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# Persuasive Authority and the Nebraska Supreme Court: Are Certain Jurisdictions or Secondary Resources More Persuasive Than Others?

by Stefanie S. Pearlman

## Introduction

I have taught legal research to first year law students for the last fourteen years. I have spent much of that time describing what legal resources are and where to find them. That's the easy part. The challenging part is the questions about what to do with the resources they find. Questions like "Can I cite an unpublished opinion?" are on the simpler end of the spectrum, since most jurisdictions have rules governing the use of unpublished opinions. The trickier questions focus on the weight given to persuasive authority: "Which non-legal dictionary should I use?" "Can I cite a legal encyclopedia?" "Should I cite this case from Iowa or this case from Florida or both?" I'll confess: I often suggest they ask their legal writing instructors these questions. Sometimes, when pressed, I do speculate on these topics based upon my experience as a litigator and a law librarian, and my conversations with other professionals. That speculation usually boils down to these two hypotheses: (1) When there is an absence of binding authority, it is typically better to cite to a state

similar to your state—one that borders your state or that shares the same circuit; and (2) When using secondary resources, it is better to use resources authored by more esteemed authors and sophisticated resources. So, in Nebraska, it is better to cite to Iowa or Kansas than to New York or California. It would also be better to cite to a treatise than a legal encyclopedia. Although these thoughts seem logical, I had no actual proof that either hypothesis is true. What I did have was six (mostly) free weeks over the summer of 2017 to review Nebraska Supreme Court opinions to search for some evidence to either support or refute these ideas. And that's exactly what I did.

This article is not intended to be a thorough statistical analysis of the Nebraska Supreme Court's citation habits, nor a definitive guide to what should or should not be cited. I am not a statistician nor did I survey a sufficient number of cases to purport to have a significant sample size. This article is simply an exercise to see if there is any preliminary support for the notion that certain jurisdictions or secondary resources are more persuasive to Nebraska Supreme Court justices than others.

## Stefanie S. Pearlman



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## Methodology

For this study, I reviewed the advance opinions in Volume 295 of the Nebraska Reports ("this volume"). These opinions dated from October 21, 2016 to March 9, 2017. It would have been my preference to look at a completed volume of the Nebraska Reports, either in print format or in the new online, certified versions published by the Court. Unfortunately, none of those volumes contained opinions by all seven of the current justices sitting on the Court.<sup>1</sup> I reviewed all opinions in this volume, noting each time a case from another jurisdiction or a secondary resource was cited in any way by the court.<sup>2</sup> I did not note citations to cases from Nebraska state courts or the United



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States Supreme Court.

I coded each case,<sup>3</sup> determining whether the case was followed, not followed, cited, distinguished, etc.<sup>4</sup> I selected some of my coding to compare against Westlaw's KeyCite to confirm my coding, and then I reviewed the results.

### Does Location Really Matter?

The preconception that opinions from neighboring states<sup>5</sup> or jurisdictions within the Eighth Circuit<sup>6</sup> are more persuasive seems logical. Why wouldn't Nebraska look to nearby states for guidance?<sup>7</sup> After all, many of our first laws were adopted verbatim from Iowa. If our statutes came from a neighboring state in our circuit, why wouldn't their opinions be more persuasive?

To begin broadly, this volume contained sixty-nine opinions. Twenty-seven of those opinions cited at least one case from another jurisdiction in some manner. Every member of the Court authored an opinion citing a case from another jurisdiction at least once. In these opinions, the Court discussed cases from forty-five states,<sup>8</sup> the District of Columbia, the United States Court of Appeals for the Federal Circuit, all of the numbered federal courts of appeals,<sup>9</sup> and seventeen federal district courts ranging from the Northern District of California to the District of Puerto Rico.<sup>10</sup>

The vast majority of these jurisdictions were cited in only one or two opinions.<sup>11</sup> Several more were cited in three to five opinions.<sup>12</sup> California, Illinois, Iowa, New Jersey, Utah, Wisconsin and the Eighth Circuit Court of Appeals were cited in six to ten opinions. The jurisdiction cited in the most opinions was Florida with eleven.

How did frequency of citations to the neighboring states/Eighth Circuit jurisdictions compare to other jurisdictions? The Eighth Circuit Court of Appeals appeared in eight opinions. Iowa appeared in seven opinions, and Arkansas appears in six opinions. They are the only **states** in either the neighboring states group or the Eighth Circuit group appearing in more than five opinions. Missouri and Kansas opinions are each cited in five opinions. As for jurisdictions not in either of these groups, the jurisdictions appearing in the most opinions include: Florida (appearing in 11 opinions), Illinois (9), California (7), Wisconsin (7), New Jersey (6), and Utah (6). If we separate federal circuit courts out of the general categories above, it does appear that the Eighth Circuit is preferred to other U.S. Courts of Appeal: it was cited twice as often by the Nebraska Supreme Court as the next most frequently cited federal circuit court.<sup>13</sup>

Looking solely at the number of opinions—viewed both positively and negatively by the Nebraska Supreme Court—it seems clear my original theory was wrong. The simple fact that Florida was cited in 11 opinions, while the Eighth Circuit, Iowa, and Arkansas were cited in only 8, 7, and 6 opinions respectively, reveals no preference for neighboring states/

Eighth Circuit jurisdictions. But what, if anything, happens when we remove the *negative* cases?

When the negative cases<sup>14</sup> are removed from these numbers, the top three neighboring states/Eighth Circuit jurisdictions include the Eighth Circuit Court of Appeals (appearing in 7 opinions), Iowa/Kansas (tie-5), and Arkansas (4). The top three other jurisdictions appear in Florida (7), Illinois (7) and California (5). The relative equivalence in the number of citations to neighboring states/Eighth Circuit jurisdictions compared to other jurisdictions still does not show any preference for neighboring states/Eighth Circuit jurisdictions. Once again, if we look to federal circuit courts only, the Eighth Circuit Court of Appeals still holds a lead over the other federal circuit courts. As mentioned above, the Eighth Circuit Court of Appeals appears in seven opinions, while no other U.S. Court of Appeals has more than two appearances in these opinions.

Of course, citing a jurisdiction is not the same thing as following it. Given the relative inconclusiveness of the cases above, examining cases where the Court actually decided to adopt or specifically disregard the opinion in another jurisdiction may be more informative. I coded nine Nebraska Supreme Court opinions from this volume specifically *following* or *not following* a case from another jurisdiction.<sup>15</sup> Chief Justice Heavican authored three of these opinions; Justice Miller-Lerman authored two; Justices Funke, Stacy and Wright each authored one; and there was one per curiam opinion.

So, which jurisdictions did the Nebraska Supreme Court in these opinions follow? In the neighboring states category, Colorado, Kansas, and South Dakota were each followed in one opinion. In the Eighth Circuit jurisdictions category, Arkansas, North Dakota, South Dakota, and the District of Nebraska were each followed in one opinion, and the Eighth Circuit was followed twice. The Court followed eleven jurisdictions that are not in either neighboring states/Eighth Circuit jurisdictions.<sup>16</sup> Not one of these eleven jurisdictions was followed in more than one Nebraska opinion in this volume.

Interestingly, far more jurisdictions were affirmatively NOT followed than were followed. Seven of these were in Eighth Circuit jurisdictions and six were in neighboring states, with some overlap between these two groups.<sup>17</sup> There are thirty-one jurisdictions not in either of those categories that were not followed by the Nebraska Supreme Court.<sup>18</sup> The highest number of times the Nebraska Supreme Court cited a jurisdiction and affirmatively did NOT follow it was three.<sup>19</sup> Ten jurisdictions were cited and not followed in two opinions in this volume.<sup>20</sup>

In three of the nine cases reviewed in this section, the Court chose not to follow any other jurisdiction. The Court instead looked to public policy in Nebraska,<sup>21</sup> created a new standard,<sup>22</sup> and disapproved of a prior line of cases.<sup>23</sup>

There are several jurisdictions that were both followed and

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not followed in opinions in this volume. In the neighboring states/Eighth Circuit jurisdictions, Arkansas, Kansas, and South Dakota each had instances where they were followed and not followed by the Court. Other jurisdictions that were both followed and not followed by the Nebraska Supreme Court include: Alabama, Illinois, Utah, the Fifth Circuit, and the Ninth Circuit.

Given all of this data, I cannot see a preference for either neighboring states/Eighth Circuit jurisdictions over other jurisdictions, with the exception that the Eighth Circuit Court of Appeals is treated more favorably than other U.S. Courts of Appeals.

### Secondary Sources

Turning to my second hypothesis: Are more sophisticated resources and those with more esteemed authors considered more persuasive? What does the Court cite?

After reviewing the secondary resources cited in these opinions, I created five main categories of resources: legal encyclopedias, dictionaries, legal periodicals, scholarly monographs/treatises, and Restatements of the Law. Two categories had the most citations: scholarly monographs/treatises and legal encyclopedias. Four justices in six opinions cited eleven scholarly monographs/treatises.<sup>24</sup> Four justices in eight opinions cited legal encyclopedias eleven times.<sup>25</sup> Between the two main legal encyclopedias, American Jurisprudence (Am. Jur. 2d) was cited seven times and Corpus Juris Secundum (C.J.S.) was cited four times.

Not surprisingly, the only legal dictionary cited was Black's Law Dictionary, which was cited in five opinions.<sup>26</sup> Only one non-legal dictionary was cited: Merriam-Webster's Collegiate Dictionary, 10th ed.<sup>27</sup>

Legal periodicals were cited four times. What was most surprising was that students authored three of them.<sup>28</sup> One was cited in an opinion by Justice Miller-Lerman, one by Justice Wright, and one in a per curiam opinion.<sup>29</sup> Since I did not expect to see these cited, I checked the briefs filed in these cases to see if one of the parties suggested them;<sup>30</sup> they did not—a perhaps even more surprising result. The fourth legal periodical citation was a faculty-authored article in an opinion by Justice Wright.<sup>31</sup>

The Restatements of the Law were cited three times in two opinions: Justice Wright cited to the Restatement (Second) of Judgments and Justice Cassel cited to the Restatement (Second) of Property: Donative Transfers and the Restatement (Second) of Trusts.<sup>32</sup>

Since I did not expect to find so many citations to legal encyclopedias and student-authored legal periodical entries, I reviewed the opinions again to see if these resources were cited along with other secondary resources. In five opinions, legal encyclopedias were not cited with any other of the other four categories of resources.<sup>33</sup> In one opinion, a legal encyclopedia was cited only with Black's Law Dictionary.<sup>34</sup> In one opinion,



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a legal encyclopedia was cited along with four treatises.<sup>35</sup> In one opinion, a legal encyclopedia was cited along with Black's Law Dictionary, a student-authored legal periodical article, a faculty-authored legal periodical, and two resources from the scholarly monographs/treatises category.<sup>36</sup> In the legal periodicals category, two opinions cited student notes without citations to resources in any of the other four categories.<sup>37</sup> Another opinion cited a student-authored piece along with a faculty-authored article, Black's Law dictionary, and two resources from the scholarly monographs/treatises category.<sup>38</sup>

This data certainly seemed to contradict my theory that scholarly monographs/treatises and faculty-authored entries in legal periodicals would be favored by the Nebraska Supreme Court. Legal encyclopedias were cited at nearly the same frequency as more sophisticated titles. In addition, the Court cited student-authored entries in legal periodicals three times, while looking to faculty-authored entries only once. The relatively heavy reliance on legal encyclopedias and student-authored works is especially striking, as they are often used in the absence of citations to other secondary resources.

### Conclusion

After reviewing all of this information, I must admit that both of my hypotheses seem deeply flawed. As noted above, my initial suppositions were that (1) the Nebraska Supreme Court is more persuaded by the jurisprudence of jurisdictions that border Nebraska or are in the Eighth Circuit than other jurisdictions and (2) more sophisticated secondary sources carry greater weight than legal encyclopedias or student-authored articles. However, as discussed thoroughly above, my review of this volume tends to refute these approaches.

As I mentioned in the beginning, this is not an extensive study. I would not recommend using any specific jurisdiction or secondary resource over another simply because it appears or fails to appear in approximately four and a half months worth of opinions. It does provide some evidence, however, that—at least as currently composed<sup>39</sup>—the Court looks at more than a shared circuit, shared border, or the prestige of a secondary resource when determining the value of the information it contains. 

*The author would like to thank Faculty Research Fellow Jared Koch for his assistance editing this article.*

### Endnotes

<sup>1</sup> Justice Stacy joined the Nebraska Supreme Court in 2015. Justices Kelch and Funke joined the Nebraska Supreme Court in 2016. *Supreme Court Justices*, NEB. JUDICIAL BRANCH, <https://supremecourt.nebraska.gov/directories/supreme-court-justices> (last visited Jan. 27, 2018).

<sup>2</sup> However, I did not note citations to secondary sources or cases contained within a primary citation to a Nebraska case. For example, I would not have counted this as a citation to *Black's Law Dictionary*: "In *State v. Long*, we relied on *Black's Law Dictionary* . . ." *State v. Arizola*, 295 Neb. 477, 490 (2017). I also did not count a resource that was only listed when the court indi-

cates a party cited that resource, but the Court did not mention the resource in its analysis. I also did not count any references to a uniform law.

<sup>3</sup> I did not code secondary resources.

<sup>4</sup> I did not distinguish whether or not the citation was made in dicta.

<sup>5</sup> States that share a border with Nebraska are: Colorado, Iowa, Kansas, Missouri, South Dakota, and Wyoming. These will be referred to as "neighboring states" throughout this article.

<sup>6</sup> Jurisdictions in the Eighth Circuit include: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. The term "Eighth Circuit jurisdictions" in this paper will refer to these states (minus Nebraska), the Eighth Circuit Court of Appeals, and the District Court of Nebraska.

<sup>7</sup> 1855 Laws of Nebraska Territory 55.

<sup>8</sup> The states that were not cited were Maine, Massachusetts, Nevada and New Hampshire; citations to Nebraska were not included.

<sup>9</sup> The Court of Appeals for the District of Columbia Circuit was not cited.

<sup>10</sup> The full list of federal district courts cited are: Central District of California, Northern District of California, District of Colorado, Southern District of Iowa, Northern District of Illinois, Southern District of Florida, Eastern District of Kentucky, Western District of Kentucky, Western District of Missouri, District of Nebraska, Middle District of North Carolina, Eastern District of Pennsylvania, Western District of Pennsylvania, District of Puerto Rico, Eastern District of Virginia, District of Vermont, and Eastern District of Wisconsin. Each district court was cited in one opinion, except the District Court of Nebraska and Eastern District of Wisconsin, which were each cited in two opinions.

<sup>11</sup> These jurisdictions are: Alaska, the District of Columbia, Delaware, Hawaii, Idaho, Louisiana, Maryland, Montana, North Dakota, New Mexico, New York, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, the First, Third, Sixth, Seventh, Tenth, Eleventh Circuits, and all seventeen of the cited district courts (see endnote 10).

<sup>12</sup> These jurisdictions are: Alabama, Arkansas, Arizona, Colorado, Connecticut, Georgia, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Virginia, Washington, Wyoming, and the Second, Fourth, Fifth, and Ninth Circuits.

<sup>13</sup> The First, Sixth, and Seventh Circuits are each cited in one opinion. The Third, Tenth, and Eleventh Circuits are each cited in two opinions. The Second, Fourth, and Fifth Circuits are each cited in three opinions. The Ninth Circuit is cited in four opinions. The Eighth Circuit is cited in eight opinions.

<sup>14</sup> I use "negative cases" to refer to cases where the Nebraska Supreme Court distinguished, did not follow, disagreed in some manner, did not reach the issue where the case was cited by a lower court, or found a case cited by a party not relevant.

<sup>15</sup> These cases are: *Devney v. Devney*, 295 Neb. 15 (2016); *Strode v. City of Ashland*, 295 Neb. 44 (2016); *Wilczewski v. Charter West Nat'l Bank*, 295 Neb. 254 (2016); *Windham v. Griffin*, 295 Neb. 279 (2016); *State v. Chauncey*, 295 Neb. 453 (2017); *Kelly v. Saint Francis Med. Ctr.*, 295 Neb. 650 (2017); *State v. Rocha*, 295 Neb. 716 (2017); *In re Interest of Noah B.*, 295 Neb. 764 (2017); and *Henn v. Am. Family Mut. Ins. Co.*, 295 Neb. 859 (2017).

<sup>16</sup> These jurisdictions include: Alabama, Connecticut, Illinois, Michigan, Mississippi, Oklahoma, Utah, and the First, Fourth, Fifth, and Ninth Circuits.

<sup>17</sup> The Court cited and did not follow Arkansas, Missouri, and Wyoming in two opinions. The Court had one opinion where it cited and did not follow the opinions of each of the following jurisdictions: Iowa, Kansas, Minnesota, and South Dakota.

<sup>18</sup> Alabama, Arizona, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maryland, Montana, North

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Carolina, New Jersey, New Mexico, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Vermont, Washington, Wisconsin, the Second Circuit, Third Circuit, Fifth Circuit, Seventh Circuit, Ninth Circuit, Tenth Circuit, Eastern District of Kentucky, and the Eastern District of Wisconsin.

<sup>19</sup> This occurred in Arizona, Utah, and Wisconsin.

<sup>20</sup> These states are Arkansas, Florida, Hawaii, Illinois, Kentucky, Missouri, North Carolina, New Jersey, New Mexico, Pennsylvania, and Texas.

<sup>21</sup> *Devney v. Devney*, 295 Neb. 15, 27 (2016).

<sup>22</sup> *Strode v. City of Ashland*, 295 Neb. 44, 56–57 (2016). In this case, the Court reviewed when the statute of limitations begins to run on a regulatory takings claim. Other jurisdictions held the statute of limitations begins at actual notice, record notice, or when the land use regulation is passed. Nebraska adopted “when the injured party has the right to institute and maintain a lawsuit due to a city’s infringement, or an attempt at infringement.”

<sup>23</sup> *Windham v. Griffin*, 295 Neb. 279, 285 (2016). Although I did not typically count cases where another jurisdiction’s opinion was discussed within the context of older Nebraska opinions, in *Windham*, the Court discussed the holding from the Supreme Court of Utah to a degree that I felt it appropriate to count it as a discussion separate from the earlier Nebraska opinions.

<sup>24</sup> These resources are: ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012); NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* (2000); JOAN H. HOLLINGER, *ADOPTION LAW AND PRACTICE* (1997); CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* (2d ed. 1984); SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* (4th ed. 2000); JOHN ALAN APPLEMAN ET AL., *APPLEMAN ON INSURANCE LAW AND PRACTICE* (2001); ROBERT KEETON & ALAN WIDISS, *INSURANCE LAW* (1988); STEVEN PITT ET AL., *COUCH ON INSURANCE* (3d ed. 1995); BROUN ET AL., *MCCORMICK ON EVIDENCE* (7th ed. 2013); RICHARD COLLIN MANGRUM, *MANGRUM ON NEBRASKA EVIDENCE* (1996); and JOHN P. LENICH, *NEBRASKA CIVIL PROCEDURE* (2008). Justices Cassel, Funke, Stacy, and Wright cited these resources in the following opinions: *In re Interest of LeVanta S.*, 295 Neb. 151 (2016); *In re Interest of Nizigiyimana R.*, 295 Neb. 324 (2016); *State v. Marrs*, 295 Neb. 399 (2016); *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 295 Neb. 419 (2016); *State v. Rocha*, 295 Neb. 716 (2017); and *In re Interest of Noah B.*, 295 Neb. 764 (2017).

<sup>25</sup> Chief Justice Heavican and Justices Wright, Cassel, and Kelch cited these resources in the following cases: *State v. Martinez*, 295 Neb. 1 (2016); *Sanders v. Frakes*, 295 Neb. 374 (2016); *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 295 Neb. 419; *Douglas City v. Archie*, 295 Neb. 674 (2017); *Rocha*, 295 Neb. 716; *Frederick v. City of Falls City*, 295 Neb. 795 (2017); *In re Interest of Luz P.*, 295 Neb. 814 (2017); and *deNourie & Yost Homes v. Frost*, 295 Neb. 912 (2017).

<sup>26</sup> Chief Justice Heavican and Justice Cassel each cited *Black’s Law Dictionary* once, and Justice Wright cited it three times. These citations appeared in: *In re Interest of Antonio J.*, 295 Neb. 112 (2016); *Sanders*, 295 Neb. 374; *State v. Arizola*, 295 Neb. 477 (2017); *Rocha*, 295 Neb. 716; and *State v. Torres*, 295 Neb. 830 (2017).

<sup>27</sup> Cited by Justice Wright in *State v. Wagner*, 295 Neb. 132 (2016)

<sup>28</sup> Two of these citations are student notes published in the *South Dakota Law Review* and the *Michigan Journal of Law Reform*. The third is an entry in the *Georgetown Law Journal Annual Review of Criminal Procedure*. That resource is updated by student editors and/or staff.

<sup>29</sup> *Wilczewski v. Charter West Nat’l Bank*, 295 Neb. 254 (2016) and *In re Guardianship & Conservatorship of Kaiser*, 295 Neb. 532 (2017).

<sup>30</sup> To check the briefs, I viewed the *Wilczewski* briefs on Westlaw. The appellee and appellant briefs did not list the student note in its table of authorities and a “find” search did not locate the name of the author in either brief. I also viewed the *Rocha* briefs on Westlaw. The appellee and appellant briefs did not list the student entry in its table of authorities and a “find” search did not locate the name of the journal or title of the entry in either brief. I viewed the *Kaiser* briefs on SCCALES. The appellee and appellant briefs did not list the student note in its table of authorities and a find search did not locate the name of the author.

<sup>31</sup> This legal periodical was the *Creighton Law Review*. It was cited in *Rocha*, 295 Neb. 716, the same case where Justice Wright cited one of the student-authored entries in the *Georgetown Law Journal Annual Review of Criminal Procedure*.

<sup>32</sup> *State v. Marrs*, 295 Neb. 399 (2016) and *In re Conservatorship of Abbott*, 295 Neb. 510 (2017).

<sup>33</sup> *State v. Martinez*, 295 Neb. 1 (2016); *Douglas City v. Archie*, 295 Neb. 674 (2017); *Frederick v. City of Falls City*, 295 Neb. 795 (2017); *In re Interest of Luz P.*, 295 Neb. 814 (2017) (Am. Jur. 2d and C.J.S. were cited in this opinion); and *deNourie & Yost Homes v. Frost*, 295 Neb. 912 (2017).

<sup>34</sup> *Sanders v. Frakes*, 295 Neb. 374 (2016). Am. Jur. 2d was cited twice in this opinion.

<sup>35</sup> *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 295 Neb. 419 (2016).

<sup>36</sup> *State v. Rocha*, 295 Neb. 716 (2017). Both Am. Jur. 2d and C.J.S. were cited in this opinion.

<sup>37</sup> *Wilczewski v. Charter West Nat. Bank*, 295 Neb. 254 (2016) and *In re Guardianship & Conservatorship of Kaiser*, 295 Neb. 532 (2017).

<sup>38</sup> *State v. Rocha*, 295 Neb. 716 (2017).

<sup>39</sup> Justice Kelch recently announced his resignation from the Court. Lori Pilger, *Justice Max Kelch Resigns from Nebraska Supreme Court*, LINCOLN J. STAR (Jan. 24, 2018), [http://journalstar.com/news/state-and-regional/govt-and-politics/justice-max-kelch-resigns-from-nebraska-supreme-court/article\\_22bfa2f5-d73e-5270-8576-78b0ce0ab44f.html](http://journalstar.com/news/state-and-regional/govt-and-politics/justice-max-kelch-resigns-from-nebraska-supreme-court/article_22bfa2f5-d73e-5270-8576-78b0ce0ab44f.html).

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