

Testimony in Opposition to HCR 5002, HCR 5003, HCR 5004
and House Bills 2019 & 2020

Anne E. Burke, Chair
Supreme Court Nominating Commission
913-498-8080
aburkejd@aol.com

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 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.

I urge you to retain the current constitutional and statutory process for merit-based selection of appellate judges in Kansas.

Respectfully submitted,

Anne E. Burke, Chair
Supreme Court Nominating Commission