TESTIMONY OF JACK FOCHT
PRESIDENT
KANSAS APPLESEED CENTER FOR LAW AND JUSTICE
BEFORE THE KANSAS SENATE JUDICIARY COMMITTEE
IN OPPOSITION TO SENATE BILL 8 AND
SENATE CONCURRENT RESOLUTION 1601

Kansas
APPLESEED

My name is Jack Focht. I am a lawyer with the law firm of Foulston & Siefkin LLP. I have been practicing law in Kansas over 50 years. I am here today as the President of the Kansas Appleseed Center For Law and Justice to offer testimony in opposition to Senate Bill 8 and Senate Concurrent Resolution 1601 and in support of merit selection of judges in Kansas.

I am sure the first question that popped into some of your minds is "What is the Kansas Appleseed Center For Law and Justice." In short hand fashion I would tell you that Kansas Appleseed Center for Law and Justice is a 501(c)(3) corporation organized according to the laws of the State of Kansas for charitable and educational purposes. Our Articles of Incorporation describe some of our purposes to include:

(a) Providing an effective voice for the public at large and for individuals and groups that otherwise would be unable to obtain effective legal representation in Kansas.

(b) Furthering the public interest in the development and application of law by courts, agencies, legislative bodies, and others in Kansas and assisting the advancement and improvement of the administration of justice.

(c) Advancing the cause of social economic and political justice in Kansas.

We were organized in the summer of 1999. Our Board of Directors is listed on our letterhead. In summary since we began our public interest organization we have had

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many distinguished Kansans serve on our Board of Directors. Some have left us by death such as Robert Geary, Robert Martin, Bert Cohen, Jordan Haines and Don Rezak.

We have determined that we will be involved in and advocate for systemic and/or institutional change, which effects the administration of justice in the State of Kansas. The matter under study by this committee has become one of our major projects. We have determined that an attack on the Merit System of selection of judges is a cause worth fighting against. We believed that the proposed recommended changes to the Kansas Constitution is an invitation to return to the good old days of partisan selection of judges and represents what has been called the tyranny of the majority. This is not a new concept. A fear expressed variously by Plato, Aristotle, Madison, Tocqueville, and J. S. Mill. If the majority rules, what is to stop it from expropriating the minority, or from tyrannizing it in other ways by enforcing the majority's religion, language, or culture on the minority?

Why do I use such strong language to comment on the proposed change? To justify my language it is necessary to do two things: to consider the present system and to consider the real rationale for the proposed change.

I was a first year law student when I got to cast my first vote on an amendment to the Kansas Constitution in 1958. Kansans, like me had been horrified at the spectacle of raw political power which had resulted from the "infamous triple play" resulting in Governor Hall becoming Justice Hall. One of my professors, Justice Schuler Jackson, later replaced Hall on the Supreme Court and the people of Kansas responded to the cries to remove partisan politics from the selection of Supreme Court Judges. The Kansas Constitution was amended by a 60% majority vote in the general election of 1958 to establish the following "merit" or "Missouri plan" system utilized in a number of other states:

The Supreme Court Nominating Commission began and it has worked well while chaired by respected members of the legal profession such as Robert Foulston, Richard Hite and Anne Burke. There have been no complaints about the candidates forwarded to the various governors for appointment

A committee composed of nine members, five lawyers and four laypersons, takes applications from those who wish to be considered for appointment to a vacancy on the Supreme Court. They review credentials and select the three they deem best suited and submit those

names to the Governor, who must make the appointment of one of the three nominees submitted. The justice thus selected is on the next state-wide general election ballot where there is a retention or non-retention choice for the voters. The justice then is subject to the same kind of vote each six years thereafter. Unfortunately, the legislature has failed to re-appropriate the judicial evaluation commission so that the Kansas voter lacks any information upon which to base his or her choice. This law will sunset in 2014.

This system has been in place for over 50 years. Those who would change the system need answer this question: *what is wrong with the way we select appellate judges now?* It is no answer to opine as some carpet bagger experts do to cry it is not democratic or it violates the one person one vote concept.[1] No credible evidence has been offered to show that the lawyer majority on the commission has been anything but beneficial. Indeed one of the chief proponents of doing away with the present system, Professor Stephen Ware admitted in his paper: *Selections to the Kansas Supreme Court,* (written for the Federalist Society) while accusing lawyers of being "faction" that:

> "Lawyers because of their professional expertise and interest in the judiciary, are well-suited to recognizing which candidates for a judgeship are especially knowledgeable and skilled lawyers." p.9.

It is only fair to say that Professor Ware goes on to say: "But is it likely that every lawyer on a nominating commission will completely put aside his or her personal worldview in favor of some non-political conception of 'merit'." The problem is that Professor Ware has no evidence to offer in his quest to turn to what is admittedly a political method of selecting judges.

I read with interest the Wichita Eagle for January 14, 2013 (yesterday) where the following appeared:

> The Kansas Chamber of Commerce, newly led by former House Speaker Mike O'Neal, has an aggressive legislative agenda aimed at phasing out all individual and corporate income taxes and pushing for changes related to state employees' pensions and unions' political influence. But both Kent Eckles, the chamber's vice president for governmental affairs, and Eric Stafford, the chamber's senior legislative affairs director, told Associated Press that the chamber will stay out of the debate about changing how appellate judges are chosen. O'Neal has said the Kansas Supreme Court stepped over the line in requiring the Legislature to increase school funding.

[1] It is not the point of this testimony to debate this issue. The courts have already denied the claim made by folks like Professor Ware.

> But he once responded to a proposed constitutional amendment to change how Supreme Court justices were chosen by asking: "What's wrong with what we've got now?"

So the answer to the first question seems to be that present system of 'merit selection' has served us well as it has the other 39 states who have adopted some variation of the "Missouri Plan." Of the states who have adopted it none have abandoned the 'merit system" selection of Judges none have returned to partisan selection. In Missouri, 76% of the voters rejected Amendment 3, a proposed constitutional amendment to give Missouri's governor a greater hand in picking the nominating commission that screens judicial candidates. In Arizona 73% of voters rejected a similar proposed constitutional amendment Proposition 115. In Florida, Amendment 5, a referendum to require state Senate confirmation of Supreme Court justices who are nominated by the governor, was defeated by a margin of 63%-37%.

It would appear that the people have not deviated from the pronouncement in Article 45 of the Magna Carta adopted in 1216 that "*We will appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well.*"

If then the answer to my first query is that the present system has given us justices and judges who are of merit we turn to the second question. What is the real reason for the proposed change?

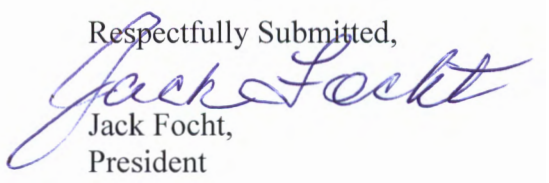
I suggest that the answer to this question is what worried Plato, Aristotle, Madison, and Tocqueville, and J. S. Mill— tyranny of the majority. These propositions are offered because the majority knows that they have the votes to pass them—regardless of the harm to the concept of separation of powers. This legislature has made their quarrel with the courts ability and right to interpret laws and the constitution a public debate. It must be that the majority party in power is willing to say that 60% of Kansas voters were wrong in 1954 when they held their noses at the smell coming from the politics of the majority and adopted the very plan that you now seek to scuttle.

To use the common vernacular—If it ain't broke don't fix it. The public is assured of nominees qualified to serve on the court because their experience and other relevant background have been scrutinized carefully by their lawyer and citizen peers and judged to be the best among all those who have agreed to accept the appointment if selected. Under your proposal there is no selection based on "merit" there is only a committee designed to issue a report on qualifications—which consist of being 30 years of age and admitted to the practice of law. You

put the cart before the horse. The Governor appoints whomever he or she wants and then the party under the present system determines if it is acceptable. This smells of the worst of the federal system with no independent analysis of the ability of the appointee and no involvement by anyone but the governor and the legislature. Tyranny of the majority indeed.

I am still proud of my vote in 1958 and I urge you to leave the system above the partisan political wars that are fought in this body.

Respectfully Submitted,



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