

Before the Senate Judiciary Committee
Senator Jeff King, Chairman
State Capitol Room 346-S (old Supreme Courtroom)
Thursday, January 17, 2013
10:30 a.m. to noon

Testimony in Opposition to
Senate Concurrent Resolution No. 1601 and Senate Bill No. 8
Anne E. Burke, Chair
Supreme Court Nominating Commission
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My name is Anne Burke. I am the current Chairman of the Kansas Supreme Court Nominating Commission.

Collectively, over nearly 50 years, members of this Commission have sent 183 names of highly qualified individuals to 11 Kansas Governors for consideration for appointment to 61 positions on the appellate bench. From Governor John Anderson's appointment of John Fontron to the Supreme Court in 1964 to Governor Sam Brownback's appointments of Judge Schroeder and Judge Powell to the Court of Appeals this year, Kansans have been well-served by the Supreme Court Nominating Commission.

When the current Court of Appeals was established in 1977, the legislature invested this Commission with the responsibility for nominations to the Court of Appeals as well as the Supreme Court. The Senate Concurrent Resolution and Senate Bill you are considering present a dramatic change to the entire appellate selection process. I invite you to consider the system which this resolution and bill contemplate that you abandon.

The Commission has a rigorous merit selection process for appellate judges. Why is it called merit selection? Because the Judicial Nominating Commission chooses applicants on the basis of their qualifications, not on the basis of political and social connections. Merit selection not only sifts out unqualified applicants, it searches out the most qualified. Judicial candidates are spared the potentially compromising process of party slating, raising money and campaigning. Professional qualifications are emphasized. Political credentials are de-emphasized. The Commission consists of nine unpaid, volunteer dedicated members. Four are lawyers elected by lawyers who reside in each of the state's four congressional districts. Four are lay members appointed by the Governor. The Chair is a lawyer, elected by lawyers statewide. There has been expressed concern that the Commission is dominated by lawyers. I would note and as you know lawyers are male and female. They are Republican, Democrat and undecided. They are liberal and they are conservative. Some lawyers vote in elections and some don't. Some are members of the bar association and some are not. Lawyers represent plaintiffs and defendants. They represent criminals. They represent injured people. They represent corporations. They represent government. Lawyers are Kansans.

Questions have been raised in recent years regarding the constitutionality of the composition of our Commission. Federal Judge Monti Belot, in a case captioned *Dool v. Burke*, recently upheld the constitutionality of that composition and the Tenth Circuit affirmed Judge Belot's decision.

I turn now to the process which the Commission employs when a vacancy occurs on the appellate courts. A notice announcing the vacancy is mailed to each active attorney admitted to practice in Kansas. That means that every individual eligible to apply for the position receives actual notice of the vacancy. A deadline is established for submitting application forms to the Commission. A copy of the application form is attached to my testimony and reveals the detailed information requested of each applicant. Particularly significant are the writing samples required to be submitted. An appellate judge must be an excellent writer and possess the intellect and legal knowledge to decide not only the cases which are controlled by existing precedent but also those which raise issues of first impression.

After the application period closes, members of the Commission receive copies of all applications and begin making background inquiries regarding those applicants. Any member of the Commission can make background inquiries about any of the applicants; however, individual assignments are also made to ensure that each applicant is thoroughly investigated. Criminal backgrounds and credit checks are run in addition to the background inquiries. Information regarding whether candidates have any ethical complaints past or pending is examined. Letters from the public are invited and received.

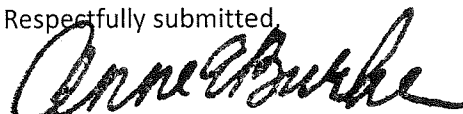
Personal interviews are then scheduled, allowing each of the nine Commission members an opportunity to ask questions and engage the applicant in discussion regarding his or her qualifications for the job. These personal interviews are open to the public. We do not ask applicants where they stand on issues or how they would decide an issue as an appellate judge. We simply try to submit to the Governor the names of three (3) of the best thinkers, the best writers and the best researchers who are of even temperament, good demeanor and high ethical standards. We want the appointment of appellate judges who will make correct judicial decisions based on principled reasoning without bias or political influence. The system has worked well for 50 years.

As retired Kansas Supreme Court Justice Fred Six has stated in the past, anyone who urges radical changes in basic institutions must bear a heavy burden of proof on two points. **First**, they must show by solid evidence that the existing system is broken and irreparable. **Second**, they must show that the proposed changes would make the institution better rather than worse. Where is the evidence that our present system of selection of judges does not work well?

The Commission is committed to an independent judiciary, selected on merit rather than political considerations. The Commission is equally committed to retention votes which allow the people of Kansas to periodically review the performance of our appellate judges.

Senate Concurrent Resolution No. 1601 and Senate Bill No. 8 substitute a political process for merit-based selection. I urge you to reject this legislation.

Respectfully submitted,

A handwritten signature in black ink that reads "Anne E. Burke". The signature is written in a cursive, flowing style.

Anne E. Burke, Chair

Supreme Court Nominating Commission

SUPREME COURT NOMINATING COMMISSION

Date _____

Full Name _____

Residence Address _____

City, State, Zip _____ Telephone No. _____

Office Address _____

City, State, Zip _____ Telephone No. _____

Email address _____ Cell Phone No. _____

Are you between the ages of 30 and 75 (yes or no)? _____

Place of Birth _____

Are you a citizen of the United States? _____

Are you a resident of Kansas? _____

How many years have you been a practicing lawyer and/or judge of a court of record or any court in the state of Kansas and/or a full-time teacher of law in an accredited law school? See K.S.A. 20-105 and K.S.A. 20-3002(a). _____

If requested to do so, are you willing to be personally interviewed by members of the Supreme Court Nominating Commission? _____

If you should be one of three nominated for one of the Kansas Appellate Courts, would you agree to serve if appointed by the Governor? _____

[NOTE: The Kansas Bureau of Investigation release form authorizes an investigation should you be one of three nominated. One notarized copy must be attached to the original of your application form. The Commission will conduct a preliminary investigation of credit, criminal, and traffic history of all applicants.]

The personal data information shown on the attached form is incorporated herein.

I hereby waive any privilege of confidentiality I may have concerning information which the Supreme Court Nominating Commission may desire to obtain from any source concerning my qualifications.

Signature of Applicant

An original and **ten** copies of this form and its attachments should be submitted to:

Carol G. Green
Clerk of the Kansas Appellate Courts
Kansas Judicial Center
301 SW 10th Avenue, Room 374
Topeka, Kansas 66612-1507

Letters in support of the nomination are encouraged. They should be addressed to the Commission Chair Anne E. Burke and mailed to the attention of Carol G. Green at the above address. Such letters may accompany the application form or may be submitted separately. Letters will be accepted until one week prior to interviews.

Please answer the following questions on 8 ½ x 11 paper. State the question, then give the answer.

Personal Data of: _____

1. List each college and law school you attended, degrees and dates earned, scholastic honors, and major academic activities. Please also state your class ranking and grade point average on graduation from law school.
2. List all state bars, courts, and administrative bodies having special admission requirements to which you are presently admitted to practice, specifying the dates of admission, whether you are currently a member in good standing, and whether there have ever been any restrictions on your practice.
3. (a) List chronologically your employment since becoming a member of any state bar. As to legal employment, include names and addresses of all law offices, firms, companies, or government agencies with which you have ever practiced, the nature of your affiliation with each, the general nature of your practice, and any other relevant particulars. Also, please provide the name, current address, and telephone number of a person, preferably your supervisor, who can verify your employment for each position listed.

See K.S.A. 20-105 and 20-3002, which require a potential nominee to have been engaged in the “active and continuous practice of law” for at least ten years prior to the date of appointment. Include in your list the months and years of legal employment to verify that you meet this statutory requirement.

- (b) List published articles on legal subjects as well as continuing legal education courses which you have presented during the past five years.
 - (c) Attach to this application form a writing sample which reflects your own work product, preferably containing legal analysis and citation to authority.
4. If in private legal practice, describe your typical client(s). If not in private legal practice, describe your employer or work arrangement, your position within the structure (are you supervised, how is work assigned, who receives your work product), and other information you feel would assist the Commission in understanding the nature of your current professional responsibilities.
5. What percentage of your court appearances in the last five years was in:
- _____ % Federal district court
 - _____ % Federal appellate court
 - _____ % State general jurisdiction court
 - _____ % State appellate court
 - _____ % State limited/special court (Specify the court.)
 - _____ % Administrative bodies
6. (a) If your practice includes litigation, list and describe the five most significant cases which you personally litigated, giving case caption, number, and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant. Give the name of the court and judge, the date tried, and the names of other attorneys involved.
- (b) If your practice does not include litigation, describe the five most significant legal matters in which you were involved. Describe the nature of your participation in the matter and the reason you believe these experiences are relevant for consideration by the Commission. Provide the name of the client and the names of other attorneys involved.
7. Describe any additional arbitration, mediation, or other alternative dispute resolution experience that you would like to bring to the attention of the Commission.
8. (a) Have you ever held judicial office? If so, provide copies or give citations to significant opinions.
- (b) Have you ever submitted your name for a vacancy on one of the Kansas Appellate Courts? If so, when?

9.
 - (a) State your approximate individual net worth and the nature of your substantial financial interests.
 - (b) Are you a director or officer of any business or corporation? Do you hold an ownership interest of more than \$5,000 in value (stock, partnership or proprietorship equity, or otherwise) in any business or corporation?
 - (c) Are you a member of any partnership or joint venture?
 - (d) If appointed, would you be willing to resign or divest yourself of any business interests, offices, or positions you now hold, if required by the Canons of Judicial Conduct?
10. Have you ever been charged or convicted of a violation of any law except traffic offenses? [DUI violations and reckless driving offenses should be included.] If you answer “yes” to this question, please supply the information requested in the Footnote.
11.
 - (a) Have you, within the last ten years, failed to **file** any applicable local, state, or federal income tax return, schedule, or report required by law? If “yes,” provide the name and address of the taxing authority, the tax year(s) for which you failed to file the return, schedule, or report, and the date you finally filed the return, schedule, or report.
 - (b) Have you, within the last ten years, failed to **pay** any taxes owed pursuant to state or federal law? If “yes,” provide the name and address of the taxing authority, the tax year(s) for which you failed to pay, and the date you finally paid the taxes. If you continue to owe past due taxes, list the current balance of the taxes by tax year and by taxing authority.
 - (c) Has a tax lien or other collection procedure ever been instituted against you by local, state, or federal authorities? If “yes,” supply the information requested in the Footnote.
12. Have you ever sued or been sued by a client or been a real party defendant in interest in any other legal proceedings? If “yes,” supply the information requested in the Footnote.
13. Have you ever been disciplined or cited for a breach of ethics or professional conduct by any professional disciplinary body? If you are a judge, have formal proceedings ever been instituted against you by the Commission on Judicial Qualifications? If “yes,” provide the information requested in the Footnote.

14. List all bar associations, professional associations, or professional societies of which you are or have been a member. Give the titles and dates of any offices which you have held and committees on which you served.
15. For the last ten years, list all civic, service, charitable, or other community organizations of which you have been a member, including the titles and dates of any offices which you have held and the activities in which you have been or are engaged in each such organization.
16. If you have been in the military service, state the length of service, the branch and dates you served, your rank on discharge, and the type of discharge.
17. List the names, addresses, and telephone numbers of five persons who are well acquainted with your legal ability.

In addition, if you are a practicing attorney, list the names, addresses, and telephone numbers of three judges before whom you have made an appearance in the last five years and three lawyers who have been adverse to you in litigation or negotiations within the last five years.

18. If you are a judge, list the names, addresses, and telephone numbers of at least five lawyers who have appeared before you within the last five years.

Include relevant case names and numbers.

19. State any other information which you believe should be disclosed in connection with the Commission's consideration of your potential nomination to one of the Kansas Appellate Courts.

Footnote

- The title of the proceedings.
- If formal proceedings have been filed, the caption of the case and the court or tribunal in which the case was filed and the location of same.
- The date of the alleged violation or incident giving rise to the charge.
- A statement of the relevant facts.
- The identity of the principal parties involved.
- The outcome of the proceedings, specifying any sentence, decision, and/or judgment entered.

SUBMIT ONLY ONE COPY OF THE FOLLOWING FOUR PAGES WITH YOUR ORIGINAL APPLICATION:

- **APPLICANT INFORMATION FOR PUBLICATION (PAGES 7 & 8)**
- **DRIVER'S LICENSE PAGE (PAGE 9)**
- **KBI RELEASE FORM (PAGE 10)**

**SUPREME COURT NOMINATING COMMISSION
APPLICANT INFORMATION FOR PUBLICATION**

DATE: _____

FULL NAME: _____

CITY OR CITIES OF RESIDENCE FOR THE PAST TEN YEARS:

LIST EACH COLLEGE AND LAW SCHOOL ATTENDED, INCLUDING DEGREES EARNED:

**LIST CHRONOLOGICALLY YOUR EMPLOYMENT SINCE BECOMING A MEMBER OF ANY
STATE BAR:**

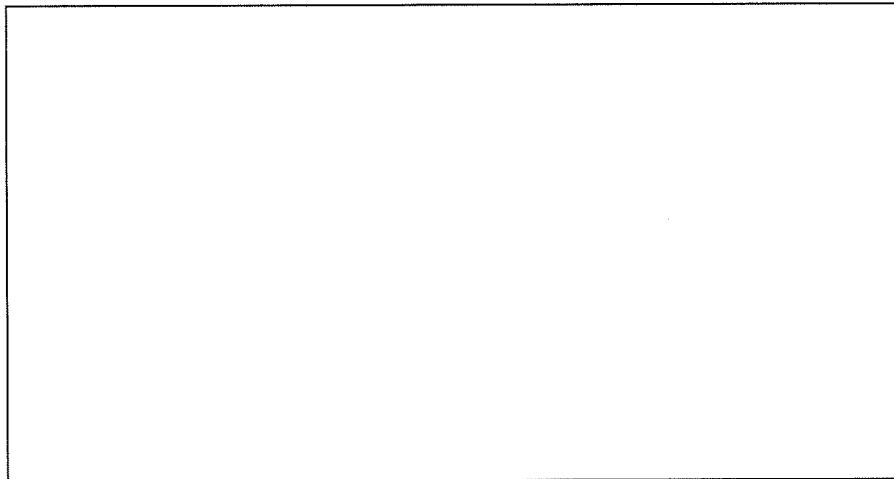
FOR THE LAST TEN YEARS, LIST ALL PROFESSIONAL, CIVIC, SERVICE, CHARITABLE OR OTHER COMMUNITY ORGANIZATIONS OF WHICH YOU HAVE BEEN A MEMBER, INCLUDING TITLES OF ANY OFFICES WHICH YOU HAVE HELD:

In order to facilitate background investigations, the Commission requests that you complete the form below and attach a copy of your current driver's license in the space provided.

Driver's License Number: _____

Issuing State: _____

Expiration Date: _____

A large, empty rectangular box with a thin black border, intended for the applicant to attach a copy of their current driver's license. The box is positioned centrally on the page, below the text fields for license number, state, and expiration date.



Kansas Bureau of Investigation

Kirk D. Thompson
Director

Derek L. Schmidt
Attorney General

Date

I hereby authorize and request any former and present employer, creditor, bank, savings and loan, credit union, finance company, mortgage company, credit card company, credit reporting agency, collection agency, school, college, university, agencies in the criminal justice system, or any other person, company or corporation to release any and all information and documentation relating to my employment, personnel records, evaluations, credit, financial condition, financial information, school activities, grades, degrees, character, integrity, criminal history including expunged records and any other information whatsoever to any agent of the Kansas Bureau of Investigation.

Signature

Typed or Handwritten Name

Social Security Number

Subscribed and sworn to before me this _____ day of _____, _____.

Notary Signature