



## The Journal of Appellate Practice and Process

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Volume 19  
Issue 1 04/01/2018

Article 1

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2018

### Where We Are

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### Recommended Citation

Nancy Bellhouse May, *Where We Are*, 19 J. APP. PRAC. & PROCESS v (2018).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol19/iss1/1>

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## FOREWORD

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### WHERE WE ARE

Grown up before I ever started fall-semester classes outside of Maine, I figured that I could hold on through three years of exile and then return. This is not how things turned out. Yet I learned most of what is important to me from growing up in Maine. And thanks in part to Margaret Chase Smith, the Maine of my childhood was not much like anywhere else.

First elected to Congress before I was born, Senator Smith kept getting elected—four times to the House and then four times to the Senate—until I was more than halfway through high school.<sup>1</sup> She was famous.<sup>2</sup> And formidable.<sup>3</sup> And so I learned early that a girl could dream of any future.

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1. Senator Smith was the first woman “to stand election in the Senate without first being appointed to fill an unexpired term,” Helen Henley, *Maine GOP Nominates Mrs. Smith for Senator*, CHRISTIAN SCI. MONITOR, June 22, 1948, at 5, the first woman to serve in both houses of Congress, and the first woman whose name was placed in nomination for the presidency at a national political convention, *Margaret Chase Smith*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS (n.d.), <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000590>. She was in fact the first woman ever to seek a major party’s presidential nomination. See, e.g., Rick Perlstein, “A Lady for President?” *Third Graders Respond*, NEW YORKER (July 25, 2016), <https://www.newyorker.com/culture/culture-desk/a-lady-for-president-third-graders-respond>.

2. William S. White, *Seven G.O.P. Senators Decry “Smear” Tactics of McCarthy. Attack Led by Mrs. Smith of Maine, Who Also Scores Democratic “Whitewash”*, N.Y. TIMES, June 2, 1950, at 1 (reporting on Senator Smith’s *Declaration of Conscience*); see also James A. Hagerty, *Mrs. Bolton Urges Women to Aid GOP. Representative, in Convention Speech, Declares Party Will Block “Spending Spree”*, N.Y. TIMES, June 23, 1948, at 5 (including report on tribute made at Republican National Convention to then-Representative Smith, newly chosen Republican nominee for Senate, that referred to “her ability and record and the position she had gained in the world of men”).

3. President Kennedy once characterized Senator Smith as “a very formidable political figure.” Ellen Fitzpatrick, *The Unfavored Daughter: When Margaret Chase Smith Ran in the New Hampshire Primary*, NEW YORKER (Feb. 6, 2016), <https://www.newyorker.com/books/page-turner/the-unfavored-daughter-when-margaret-chase-smith-ran-in-the-new-hampshire-primary>. Indeed, her potential run for the presidency in 1964

I still think about Senator Smith, and I still return periodically to the *Declaration of Conscience*.<sup>4</sup> Her language there is crisp, her approach forthright, and despite the fervor with which her primary target was pursuing his ends, she keeps her passion short-leashed. In the end, she takes both sides of the aisle to task.

I can't help wondering what Senator Smith might have made of this fall's hearings. Justices Clark, Minton, Harlan, Brennan, Whittaker, Stewart, White, Goldberg, Fortas, Marshall, Blackmun, Powell, and Rehnquist, and Chief Justices Warren and Burger, were all confirmed during her time in the Senate,<sup>5</sup> so she was there when the first aggressive grilling of a Supreme Court nominee took place.<sup>6</sup> She was there too for the doomed nomination of Justice Fortas to replace Chief Justice Warren,<sup>7</sup> and the equally ill-fated nominations of Judges Thornberry, Haynsworth, and Carswell.<sup>8</sup>

We speak today of the confirmation process as broken. Perhaps it is. But we should remember that we have been here before—once already in my own lifetime—the country divided as politics begin to color public opinion of the Court. At least one of Senator Smith's colleagues worried, for example, about “the deep division throughout the country” and “the doubt, discord and polarization” associated with the Haynsworth nomination.<sup>9</sup>

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“unsettled leading G.O.P. hopefuls Nelson Rockefeller and Barry Goldwater.” *Id.* Those assessments were justified. Senator Smith won her first Senate primary by a “one-sided” margin, Josephine Ripley, *Women Hail Smith Victory in Maine*, CHRISTIAN SCI. MONITOR, June 23, 1948, at 7, amassing “more votes than went to all three of her men opponents combined,” Henley, *supra* note 1.

4. Margaret Chase Smith, *A Declaration of Conscience*, in ROBERT C. BYRD, THE UNITED STATES SENATE 1789–1989 at 621 (1988).

5. *Supreme Court Nominations: Present–1789*, U.S. SENATE (n.d.), <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm#vote> [hereinafter *Supreme Court Nominations*].

6. As Judge Newman points out later in this issue, Senator McClellan grilled then-Judge Stewart about racial segregation during his confirmation hearing in 1959. Jon O. Newman, *The Supreme Court—Then and Now*, 19 J. APP. PRAC. & PROCESS 1, 7 (2018).

7. Nominated by President Johnson to succeed Chief Justice Warren, Justice Fortas withdrew in October 1968. *Supreme Court Nominations, supra* note 5.

8. Judge Thornberry, nominated by President Johnson to succeed Justice Fortas, withdrew in October 1968, *id.*, while Judges Haynsworth and Carswell, nominated successively by President Nixon to replace Justice Fortas, were both rejected, Senator Smith voting with the majority in each case. *Supreme Court of the United States*, 116 CONG. REC. 10769 (1970) (showing tally for Carswell vote); *Supreme Court of the United States*, 115 CONG. REC. 35396 (1969) (showing tally for Haynsworth vote).

9. *Supreme Court of the United States*, 115 CONG. REC. 35398 (1969) (recording statement of Senator Hatfield).

That too was an uncertain time for both the country and the Court, but eventually we found our footing. Surely we can do it again.

## THE ISSUE

This issue offers several absorbing essays, one the newest installment in our episodic first-argument series. It also includes an article reporting on an important study of the Eighth Circuit's performance at the Supreme Court. And we have as well the AAAL's statement addressing oral argument and the NAAG's *U.S. Supreme Court Brief Writing Style Guide*, both of such importance to the appellate community that we present them here even though we do not generally publish material that first appeared elsewhere. I urge you to give every part of this issue a chance to challenge or charm you, or maybe to teach you something new.

NBM

Little Rock

October 15, 2018

