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THE  
GREEN BAG

ALMANAC

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

2010

– AND –

READER

OF EXEMPLARY LEGAL WRITING FROM THE  
YEAR JUST PASSED

2009

SELECTED BY THE  
LUMINARIES AND SAGES ON OUR BOARD OF ADVISERS

EDITED BY ROSS E. DAVIES



GREEN BAG PRESS  
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2009

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# PREFACE

This is the fifth *Green Bag Almanac & Reader*. For a reminder of the reasons why the world needs our almanac and our reader, read the “Preface” to the 2006 edition. It is available on our web site ([www.greenbag.org](http://www.greenbag.org)), in the “Almanac & Reader” section.

## OUR DILIGENT BOARD

Our selection process for “Exemplary Legal Writing of 2009” 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 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.

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 2011 *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 it as some sort of professional duty. Either way, we’re glad to have them. But these are people with day jobs, other commitments, and minimum sleep requirements. So not everyone can pitch in every year. Being listed as an adviser implies that a body has done some advising, however, and it doesn’t seem right to burden someone with a 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 in this *Almanac & Reader* 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 & Reader*, other than when they have had the time and inclination to participate. Of course, we hope they always will.

## WHERE ARE THE BLOGGERS? IN THE ALMANAC, AND ABOVE THE LAW

Two years ago I explained why we had not yet seen nominations from the blogosphere, and expressed hope that we would receive more over time. Last year one blog entry made it into the packet of nominees sent to our advisers, and they selected it for inclusion in the 2009 *Almanac & Reader* (congratulations again Richard G. Kopf). This year, we had another, and it too merited republication here (congratulations to Eugene Fidell).

This year we have been blessed with another signal that the blogosphere is becoming part of the American establishment: a celebrity in that field has received the kind of treatment that some in our justice system provide to the local and international aristocracy. The associated judicial opinion (which does not endorse a one-law-for-the-few-and-another-law-for-the-many jurisprudence) was not nominated in time to be considered for this year’s *Almanac & Reader*. And so it is reproduced here merely to illustrate the point: While it may be true that a “blogger can get away with less and afford fewer pretensions of authority” than the average writer, it may also be true that a celebrity blogger can get away with just as much at the hands of the authorities as the average celebrity.

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\* Andrew Sullivan, *Why I Blog*, *The Atlantic*, Nov. 2008, at 106-13.



## PREFACE

# UNITED STATES V. ANDREW M. SULLIVAN

Case No. 2009-PO-0476-RBC

Memorandum and Order on Government's Request for Leave to File a  
Dismissal of Violation Notice, September 10, 2009

*Robert B. Collings*<sup>†</sup>

## I. INTRODUCTION

It sometimes happens that small cases raise issues of fundamental importance in our system of justice; this case happens to be an example.

## II. FACTS

The facts are straightforward. The defendant, Andrew M. Sullivan, who resides in Washington, D.C. but, according to his attorney, owns a home in Provincetown, Massachusetts, was in an area of the Cape Cod National Seashore on July 13, 2009 when he was charged by a National Park Service Ranger with a violation of 36 C.F.R. § 2.35(b)(2) which prohibits possession of a controlled substance on National Park Service lands. Specifically, Mr. Sullivan was charged with possession of marijuana. Title 36 C.F.R. § 2.35(b)(2) prohibits “the possession of a controlled substance . . . .”<sup>1</sup> The maximum penalty upon conviction of the offense is a fine of \$5,000, six months imprisonment, a \$25 processing fee and a \$10 special assessment. As such, it is classified under the federal criminal code as a Class B misdemeanor;<sup>2</sup> it is also denoted a “petty offense.”<sup>3</sup>

The charge was contained in a citation which the Ranger issued to Mr. Sullivan on July 13, 2009. The citation, which was on a form denoted “United States District Court Violation Notice,” required Mr. Sullivan either to appear in the United States District Court when notified to do so or to forfeit collateral in the amount of \$125.00.<sup>4</sup>

Mr. Sullivan was notified to appear before the Court on September 2, 2009 at Hyannis at a session at which the undersigned was to preside. On August 26,

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<sup>†</sup> Magistrate Judge, United States District Court for the District of Massachusetts.

<sup>1</sup> Title 36 C.F.R. § 1.4(a) provides, in pertinent part, that “[c]ontrolled substance means a drug or other substance . . . included in schedules I, II, III, IV, or V of part B of the Controlled Substance Act (21 U.S.C. 812) . . . .” “Marihuana” is a Schedule I controlled substance. Title 21 U.S.C. § 812, Schedule I, (c)(10).

<sup>2</sup> See Title 18 U.S.C. § 3559(a)(7).

<sup>3</sup> See Title 18 U.S.C. § 19.

<sup>4</sup> See Rule 14(a), Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts (“A person who is charged with a petty offense may, in lieu of appearance, post collateral in the amount indicated for the offense, waive appearance before a magistrate judge, and consent to forfeiture of collateral . . .”).

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2009, the United States Attorney for the District of Massachusetts filed a “Dismissal of Complaint” [sic] seeking leave to file a dismissal of the Violation Notice issued to Mr. Sullivan because “further prosecution of the violation would not be in the interest of justice.”

Because the reason given by the United States Attorney was so general (“interest of justice”), the Court scheduled a hearing on the request for leave to file the dismissal and directed that Mr. Sullivan appear. He did so on September 2, 2009 at Hyannis. He was represented by Robert Delahunt, Jr., Esquire, of Boston. The United States Attorney was represented by Assistant United States Attorney James F. Lang, Acting Deputy Chief of the Criminal Division.

When the case was called, the Court expressed its concern that a dismissal would result in persons in similar situations being treated unequally before the law. The Court noted that persons charged with the same offense on the Cape Cod National Seashore were routinely given violation notices, and if they did not agree to forfeit collateral, were prosecuted by the United States Attorney. In short, the Court explained that there was no apparent reason for treating Mr. Sullivan differently from other persons charged with the same offense. In fact, there were other persons who were required to appear on the September 2nd docket who were charged with the same offense and were being prosecuted.<sup>5</sup>

Both Assistant U.S. Attorney Lang and Attorney Delahunt explained that Mr. Sullivan is a British citizen who is applying for a certain immigration status in the United States. They stated that lawyers expert in the field of immigration law had advised them that if Mr. Sullivan were to forfeit the \$125.00 in collateral, it would have an adverse effect on his application. The Court noted that Mr. Sullivan had been charged with the crime at the time the Violation Notice issued and that even if the Court did grant leave to dismiss the Violation Notice, Mr. Sullivan, if asked by immigration authorities, would have to answer truthfully that he had been charged with a crime involving controlled substances. In these circumstances, the Court asked the attorneys to explain why forfeiting collateral would have any additional adverse effect on his application. Neither attorney could answer the Court’s query except to say that the lawyers they had consulted who practice immigration law said it would.

In these circumstances, the Court indicated that it would like Attorney Delahunt to file a brief answering the Court’s query. Before Attorney Delahunt could reply, Assistant U.S. Attorney Lang stated that the Court was without power to ask for the brief, or, in fact, to inquire further into the decision of the United States Attorney to dismiss the charge.<sup>6</sup> He asserted, quite correctly, that the

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<sup>5</sup> In point of fact, there were three other defendants on the list charged with the same offense.

<sup>6</sup> Research conducted by the Court after the hearing indicates that Assistant U.S. Attorney Lang is quite incorrect in his statement that the Court had no power to inquire. See *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir., 1973)(“... [I]n the exercise of its responsibility [under Rule 48(a), Fed. R. Crim. P.], the court will not be content with a mere conclusory statement by the prosecutor that dismissal is in the public interest, but

## PREFACE

United States Attorney has broad discretion as to when to dismiss a criminal charge and that the power of the Court in these circumstances is limited and able to be exercised only in special circumstances.<sup>7</sup>

The Court, still concerned about the apparent derogation of the principle that all persons stand equal before the law, decided to take the matter under advisement.

### III. A BRIEF DETOUR

Before going any further, it is important to state with clarity those matters about which the Court is not concerned.

First, the Court is well aware of political discussion over whether the possession of a small amount of marijuana should be illegal. Whether or not the law should be changed to make such possession legal is a matter entrusted to state and federal lawmakers, and ultimately to the voters.<sup>8</sup> The Court's duty is to uphold the law as it is, and unless and until the law is changed, the Court must enforce it, regardless of whether or not the judge personally has any opinion as to how the law should be changed.

Second, the Court would not be concerned with any exercise of discretion by the United States Attorney not to prosecute the possession of small amounts of marijuana. The United States Attorney certainly has discretion to determine how best to allocate the resources of his office and could, if he deemed it appropriate, elect to focus those resources on more serious crimes while declining to prosecute the type of violation which Mr. Sullivan faces. However, from all that appears, the United States Attorney has not taken the position that persons who possess marijuana on federal property will not be prosecuted; rather, those persons are prosecuted routinely.

### IV. THE ISSUE RAISED IN THE INSTANT CASE

In the Court's view, in seeking leave to dismiss the charge against Mr. Sullivan, the United States Attorney is not being faithful to a cardinal principle of our legal system, i.e., that all persons stand equal before the law and are to be treated equally in a court of justice once judicial processes are invoked. It is quite apparent that Mr. Sullivan is being treated differently from others who have been charged with the same crime in similar circumstances.

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will require a statement of reasons *and underlying factual basis*." (emphasis supplied; footnote omitted).

<sup>7</sup> See discussion of the Court's power in this regard at pp. [6-7], *infra*.

<sup>8</sup> The Court notes that voters in Massachusetts recently changed the penalty for possession of small amounts of marijuana from a criminal to a civil sanction. Possession of marijuana is still illegal in Massachusetts but the sanction for violation is a civil rather than a criminal penalty. Of course, on the Cape Cod National Seashore, a federal property, the federal regulation cited, *supra*, which provides for a criminal sanction for possession of marijuana is applicable and is unaffected by the change in Massachusetts state law.

## GREEN BAG ALMANAC & READER 2010

If there were a legitimate reason for the disparate treatment, the Court would view the matter differently. But the United States Attorney refused to allow the Court to inquire into why, in the circumstances of this case where Mr. Sullivan had already been charged with the crime, either a forfeiture of collateral or an adjudication would make a difference in the immigration application.

But there is more. If, in fact, a determination that Mr. Sullivan had possessed marijuana is a factor which, under immigration law, the immigration authorities are legally charged with taking into account when deciding Mr. Sullivan's application, why should the United States Attorney make a judgment that, despite the immigration law, the charge should be dismissed because it would "adversely affect" his application?<sup>9</sup> If other applicants for a certain immigration status have had their applications "adversely affected" by a conviction or a forfeiture of collateral for possession of marijuana, then why should Mr. Sullivan, who is in the same position, not have to deal with the same consequences?

In short, the Court sees no legitimate reason why Mr. Sullivan should be treated differently, or why the Violation Notice issued to him should be dismissed. The only reasons given for the dismissal flout the bedrock principle of our legal system that all persons stand equal before the law.

### V. THE BOTTOM LINE

In urging fidelity to these principles of our legal system, the Court must also be faithful to the constitutional principle of separation of powers — that the executive branch of the federal government (of which the United States Attorney is a part) and the judicial branch (of which the Court is a part) have both powers and limitations on their powers.

The law with respect to the limit of a Court's power to refuse to grant leave to the United States Attorney to dismiss a criminal matter is not entirely clear. The Supreme Court has written on the subject but declined to decide the issue. Over thirty years ago, the Court commented that:

The words "leave of court" were inserted in Rule 48(a) without explanation. While they obviously vest some discretion in the court, the circumstances in which that discretion may properly be exercised have not been delineated by this Court. The principal object of the "leave of court" requirement is apparently to protect a defendant against prosecutorial harassment, *e.g.*, charging, dismissing, and recharging, when the Government moves to dismiss an indict-

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<sup>9</sup> Again, the Court takes no position on what the law should be regarding the effect of a prior possession of marijuana on an application for immigration status. That is a matter which is in the province of the Congress. Similarly, the Court takes no position on how the immigration authorities should exercise their discretion when presented with applications by persons who have either been convicted or forfeited collateral for possession of marijuana. If the law gives the immigration authorities the discretion to determine the weight, if any, to be given this circumstance in making their decision on the applications, presumably authorities could determine that the application is not to be adversely affected.

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ment over the defendant's objection. See, e.g., *United States v. Cox*, 342 F.2d 167, 171 (CA5), cert. denied, sub nom. *Cox v. Hauberg*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965); *Woodring v. United States*, 311 F.2d 417, 424 (CA8), cert. denied sub nom. *Felice v. United States*, 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963). But the Rule has also been held to permit the court to deny a Government dismissal motion to which the defendant has consented if the motion is prompted by considerations clearly contrary to the public interest. See *United States v. Cowan*, 524 F.2d 504 (CA5 1975); *United States v. Ammidown*, 162 U.S.App.D.C. 28, 33, 497 F.2d 615, 620 (1973). It is unnecessary to decide whether the court has discretion under these circumstances, since, even assuming it does, the result in this case remains the same.

*Rinaldi v. U.S.*, 434 U.S. 22, 30 n.15 (1977).

Obviously, the instant case does not involve the need to protect Mr. Sullivan from "prosecutorial harassment" since the United States Attorney, in seeking leave to dismiss the charge, is doing precisely what the defendant wants. Rather, the issue in this case is that which the Supreme Court declined to decide, i.e. whether the Court can refuse leave if, in the words of the Supreme Court, the request for leave ". . . is prompted by considerations clearly contrary to the public interest." *Id.*

While several Circuits have written on the subject since the *Rinaldi* decision, no consensus seems to have emerged, and the First Circuit has not had the opportunity to render its view. A good summary of the law in the various circuits is contained in the case of *United States v. Nixon*, 318 F. Supp. 2d 525, 527-30 (E.D. Mich., 2004). The Seventh Circuit Court of Appeals had the most recent opportunity to write on the issue in the case of *In Re United States of America*, 345 F.3d 450 (7 Cir., 2003). In that case, the Court held that a court would exceed the limits of judicial power under the Constitution if it refused to grant leave to dismiss a criminal charge on the grounds that the dismissal is "contrary to the public interest." *In Re United States*, 345 F.3d at 452-454.

The end result is that fidelity to the law requires that the Court grant leave to the United States Attorney to dismiss the Violation Notice against Mr. Sullivan, and the Court hereby grants such leave.<sup>10</sup> That the Court must so act does not require the Court to believe that the end result is a just one.

. . . .

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<sup>10</sup> The Court also notes that the United States Attorney would have the last word in any event. If the Court were to refuse to dismiss the charge, the United States Attorney could merely decide not to present any evidence at the trial which would require the Court to enter a judgment of acquittal. See *United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n*, 228 F. Supp. 483, 489-90 (S.D.N.Y., 1964). Nevertheless, the Third Circuit has noted that "[e]ven though a judge's discretion under Rule 48(a) is severely cabined, the rule may serve an important interest as an information-and accountability-producing vehicle." *In Re Richards*, 213 F.3d 773, 788 (3 Cir., 2000). The Court is hopeful that its inquiry into the Government's reasons for seeking leave to dismiss the charge against Mr. Sullivan has served those purposes.

And now back to our regularly scheduled programming.

### HOMER KEEPS 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 2009 *Almanac & Reader*:

Page 166: Rachel Davies of Willow Grove, PA, noted that “un-conscious” ought to be “unconscious.” And while wringing our hands over that mistake we noticed that we’d spelled “pedagogical” “pedadogical” on the same page.

Page 247: John Harrison of Charlottesville, VA, gently asked us two questions:

(1) “In discussing Measure for Measure, Bowdler says that the Duke acts ‘curly.’ Bowdler’s error for ‘cruelly’?”

and

(2) “What about ‘untied’ as opposed to ‘united’ in the second line of the third paragraph on that . . . page?”

Professor Harrison is too kind. The answers are: (1) “curly” is the *Green Bag*’s error for Bowdler’s “cruelly” and (2) “untied” is the *Green Bag*’s error for Bowdler’s “united.”

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 2009 exemplars republished in this volume are wide-ranging in subject, form, and style. This year most of the potpourri has to do with baseball; next year is an open field. 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.

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Finally, the *Green Bag* proffers the customary thanks to you, our readers. Your continuing kind remarks about the *Almanac* are inspiring. 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, for her good reads; Susan Birchler, Nathan Chubb, Nicholas Frankovich, Paul Haas, and Tiger Jackson; and Green Bag Fellow Rob Willey.

Ross E. Davies  
December 25, 2009

# 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.<sup>1</sup>

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## OPINIONS FOR THE COURT

William B. Chandler, III, *Rohm & Haas Co. v. Dow Chemical Co.*, 2009 WL 445609 (Del. Ch. 2009)

★ Frank H. Easterbrook, *Buchmeier v. United States*, 581 F.3d 561 (7th Cir. 2009) (en banc)

Ferdinand F. Fernandez, *BNSF Railway Co. v. O’Dea*, 572 F.3d 785 (9th Cir. 2009)

Ralph D. Gants, *In re Birchall*, 913 N.E.2d 799 (Mass. 2009)

★ Ruth Bader Ginsburg, *United States v. Hayes*, 129 S. Ct. 1079 (2009)

Per Curiam, *Spears v. United States*, 129 S. Ct. 840 (2009)

★ Jed S. Rakoff, *Securities and Exchange Commission v. Bank of America*, 2009 WL 2916822 (S.D.N.Y. 2009)

James Robertson, *Hollister v. Soetoro*, 601 F.Supp.2d 179 (D.D.C. 2009)

Antonin Scalia, *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009)

Paul A. Suttell, *Viveiros v. Town of Middletown*, 973 A.2d 607 (R.I. 2009)

## CONCURRENCES, DISSENTS, ETC.

William A. Fletcher, *Cooper v. Brown*, 565 F.3d 581 (9th Cir. 2009)

★ Alex Kozinski, *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009)

Carlos R. Moreno, *Strauss v. Horton*, 207 P.3d 408 (Cal. 2009)

★ John T. Noonan, Jr., *Tucson Herpetological Society v. Salazar*, 566 F.3d 870 (9th Cir. 2009)

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<sup>1</sup> 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 Gene Weingarten’s article and a slice of Melvin Urofsky’s book.

## GREEN BAG ALMANAC & READER 2010

Mark P. Painter, *Blust v. City of Blue Ash*, 894 N.E.2d 89 (Ohio Ct. App. 2008)\*

Mark P. Painter, *State v. Roberts*, 904 N.E.2d 945 (Ohio Ct. App. 2008)\*

John G. Roberts, Jr., *United States v. Hayes*, 129 S. Ct. 1079 (2009)

★ John G. Roberts, Jr., *Virginia v. Harris*, 130 S. Ct. 10 (2009)

Conrad L. Rushing, *Miyamoto v. Department of Motor Vehicles*, 176 Cal.App.4th 1210 (Cal. Ct. App. 2009)

★ David H. Souter, *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009)

## BOOKS

(including articles more than 25,000 words long)

★ Amy Bach, *Ordinary Injustice: How America Holds Court* (Metropolitan Books 2009)

Lackland H. Bloom, Jr., *Methods of Interpretation: How the Supreme Court Reads the Constitution* (Oxford University Press 2009)

★ Annette Gordon-Reed, *The Heminguses of Monticello: An American Family* (W. W. Norton & Co. 2008)

Philip Hamburger, *Law and Judicial Duty* (Harvard University Press 2008)

John Kroger, *Convictions: A Prosecutor's Battles Against Mafia Killers, Drug Kingpins, and Enron Thieves* (Farrar, Straus and Giroux 2008)

Goodwin Liu, Pamela S. Karlan, and Christopher H. Schroeder, *Keeping Faith with the Constitution* (American Constitution Society 2009)

Elizabeth Magill, *Standing for the Public: A Lost History*, 95 Va. L. Rev. 1131 (2009)

★ David G. Post, *In Search of Jefferson's Moose: Notes on the State of Cyberspace* (Oxford University Press 2009)

Melvin I. Urofsky, *Louis D. Brandeis: A Life* (Random House 2009)

Carlos Manuel Vázquez, *Treaties as the Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev. 599 (2008)

Steven T. Wax, *Kafka Comes to America: Fighting for Justice in the War on Terror* (Other Press 2008)

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\* Nominated by the author.



## RECOMMENDED READING

### SHORT ARTICLES

- Michael Boudin, *A Response to Professor Ramseyer, Predicting Court Outcomes Through Political Preferences*, 58 Duke L.J. 1687 (2009)
- ★ Pamela S. Karlan, *Voting Rights and the Third Reconstruction*, in *The Constitution in 2020* (Oxford University Press 2009) (Jack M. Balkin & Reva B. Siegel, eds.)
- Leandra Lederman, *EBay's Second Life: When Should Virtual Earnings Bear Real Taxes?*, 118 Yale L.J. Pocket Part 136 (2009)
- ★ David F. Levi, *Autocrat of the Armchair*, 58 Duke L.J. 1791 (2009)
- ★ Michael J. Morrissey, *Dead Men Sometimes Do Tell Tales*, in *Your Witness: Lessons on Cross-Examination and Life from Great Chicago Trial Lawyers* (Law Bulletin 2008) (Steven F. Molo and James R. Figliuolo, eds.)
- Jeffrie G. Murphy, *Remorse, Apology & Mercy*, in *Criminal Law Conversations* (Oxford University Press 2009) (Paul H. Robinson, Stephen P. Garvey, and Kimberly Kessler Ferzan, eds.)
- Henry E. Smith, *Does Equity Pass the Laugh Test?: A Response to O'liar and Sprigman*, 95 Va. L. Rev. in Brief 9 (2009)

### LONG ARTICLES

- Stephanos Bibas, Max M. Schanzenbach, and Emerson H. Tiller, *Policing Politics at Sentencing*, 103 Nw. U. L. Rev. 1371 (2009)
- ★ Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 Boston U. L. Rev. 539 (2009)
- Robert Henry, *Do Judges Think?*, 58 Duke L.J. 1703 (2009)
- William Ranney Levi, *Interrogation's Law*, 118 Yale L. J. 1434 (2009)
- ★ Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 NYU L. Rev. 1109 (2008)
- Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 Harv. L. Rev. 1869 (2009)
- Jeannie Suk, *Is Privacy a Woman?*, 97 Georgetown L.J. 485 (2009)
- Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 Tex. Tech L. Rev. 1173 (2009)
- ★ G. Edward White, *Introduction to Oliver Wendell Holmes, Jr., The Common Law* (1881; Harvard University Press 2009 prtg.)
- Verna L. Williams, *The First (Black) Lady*, 86 Denv. U. L. Rev. 833 (2009)

## NEWS & EDITORIAL

- William W. Bedsworth, *The Moving Blues: A farewell serenade to an unconventional courthouse*, *The Recorder*, May 15, 2009
- ★ Eugene R. Fidell, *Appellate Review of Military Commissions*, at Balkinization, Oct. 8, 2009
- Rich Leonard, *Give Bankruptcy Judges the Power to Alter Mortgages*, *Washington Post*, Nov. 28, 2008
- ★ Dahlia Lithwick, *Shit Doesn't Happen: The Supreme Court's 100 percent dirt-free exploration of potty words*, *Slate*, Nov. 4, 2008
- ★ Kermit Roosevelt, *Justice Cincinnatus: David Souter—a dying breed, the Yankee Republican*, *Slate*, May 1, 2009
- ★ Jeffrey Toobin, *Are Obama's judges really liberals?*, *The New Yorker*, Sept. 21, 2009
- Bruce Weber, *Umpires v. Judges*, *New York Times*, July 12, 2009
- Gene Weingarten, *Fatal Distraction*, *Washington Post*, March 5, 2009

## MISCELLANY

- Thomas E. Baker, *A Primer on the Jurisdiction of the U.S. Courts of Appeals*, §§ 1.01, 1-02, 3.01-05 (Federal Judicial Center 2d ed. 2009)
- Mark E. Elias et al., *Memorandum of Law in Opposition to Contestants' Motion for Ruling Applying Feb. 13, 2009 Order to Previously Counted Absentee Ballots*, *Sheehan v. Franken*, No. 62-CV-09-56 (Minn. D. Ct. 2009)
- ★ Elena Kagan et al., *Brief for the United States as Amicus Curiae Supporting Petitioners*, *Migliaccio v. Castaneda*, Nos. 08-1529 and 08-1547 (U.S. 2009)
- ★ Martin S. Lederman, *Constitutionality of the Ronald Reagan Centennial Commission Act of 2009*, 33 Op. Office of Legal Counsel (2009)
- Maureen Mahoney et al., *Brief of Petitioner, Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, No. 08-604 (U.S. 2009)
- ★ Elizabeth B. Wydra, Douglas T. Kendall, and David H. Gans, *Brief of Constitutional Law Professors as Amici Curiae in Support of Reversal, McDonald v. City of Chicago*, Nos. 08-4241, 08-243, 08-4244 (7th Cir. 2009)

