who served in the state house for twenty-five years, most of that time as majority floor leader.

The committee handled several other complaints, dismissing most for various reasons. In two cases involving trial-court races, findings were announced through letters to the parties involved, who then cited the findings in their own newspaper ads. In both cases those candidates lost.

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79. *Id.*

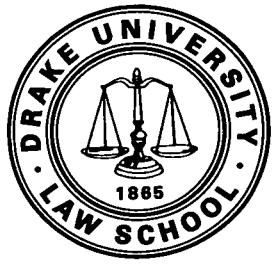
80. *Id.*

81. *Id.*

82. Ky. Judicial Campaign Conduct Comm., Judicial Elections Are Different This Year, but They're Still Unlike Other Elections (Jan. 19, 2007), http://www.loubar.org/ JCCC/KJCCChome.htm.

83. Ky. State Bd. of Elections, *supra* note 75.

While the KJCCC cannot claim a great impact on Kentucky's 2006 judicial elections, the authors of this Article believe that the committee played a positive role. For the most part, judicial candidates campaigned in a dignified and ethical manner, and refrained from running on issues that might strike a chord with the electorate. Judicial candidates did not go as far as *White* allowed them to go, and the KJCCC can take part of the credit—or blame—for that. We believe the KJCCC's activity reminded voters that judicial elections are supposed to be different from elections for legislative and executive office and probably influenced voters to cast ballots for candidates who demonstrated that they agreed with that principle.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