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THE
GREEN BAG

ALMANAC

OF USEFUL AND ENTERTAINING TIDBITS FOR
LAWYERS FOR THE YEAR TO COME

2009

— AND —

READER

OF EXEMPLARY LEGAL WRITING FROM THE
YEAR JUST PASSED

2008

SELECTED BY THE
LUMINARIES AND SAGES ON OUR BOARD OF ADVISERS

EDITED BY ROSS E. DAVIES



GREEN BAG PRESS

WASHINGTON, DC

2008

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PREFACE

This is the fourth *Green Bag Almanac & Reader*. We recognize that we are a bit late getting this edition off the presses and into your hands, and for that we apologize. We hope you will enjoy this book, off and on, for what is left of 2009. For a reminder of the reasons why the world needs our almanac and our reader, please read the “Preface” to our first (2006) edition. It is available on our web site (www.greenbag.org), in the “Almanac & Reader” section.

OUR DILIGENT BOARD

Our selection process for “Exemplary Legal Writing of 2008” was, like past years’, not your typical invitation to competitive self-promotion by authors and their publishers and friends. We did not solicit (or accept) entries from contestants, charge them entry fees, or hand out blue, red, and white ribbons. Rather, we merely sought to:

- (a) organize a moderately vigilant watch for good legal writing, conducted by people (our Board of Advisers) who would know it when they saw it and bring it to our attention;
- (b) coordinate the winnowing of advisers’ favorites over the course of the selection season, with an eye to harvesting a crop of good legal writing consisting of those works for which there was the most substantial support (our “Recommended Reading” list);
- (c) ballot our advisers to identify the cream of that already creamy crop; and then
- (d) present the results to you in a useful and entertaining format — this book.

The nitty-gritty of our process for selecting exemplars is a simple but burdensome series of exercises:

Step 1: Our advisers read legal writing as they always have, keeping an eye out for short works and excerpts of longer works that belong in a collection of good legal writing. When they find worthy morsels, they send them to the *Green Bag*. “Good legal writing” is read broadly for our purposes. “Good” means whatever the advisers and the volume editor think it does. As one experienced scholar and public servant on our board put it, “there is good writing in the sense of what is being said and also in the sense of how it is being said.” Our advisers are looking for works that

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have something of each. “Legal” means anything written about law — opinions, briefs, articles, orders, statutes, books, motions, letters, emails, contracts, regulations, reports, speeches, and so on. “Writing” means ink-on-paper or characters-on-screen.

Step 2: The *Green Bag* organizes the advisers’ favorites into categories, and then sends a complete set to every adviser. Advisers’ names are not attached to the works they nominate. In other words, everything is anonymized. Advisers vote without knowing who nominated a piece. Similarly, their rankings are secret. No one but the volume editor ever sees individual advisers’ rankings or knows who voted in which categories. And the editor destroys all individualized records once the *Almanac* is in print.

Advisers are free to vote in as many categories — or as few — as they desire. That is, although there may be scores of nominated works in total, they are free to select the types of writing they want to evaluate. Almost all — but invariably not all — advisers vote in each category.¹

Step 3: The volume editor tallies the rankings and compiles the “Reader” portion of the *Almanac & Reader* based on the results, reserving, as editors tend to do, the right to add, subtract, and reorganize within reason. Nominated works not published in the book are listed in the “Recommended Reading” section.

Step 4: The advisers and the editor start all over again for next year’s edition — a process which has been underway since last Halloween (recall that our annual cycle for selection of exemplary legal writing begins and ends on October 31), with dozens of nominees already in the queue for the 2010 *Almanac*.

Despite the substantial work involved in this business, most of our advisers seem to enjoy participating. Those who don’t enjoy it appear to view this business as some sort of professional duty. Either way, we’re glad to have them. But these are people with day jobs, other substantial commitments, and minimum sleep requirements. So not everyone can pitch in every year. Being listed as an adviser implies that a body has

¹ Given the caliber of our advisers, it should come as no surprise that several of them are also authors of exemplars appearing in this volume or included in our list of “Recommended Reading.” Perhaps it should also come as no surprise — in a group that consists almost entirely of people who either work under the authority of, or engage from time to time in the contemplation of, 28 U.S.C. § 455(a) (“Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”) or its state-law equivalents — that none of the advisers whose works are published in this volume voted for themselves.

PREFACE

done some advising, however, and it just doesn't seem right to burden someone with some small slice of the collective responsibility (or credit, if there is any) for a project in which they did not participate, at least this time around. So the list of board members published on the inside and the outside of this *Almanac* has changed since last year and will, we expect, continue to change from year to year. The fact that people come and go from the board does not necessarily indicate anything about their ongoing commitment to the *Almanac*, other than when they have had the time and inclination to participate. Of course, we hope they always will.

WHERE ARE THE BLOGS?

Last year I explained why we had not yet seen nominations from the blogosphere, and expressed hope that we would receive more over time. This year we took a small step. One blog entry made it into the packet of nominees sent to our board of sagacious and luminous advisers, and they selected it for inclusion in this year's *Almanac & Reader* (see page 491). Congratulations to the author — Judge Richard G. Kopf of the United States District Court for the District of Nebraska — and to the publisher — the *Ohio State Journal of Criminal Law*, which posts *OSJCL Amici: Views from the Field* at osjcl.blogspot.com.

JUST WHAT IS LEGAL WRITING?

We do not have an entirely satisfying answer. (Recall Justice Ronald Nehring's thoughtful letter on this subject on pages 9-10 of the 2007 *Almanac*.) As I explained above,

"Good legal writing" is read broadly for our purposes. . . .
"Legal" means anything written about law — opinions, briefs, articles, orders, statutes, books, motions, letters, emails, contracts, regulations, reports, speeches, and so on. . . .

But that does not mean all of our readers are quite so loosey-goosey. David Roe, an accomplished lawyer and an *Almanac* adviser, recently expressed his concerns:

To the Editor:

It's a pleasure to read through the *Almanac* nominations, and flattering to do it as one of your judges. But I find myself not voting for some of the best-written pieces in the bunch. They are *writing*, but they are not *legal writing* — written about legal subjects, but not written for legal purposes, and therefore not examples of the limited and technically demanding craft

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that lawyers and judges must exercise in their professional roles.

Why niggle over the Almanac's definition of "legal writing," which now includes *New Yorker* and *Vanity Fair* pieces, front-page newspaper articles, and books of history and current affairs? They're certainly welcome leavening in the stack of reading you send us judges every fall, and nearly always better writing, as writing, than the best of opinions and briefs.

My sense of the Almanac's purpose, however, is to highlight and encourage excellent writing within the legal profession — to remind lawyers as they go about their written craft, fitting complex points and materials onto the page in as unassailable form as possible, that grace and pith also count. Legal writing in this sense operates within tight boundaries, and writing well within those boundaries is different from writing well in general.

What tighter definition of "legal writing" would I offer the Almanac? Not just documents with a file stamp, and not just articles in law reviews. Instead, how about writing that has primarily a professional legal purpose, or is meant for primarily a professional legal audience? This would exclude *New York Times* coverage of the U.S. Supreme Court but would include Stern & Gressman, or a do-it-yourself divorce manual, or a Scalia speech to the Federalist Society.

It's still a fuzzy line, and it would cut out some of the most pleasurable of your materials. But otherwise doesn't the slippery slope go all the way to the best writers in the world, whenever their subject matter happens to stray into legal territory — Merchant of Venice, The Trial, Bleak House?

Faithfully, and with thanks that this worthy exercise exists,

David Roe

Mr. Roe makes some good points and offers some promising suggestions. What do you think? Where would you draw the lines between what we should and should not consider, and how would you define the categories into which we ought to divide those things that fall inside the lines? The *Green Bag* would like to know. Please write to us at editors@greenbag.org.

AND HOMER KEEPS ON NODDING . . .

We continue to struggle, and fail, to produce a flawless big fat book in a hurry. Here are the errors we are sure we made in the 2008 *Almanac*:

Pages 5-6: Last year we said this:

"Bob Berring extolled the wisdom of Meredith Wilson, not 'Mary Willson.' See Mary Whisner, *Almanac Errata Errata*, 10

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Green Bag 2d 277 (2007). Professor Berring tactfully asks, 'Could this lead to an infinite series of corrections, like something drawn from M.C. Escher or perhaps based on Steven Colbert's portrait of Steven Colbert standing in front of a portrait of Steven Colbert . . . ?'"

Alas, the answer to Professor Berring's question is increasingly appearing to be "yes." In February Adam Sachs of San Francisco wrote to us:

"Erratum again, in the 2008 Almanac on page 5: Re the note about page 7 of the 2007 Almanac, Bob Berring was probably extolling the wisdom of Meredith Willson, whose last name was also, I believe, misspelled in the last issue. To answer Bob's question, perhaps it would lead to an infinite series of corrections. When will they mesh back together is the question I'd ask Bob to answer."

To which Professor Berring replied:

"There is something perfect about this one."

Page 252: And in March Jack Metzler of Washington, DC sent us this helpful email:

"I write to note that the reprint of *The Adventure of Silver Blaze* in the 2008 Almanac appears to have a typo on page 252, third paragraph. The sentence that begins, 'But if falls away towards Mapleton' should, I believe, read, 'But it falls away towards Mapleton . . .'"

Mr. Metzler is correct.

Page 589: We put "Page 145-180" where "Pages 145-180" would have been better.

Page 591: We included a credit for a little treasure from Michael Stokes Paulsen that we decided to save for some other rainy day.

We will keep trying.

IN OTHER BUSINESS

Our goals remain the same: to present a useful and entertaining, perhaps even inspiring, monthly dose of our stock in trade — good legal reasoning and reporting, well-written — with moderate amounts of the traditional almanac potpourri of useful and distracting information thrown in. Like the law itself, the 2008 exemplars republished in this volume are wide-ranging in subject, form, and style. This year most of the potpourri has to do with Shakespeare; next year the mix will be mostly baseball-related.

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With any luck we'll deliver some reading pleasure, a few role models, and some reassurance that the nasty things some people say about legal writing are not entirely accurate.



Finally, the *Green Bag* proffers the traditional, and in our case deep and sincere, gratitude to you, our readers. Your continuing kind remarks about the *Almanac* are inspiring. Our hearts are replete with thankfulness. The *Green Bag* also thanks our Board of Advisers for nominating and selecting the works recognized here; the George Mason University School of Law and the George Mason Law & Economics Center for their continuing generous support of the *Green Bag*; Susan Davies, whose pains to improve this book we commend, as should everyone who shares in the gains; Susan Birchler, Ofemi Cadmus, Rachel Davies, Amy Flanagan, Paul Haas, Andrew Heger, Jeff Newman, Don Rebstock, and David Van Zandt; and Green Bag Fellow Patrick Foltz.

Ross E. Davies
December 25, 2008



[I would not] give one
scene in Shakespeare for
1000 Harringtons, Lockes
and [John] Adams.

Robert R. Livingston (1776)

RECOMMENDED READING

We have tallied the ballots and printed the top vote-getters in this book. They are the ones listed in the Table of Contents above and marked on the list below by a little ★. There were plenty of other good works on the ballot. We list them here. Congratulations to all.¹

• • • •

OPINIONS FOR COURTS

Carlos Bea, *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008)

Franklin D. Elia, *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (6th Dist. 2008)

★ Frank H. Easterbrook, *FTC v. QT, Inc.*, 512 F.3d 858 (7th Cir. 2008)

Ronald M. George, *In re Marriage Cases*, 43 Cal.4th 757 (2008)

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Patrick E. Higginbotham, *In re Katrina Canal Litigation Breaches*, 524 F.3d 700 (5th Cir. 2008)

★ Robert A. Katzmann, *Aris v. Mukasey*, 517 F.3d 595 (2d Cir. 2008)

Alex Kozinski, *Garcia-Aguilar v. U.S. District Court for the Southern Dist. of California*, 535 F.3d 1021 (9th Cir. 2008)

Michael McConnell, *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008)

★ M. Margaret McKeown, *Anderson v. Terhune*, 516 F.3d 781 (9th Cir. 2008) (en banc)

Antonin Scalia, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008)

J. Harvie Wilkinson III, *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306 (4th Cir. 2008)

William G. Young, *Situation Management Systems v. ASP Consulting Group*, 535 F. Supp. 2d 231 (D. Mass. 2008)

William J. Zloch, *In re Beck*, 526 F. Supp. 2d 1291 (S.D. Fla. 2007)

¹ Some publishers require consideration for republication that exceeds our modest resources. It was publishers' demands for money, not low supplies of votes, that precluded our presentation of Adam Liptak's article, *Illegal Globally, Bail for Profit Remains in U.S.*, and an extract from H. Jefferson Powell's book, *Constitutional Conscience: The Moral Dimension of Judicial Decision*.

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- William A. Fletcher, *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008)
- Thomas Reavley, *Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455 (5th Cir. 2008)
- Robert Sack, *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008)
- Antonin Scalia, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008)
- David Souter, *United States v. Williams*, 128 S. Ct. 1830 (2008)
- John Paul Stevens, *New York State Board of Elections v. Lopez Torres*, 128 S. Ct. 791 (2008)
- John Paul Stevens, *Baze v. Rees*, 128 S. Ct. 1520 (2008)

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(including articles more than 25,000 words long)

- Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 Columbia Law Review 529 (2008)
- Mary L. Dudziak, *Exporting American Dreams* (Oxford University Press 2008)
- Oona A. Hathaway, *Treaties End*, 117 Yale Law Journal 1236 (2008)
- ★ Charles Lane, *The Day Freedom Died* (Henry Holt & Co. 2008)
- ★ Victoria F. Nourse, *In Reckless Hands* (W.W. Norton & Co. 2008)
- Nicholas Parrillo, *The De-Privatization of American Warfare*, 19 Yale Journal of Law & Humanities 1 (2007)
- Justin Peacock, *A Cure for Night* (Doubleday Press 2008)
- William D. Popkin, *Evolution of the Judicial Opinion: Institutional and Individual Styles* (New York University Press 2007)
- H. Jefferson Powell, *Constitutional Conscience: The Moral Dimension of Judicial Decision* (University of Chicago Press 2008)
- ★ Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (Thomson/West 2008)
- William J. Stuntz, *Unequal Justice*, 121 Harvard Law Review 1969 (2008)
- Steven M. Teles, *The Rise of the Conservative Legal Movement* (Princeton University Press 2008)

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Laurence H. Tribe, *The Invisible Constitution* (Oxford University Press 2008)

★ Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (Penguin Press 2008)

Jonathan Zittrain, *The Future of the Internet and How to Stop It* (Yale University Press 2008)

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Neil Kinkopf, *The Congress as Surge Protector*, www.acslaw.org/pdf/Kinkopf-Surge.pdf (2007)

Michael J. Klarman, *Conclusion*, in *Unfinished Business: Racial Equality in American History* (Oxford University Press 2007)

Adam Liptak, *If Your Hard Drive Could Testify . . .*, *New York Times*, January 7, 2008

Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, *New York Times*, January 29, 2008

Theodore B. Olson, *Clinton v. Obama: The Lawsuit*, *Wall Street Journal*, February 11, 2008

★ Norman Otto Stockmeyer, *To Err Is Human, To Moo Bovine: The Rose of Aberlone Story*, 24 *Thomas M. Cooley Law Review* 491 (2007)

★ Jeffrey Toobin, *Death in Georgia*, *The New Yorker*, Feb. 4, 2008

Henry Weinstein, *Supreme Court takes up lethal injection battle*, *Los Angeles Times*, January 7, 2008

★ J. Harvie Wilkinson III, *Toward One America: A Vision in Law*, 83 *New York University Law Review* 323 (2008)

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Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 *Harvard Law Review* 1333 (2008)

★ Michael Boudin, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 *New York University Law Review* 975 (2007)

Jose Cabranes, *International Law By Consent of the Governed*, 42 *Valparaiso University Law Review* 119 (2007)

Scott Dodson, *Mandatory Rules*, 61 *Stanford Law Review* 1 (2008)

Lisa Eichhorn, *Clarity and the Rules of Civil Procedure: A Lesson from the Style Project*, 5 *Journal of ALWD* 1 (2008)

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- ★ Lee Epstein, Kevin Quinn, Andrew D. Martin & Jeffrey A. Segal, *On the Perils of Drawing Inferences About Supreme Court Justices from Their First Few Years of Service*, 91 *Judicature* 168 (2008)
- Robert George, *Natural Law*, 31 *Harvard Journal of Law & Public Policy* 171 (2008)
- Jamal Greene, *Giving the Constitution to the Courts*, 117 *Yale Law Journal* 886 (2008)
- Steven G. Kalar and Jon M. Sands, *An Object All Sublime – Let the Punishment Fit the Crime*, *The Champion* 20 (March 2008)
- Jamie Gibbs Pleune, *Is Scalian Standing the Latest Sighting . . . ?*, 38 *Lewis & Clark Law School's Environmental Law Online*
- ★ James Robertson, *Quo Vadis, Habeas Corpus?*, 55 *Buffalo Law Review* 1063 (2008)
- ★ Philippe Sands, *The Green Light*, *Vanity Fair* (May 2008)
- Joseph W. Singer, *Things that We Would Like to Take for Granted*, 2 *Harvard Law & Policy Review* 139 (2008)
- John Yoo, *Jefferson and Executive Power*, 88 *Boston University Law Review* 421 (2008)

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- ★ Richard G. Kopf, *The Top Ten Things I Learned From Apprendi, Blakely, Booker, Rita, Kimbrough and Gall*, osjcl.blogspot.com (2008)
- Ronald B. Leighton, *Presidio Group LLC v. GMAC Mortgage LLC*, 2008 WL 2595675 (W.D. Wash. 2008)
- Benjamin C. Mizer, *Application for a Stay, Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008)
- James R. Nowlin, *Waggoner v. Wal-Mart Stores, Inc.*, No. A-07-CA-703-JRN (W.D. Tex., June 3, 2007)
- ★ John G. Roberts, Jr., *Pennsylvania v. Dunlap*, 129 S. Ct. 448 (2008)
- Chris Satullo, *A not-so-glorious Fourth*, *Philadelphia Inquirer*, July 1, 2008

