



# The Journal of Appellate Practice and Process

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Volume 14 | Issue 1

Article 1

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2013

## The First and the Last

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### Recommended Citation

Nancy Bellhouse May, *The First and the Last*, 14 J. APP. PRAC. & PROCESS v (2013).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol14/iss1/1>

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## FOREWORD

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### THE FIRST AND THE LAST

Thinking recently that the story of the first appellate court in the United States was bound to be interesting, I set out to find it. But I never got there.

I learned instead that there is some uncertainty about which of the state supreme courts has the longest history. The Supreme Court of Virginia, for example, “is one of the oldest continuous judicial bodies in the United States.”<sup>1</sup> Its antecedents include both the Supreme Court of Appeals, which first sat in 1779, and the Quarter Court, established by the House of Burgesses in the 1620s.<sup>2</sup> The Supreme Court of Connecticut’s earliest ancestor appears to have been the Court of Assistants, which was established in 1665.<sup>3</sup> And the Supreme Court of Pennsylvania, which traces its history back to 1684,<sup>4</sup> characterizes itself as “the oldest appellate court in the nation.”<sup>5</sup> The Supreme Judicial Court of Massachusetts was established in 1692 as the Superior Court of Judicature,<sup>6</sup> and is now “believed to be the oldest

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1. See Office of the Executive Secretary, Supreme Court of Virginia, Virginia’s Judicial System, *The Supreme Court of Virginia*, <http://www.courts.state.va.us/courts/scv/scvinfo.pdf> (accessed Oct. 15, 2013; copy on file with Journal of Appellate Practice and Process).

2. *Id.*

3. See State of Connecticut, Judicial Branch, *History of the Courts*, <http://www.jud.ct.gov/ystday/history.html> (noting that the history of the appellate courts in Connecticut runs from the Court of Assistants through the Superior Court and eventually to the “Supreme Court of Errors” established in 1784 as the “highest appellate tribunal of the state” and absorbed into the new judicial branch established by the 1818 constitution) (accessed Oct. 15, 2013; copy on file with Journal of Appellate Practice and Process).

4. See Unified Judicial System of Pennsylvania, *Supreme Court of Pennsylvania—Overview*, <http://www.pacourts.us/learn?q=supreme> (accessed Oct. 15, 2013; copy on file with Journal of Appellate Practice and Process).

5. *Id.*

6. See Massachusetts Judicial Branch, Massachusetts Judicial System, *The Supreme*

appellate court in continuous existence in the Western Hemisphere.”<sup>7</sup> And a fifth possible contender for the title of oldest, the Supreme Court of Maryland, is descended from an appellate tribunal active in the early eighteenth century.<sup>8</sup>

The historical record may not show us, then, which of the state supreme courts has an absolute claim to first place. But we know at least which of the high courts in the original thirteen states was formed most recently: Delaware established a separate supreme court only in 1951.<sup>9</sup>

## THE ISSUE

We have in this issue a reflection on the ways in which President Obama’s background as a professor of constitutional law might be influencing his approach to the selection of federal judges, an insider’s report on the drawbacks of lobbying among the members of multi-judge appellate courts, a dialogue about oral argument, a comparison of two anti-retention efforts—one successful, one thwarted—mounted against members of the Iowa Supreme Court, an examination of the English approach to appellate review of criminal sentencing, and an overview of the California appellate courts’ experiment with tentative oral opinions. All are interesting, all are timely, and all address matters likely to affect the future of all our appellate courts—no matter which among them has roots that extend most deeply into the past.

NBM

Little Rock

October 15, 2013

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*Judicial Court*, <http://www.mass.gov/courts/sjc/supreme-judicial-court.html> (accessed Oct. 15, 2013; copy on file with Journal of Appellate Practice and Process).

7. *Id.*

8. See Maryland State Archives, *A Court of Appeals Time Capsule*, <http://msa.maryland.gov/ecp/45/00029/html/intro.html> (noting that “[t]he Court of Appeals of Maryland is probably the oldest appellate court in the United States,” and that “its origin goes back more than a half century before” the current body was “created by the State Constitution of 1776”) (accessed Oct. 15, 2013; copy on file with Journal of Appellate Practice and Process).

9. See Delaware State Courts, *History of the Delaware Supreme Court*, <http://courts.delaware.gov/supreme/history.stm> (noting that “[t]he highest appellate authority prior to the creation of the separate Supreme Court consisted of those judges who did not participate in the original litigation in the lower courts,” and who “would hear the appeal en Banc”) (accessed Oct. 15, 2013; copy on file with Journal of Appellate Practice and Process).