



* For the words, see *The Wizard of Oz* (Metro-Goldwyn-Mayer 1939) (opening credits); for the picture, see L. Frank Baum, *The Wonderful Wizard of Oz* 6 (Geo. M. Hill Co. 1900) (illus. by W.W. Denslow).

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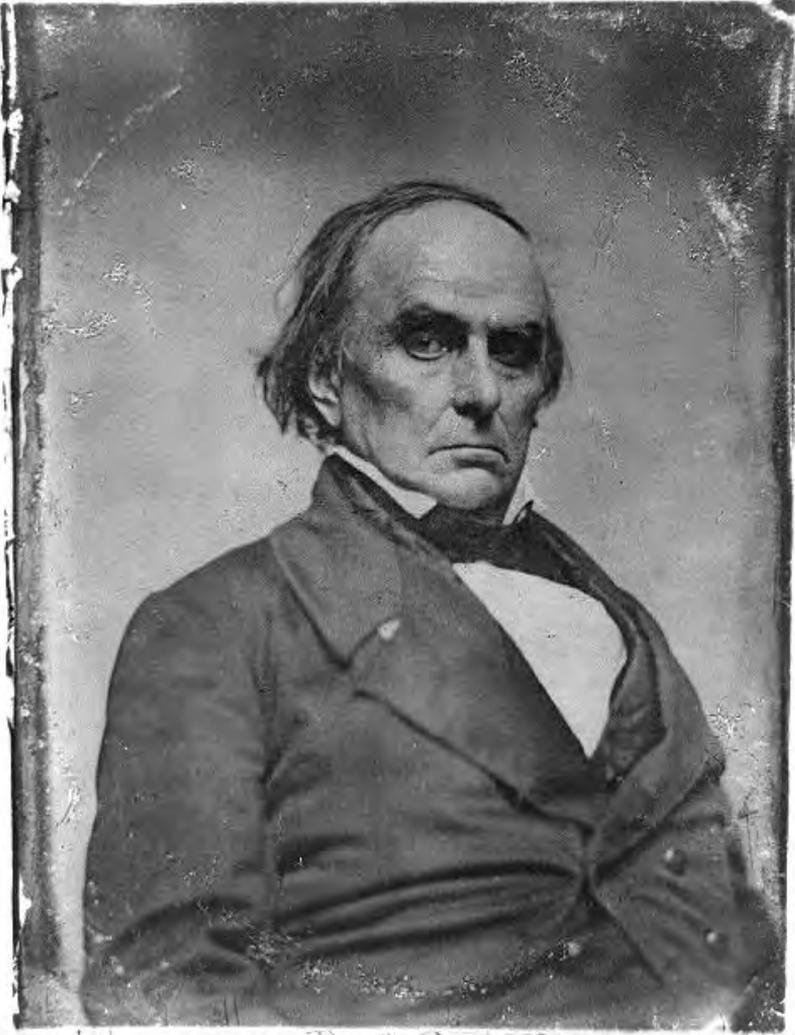
THE
GREEN BAG

ALMANAC

&

READER

2013



DANIEL WEBSTER, 1782-1852

Lawyer, Senator, Secretary of State, Orator.

See ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME (1997).

“An unlimited power to tax involves,
necessarily, a power to destroy”

M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819)
(Webster, for the plaintiff in error)

THE
GREEN BAG

ALMANAC

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

2013

– AND –

READER

OF EXEMPLARY LEGAL WRITING FROM THE
YEAR JUST PASSED

2012

SELECTED BY THE
LUMINARIES AND SAGES ON OUR BOARD OF ADVISERS

EDITED BY ROSS E. DAVIES



GREEN BAG PRESS
WASHINGTON, DC
2013

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PREFACE 2013

THE CAPACITY TO BE TAXED IS THE CAPACITY TO SELF-DESTRUCT

This is the eighth *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 website (www.greenbag.org). This year is a special one, though, for reasons given after our customary salute to our diligent board and before our customary confessions of editorial error.

OUR DILIGENT BOARD

Our selection process for “Exemplary Legal Writing of 2012” 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* 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 that 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 2014 *Almanac*.

Despite the substantial work involved in this project, most of our advisers seem to enjoy participating. Those who don’t seem 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 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 people 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* is different from last year’s and will, we expect, be different again next year and thereafter. The fact that people move on and off the list 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.



TAX TROUBLE

There are two big problems with this *Almanac*. First, it is late — printed in September 2013, not in the winter of 2012-13, as it should have been. Second, it is relatively plain and boring — it lacks both the elaborate design and the voluminously numerous entertaining tidbits featured in previous *Almanacs*. (The exemplary legal writing is still excellent, of course, as are the annual reviews on pages 19-78 below.) Both problems are our own fault, because we screwed up the Green Bag, Inc.’s taxes.¹

Permit me to explain.

The Green Bag, Inc. — publisher not only of this *Almanac* but also of the *Green Bag* (a useful and entertaining law journal), the *Journal of Law* (a periodical laboratory of legal scholarship), *In-Chambers Opinions by the Justices of the Supreme Court* (a case reporter), and several other worthy publications, as well as producer of such works of scholarly artistry as the *Supreme Court Sluggers* trading cards, *Learned Hand’s Songs of His Youth*, and a series of bobbleheads of Supreme Court Justices — was a not-for-profit corporation blessed by the IRS with limited tax-exempt status under section 501(c)(3) of the federal internal revenue code. We received our 501(c)(3) determination in 1998, shortly after the company was formed.

But in August 2010 we lost it. Like many not-for-profits, large and small, the Green Bag, Inc. had been stupidly failing to engage in the fairly simple process of filing the required tax forms. As a result, when the IRS launched its automatic revocation system in 2010,² we were one of the roughly 275,000 not-for-profits whose tax exemptions were revoked.³ Although our revocation occurred in August, we did not learn about it until shortly after the IRS published the information online in June 2011.⁴

Once we realized what we had not done, we went to work to put our house in order and regain our tax-exempt status. We were confident that we would keep the Green Bag afloat, one way or

¹ And “we” means mostly me, as head of this little enterprise.

² *IRS Identifies Organizations that Have Lost Tax-Exempt Status; Announces Special Steps to Help Revoked Organizations*, IR-2011-63, June 8, 2011 (updated June 9, 2011), www.irs.gov/uac/IRS-Identifies-Organizations-that-Have-Lost-Tax-Exempt-Status%3B-Announces-Special-Steps-to-Help-Revoked-Organizations; Pension Protection Act of 2006, P.L. 109-280, 120 Stat. 1090, 26 U.S.C. § 6033.

³ Paul Caron, *IRS Strips Tax-Exempt Status From 275,000 Nonprofits*, TAXPROFBLOG, June 9, 2011, taxprof.typepad.com/taxprof_blog/2011/06/irs-strips-.html (vis. Sept. 14, 2013); Stephanie Strom, *I.R.S. Ends Exemptions For 275,000 Nonprofits*, N.Y. TIMES, June 8, 2011.

⁴ *Exempt Organizations Select Check*, apps.irs.gov/app/eos/pub78Search.do?searchChoice=revoked&dispatchMethod=selectSearch (vis. Sept. 14, 2013) (“Green Bag”), www.availableat.org.

another, but we had no idea what our fate before the IRS would be. The IRS was, after all, administering a large and (maybe more significantly) new program with new rules of uncertain meaning.⁵ And then there was the general terror that haunts any tiny entity that finds itself in the grasp of an unpredictable giant.

Faced with an uncertain future (and driven by what may yet turn out to be an excess of caution), we pulled in our horns. We were worried in particular about how much our foolishness might cost us — in taxes and penalties, and in fees paid for professional help. So, we carried on with projects already in the works, but we put new ones — the *Complementary Reporter*, the *National Gazette of the United States*, the *Bush v. Gore* commemorative chadglobe, the *Great Moments in the Law* parade float, the William Howard Taft weather balloon, the quarterly version of the *Journal of Law*, and others — on hold.

Our thinking was, and remains, that as soon as we are out of the tax woods we can get back to investing all of our time and resources in improved and new law-related products.

But getting out of the woods takes time. It took us a while to assemble the necessary information and file the correct paperwork with the IRS. It took the IRS a longer while to make a decision about our case — understandably, given that many other formerly tax-exempt organizations must have been seeking the same treatment we were asking for, and at the same time. By the spring of 2013, though, we had mostly good news: the IRS determined that we were once again tax-exempt under section 501(c)(3),⁶ but that we had been non-exempt from August 2010 to May 2012 and therefore had to pay regular corporate taxes for that period. We filed the required returns for 2010, 2011, and 2012, which showed that we owed taxes for 2010 and 2011 and were due a refund for 2012. Some sort of mysterious snafu slowed delivery of the Personal Identification Number (PIN) we needed to pay our taxes via the IRS's electronic funds transfer system. By the end of July 2013, though, we had the PIN and could finally pay our taxes and put the whole mess behind us.

While this prolonged process was proceeding, we were wringing our hands over the *Almanac*, mostly because it is by far our biggest single annual expense.⁷ For the 2012 edition we were committed to a fairly elaborate book with a Rex Stout/Nero Wolfe theme. It came out as planned and on schedule in early 2012. For

⁵ See, e.g., *Application for Reinstatement and Retroactive Reinstatement for Reasonable Cause Under Internal Revenue Code § 6033(j)*, INTERNAL REVENUE BULLETIN 2011-25, NOTICE 2011-44 (June 20, 2011), www.irs.gov/irb/2011-25_IRB/ar10.html.

⁶ Thank goodness and the IRS!

⁷ The 2009 *Almanac* was an exception, because that year we commissioned an expensive custom sound chip for the Justice David Souter bobblehead.

the 2013 edition we had not made any commitments to content providers or production suppliers. We had, however, been working on it for a couple of years. It was to be a 1,000-page volume featuring the longest flipbook ever published. The artwork was ready, as were many of the useful and entertaining tidbits (most of which are created in-house for every *Almanac*). But spending a boatload of money printing and distributing such a volume when the costs of our tax transgressions were still unknown seemed too risky. With a back-up package on the shelf and ready to go if necessary (prepared and socked away back when the *Almanac* series began in 2006), we postponed the decision. The hope was for some good news from the IRS in early 2013 that would free us to bestow on our readers the blockbuster flipbook rather than the relatively low-key (and cheap) 400-page Land of Oz scrapbook you are holding now.

Having made an ill-defined commitment to delay for our beloved flipbook project, we waited, and waited. Just another week or two, just another week or two, and so on. And we were still waiting when we paid our taxes in July 2013. By then we were receiving an increasing number of friendly inquiries about the 2013 *Almanac* (as well as a few peremptory “claims” for a book that we only share as a gift). In retrospect, we should not have stepped onto the Slippery Slope of Hope.

Which brings us to the one moment in this entire process when things moved downright fast. Armed with our IRS PIN, on July 29 we authorized the IRS to electronically transfer funds to itself from the Green Bag’s bank account to pay the taxes we owed for 2010 and 2011. (See page 8 below.) The very next day, July 30, the IRS did just that. (See page 9 below.)

At that point, it seemed worthwhile to wait just a few more days for official confirmation that we had met our tax obligations for 2010 through 2012 and were in fact out of the woods — free to safely pour our resources into the super-flipbook *Almanac*. And so we waited, again.

Finally, in early September, I signed for two certified mail envelopes from the IRS. Inside, alas, were not the good tidings we were expecting. Instead, they were notices that the IRS intends to seize the Green Bag’s assets and apply them to the taxes we owe for 2010 and 2011. (See pages 10 and 11 below.) But didn’t we pay those taxes back in July? Somewhere along the way there must have been some sort of mistake — maybe by us, maybe by the IRS, maybe by both. Given some more time, surely we will work it out.

That is where we stand now.

Having finally lost all hope that we will find our way out of the woods in time to publish our flipbook *Almanac* in 2013, we offer this year’s Oz-themed *Almanac* instead. It is not an eyesore, and

the exemplars and reviews are just as good as they would have been had they appeared in the company of hundreds of flippable pictures instead of a few Munchkins. And it will have to suffice.

We are optimistic that this whole tax business will turn out okay — that in the end we will have lost some money, some time, and some dignity, but not our beloved and (we would like to think) worthwhile enterprise. Someday we may even publish that flipbook. We are optimistic in large part because of our experience during this process with the people who work at the IRS. The system in which they work is terrifying, at least for puny outsiders like the Green Bag. The IRS has the idiot strength characteristic of giant bureaucracies — simultaneously ponderous and sudden. But the individual human beings with whom we have dealt have been patient, knowledgeable, helpful, and fair. In other words, fine public servants.

• • • •

This long and ongoing course of events has been mostly frightening and exhausting, but it has also had its entertaining aspects. Consider the following:

1. The Green Bag, Inc. does not have much for the IRS to seize. There is a little bit of money in our bank account and we have a few bobbleheads, mostly Harry Blackmuns, Clarence Thomases, and Ruth Bader Ginsburgs. That's about it. Can you picture a pair of dark-suited, grim-faced, well-armed Treasury agents taking a troop of miniature Supreme Court Justices into custody?

2. For the past several years, the Green Bag has been publishing short articles in which I needle law reviews about their failures to comply with government filing regulations — postal regulations, not tax regulations, but the analogy is pretty darn close.⁸ During the long hours spent on remedial tax compliance over the past couple of years, I have often felt like a gander stewing in goose sauce while being hoist by its own petard.⁹ The feeling may have been good for my soul, but it most certainly has not been good for my mood.

⁸ See, e.g., *The Increasingly Lengthy Long Run of the Law Reviews: Law Review Business 2012 – Circulation and Production*, 3 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (2 J. LEGAL METRICS) 245 (2013); *Law Review Circulation 2011: More Change, More Same*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 179 (2012); *The Dipping Point: Law Review Circulation 2010*, in 2011 GREEN BAG ALM. 547; *Law Review Circulation 2009: The Combover*, in 2010 GREEN BAG ALM. 419; *Law Review Circulation*, in 2009 GREEN BAG ALMANAC 164.

⁹ See, e.g., *Kaufmann v. Prudential Insurance Co.*, 2009 WL 2449872, at *1 (D. Mass. Aug. 6, 2009) (“Assuming, without deciding, that sauce for the goose is sauce for the gander . . .”); *Spradlin v. Pikeville Energy Group, LLC*, 2012 WL 6706188, at *1 (E.D. Ky. Dec. 26, 2012) (“When an engineer was hoist by his own petard during a siege, it was the result of poor timing.”). It is a rather messy mixed metaphor, if you think it all the way through.

3. The material for an Oz-themed *Almanac* has been sitting in a file at Green Bag World Headquarters for almost ten years, just in case of an editorial emergency. All we had to do was add a few recent judicial references to Oz and its denizens, and then move the 2012 exemplary legal writing and our annual reviews out of the flipbook and into the Oz book. If we had known in advance the circumstances in which that emergency file would come in handy we could not have selected a theme more ironically appropriate than the Land of Oz. Indeed, it is not difficult to imagine an IRS-themed spoof of *The Wizard of Oz*. Dorothy could navigate a disorienting and sometimes frightening foreign land (the internal revenue code and associated regulations), making helpful friends (straw-stuffed accountants, tin bureaucrats, cowardly lawyers) along the way, and (after performing a series of difficult tasks) eventually coming face-to-face with the real Commissioner of Oz (who turns out to be a kindly old soul who is trying to make the best of a an enormous and sometimes unmanageable burden of responsibility). The story would end on a cheerful note, when Dorothy learns that to achieve her fondest wish all she must do is complete and file a simple form. She does so, is transported to safety, and joyfully and tearfully shouts: "There's no place like the status quo ante!" That is the Green Bag's fondest wish for 2013, or, if that cannot be arranged, for 2014.



A final note about the Land of Oz: There are really two of them. One is free and open to the public: L. Frank Baum's *The Wonderful Wizard of Oz* (1900), the novel in which Oz first appeared.¹⁰ The other is privately held, heavily fortified, and fiercely defended,¹¹ but accessible for a price: MGM's *The Wizard of Oz* (1939), the first Oz film.¹²

The Oz material in this book is a scattering of tidbits from both Ozes, many of them mixed and morphed by judges. And the discerning reader will see that the use of those bits is legally, morally, ethically, spiritually, physically, positively, absolutely, undeniably, and reliably fair. Indeed, we must aver that we've thoroughly examined this *Almanac*, and our use of those bits is not only merely fair, it's really most sincerely fair.¹³

¹⁰ You can read it here: archive.org/stream/wonderfulwizardo00baumiala#page/n0/mode/2up.

¹¹ See, e.g., *Warner Bros. Entertainment v. X One X Productions*, 644 F.3d 584 (8th Cir. 2011); Brooks Barnes, *We Aren't in the Old Kansas, Toto*, N.Y. TIMES, Feb. 28, 2013.

¹² You can buy it on iTunes.

¹³ Cf. *The Wizard of Oz* at approx. 25:50-26:38 (Metro-Goldwyn-Mayer 1939); see also Noel Langley, Florence Ryerson & Edgar Allan Woolf, *The Wizard of Oz* (1939) (screenplay).

GREEN BAG ALMANAC & READER 2013



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REMINDER: REMEMBER TO FILE ALL RETURNS WHEN DUE!

EFT ACKNOWLEDGEMENT NUMBER: [REDACTED]

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Taxpayer EIN	xxxx
Tax Form	1120 Corporation Income Tax Return
Tax Type	Balance due on return or notice
Tax Period	2010
Payment Amount	\$2,799.00
Settlement Date	07/30/2013

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Tax Period	2011
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PREFACE: THE CAPACITY TO BE TAXED

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 San Antonio, Texas 78245

0-0R1120F008

003
 CITIBANK, N. A.
Account

Statement Period
 Jul 1 - Jul 31, 2013
Relationship Manager
 Citibusiness Service Center
 (877) 528-0990

THE GREEN BAG, INC
 [REDACTED]

Page 1 of 2

Relationship Summary:

Checking [REDACTED]
 Savings [REDACTED]
 Checking Plus [REDACTED]

Type of Charge	No./Units	Price/Unit	Amount
CITIBUSINESS CHECKING # [REDACTED]			
Average Daily Collected Balance			[REDACTED]
DEPOSIT SERVICES			
DEPOSIT ASSESSMENT	[REDACTED]	[REDACTED]	[REDACTED]
MONTHLY MAINTENANCE FEE	[REDACTED]	[REDACTED]	[REDACTED]
CHECKS PAID	[REDACTED]	[REDACTED]	[REDACTED]
AUTOMATED CLEARING HOUSE (ACH)			
ACH DEBIT RECEIVED	[REDACTED]	[REDACTED]	[REDACTED]
Total Charges for Services			[REDACTED]
Average collected balances			[REDACTED]
Balances eligible for Earnings Credit			[REDACTED]
Balances Required to Offset Service Charges			[REDACTED]
Earnings Credit allowance at 0.20000%			[REDACTED]
Charges Subject to Earnings Credit			[REDACTED]
Net Service Charge			[REDACTED]

THE GREEN BAG, INC

Account [REDACTED] Page 2 of 2
 Statement Period: Jul 1 - Jul 31, 2013

0-0R1120F008

Date	Description	Debits	Credits	Balance
07/09	[REDACTED]			[REDACTED]
07/09	[REDACTED]	[REDACTED]		[REDACTED]
07/09	[REDACTED]	[REDACTED]		[REDACTED]
07/15	[REDACTED]	[REDACTED]		[REDACTED]
07/16	[REDACTED]		[REDACTED]	[REDACTED]
07/17	[REDACTED]	[REDACTED]		[REDACTED]
07/18	[REDACTED]	[REDACTED]		[REDACTED]
07/23	[REDACTED]	[REDACTED]		[REDACTED]
07/30	[REDACTED]	[REDACTED]		[REDACTED]
07/30	ACH DEBIT	571.00		[REDACTED]
	IRS USATAXPYMT 270361144514082 Jul 30			
07/30	ACH DEBIT	2,799.00		[REDACTED]
	IRS USATAXPYMT 270361132241377 Jul 30			
07/31	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Total Debits/Credits	[REDACTED]	[REDACTED]	[REDACTED]

IF YOU HAVE QUESTIONS ON:
 Checking

YOU CAN CALL:
 877-528-0990
 (For Speech and Hearing
 Impaired Customers Only
 TDD: 800-945-0258)

YOU CAN WRITE:
 CitiBusiness
 100 Citibank Drive
 San Antonio, TX 78245-9986

GREEN BAG ALMANAC & READER 2013

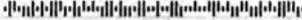


Department of the Treasury
Internal Revenue Service
Ogden, UT 84201-0038



7161 7618 3636 1873 1560

049939.363455.0285.007 2 XT 0.384 1150



TE	
Notice	CP504B
Tax Period	2010
Notice date	September 9, 2013
Employer ID number	[REDACTED]
To contact us	Phone 1-800-829-0115
Your Caller ID	[REDACTED]
Page 1 of 4	



GREEN BAG INC

049939



Notice of intent to levy

Intent to seize your property or rights to property
Amount due immediately: \$1,301.27

As we notified you before, our records show you have unpaid taxes for the tax period ending December 31, 2010 (Form 1120). If you don't call us immediately or pay the amount due by September 19, 2013, we will seize ("levy") your property or rights to property and apply it to the \$1,301.27 you owe.

Billing Summary

Amount you owed	\$1,298.91
Interest charges	2.36
Amount due immediately	\$1,301.27

Continued on back...



GREEN BAG INC

Notice	CP504B
Notice date	September 9, 2013
Employer ID number	[REDACTED]

Payment

- Make your check or money order payable to the United States Treasury.
- Write your Employer ID number (31-1563469), the tax period (December 31, 2010), and the form number (1120) on your payment and any correspondence.

Amount due immediately

\$1,301.27

INTERNAL REVENUE SERVICE
KANSAS CITY, MO 64999-0202



311563469 RZ GREE 02 2 201012 670 0000000000

PREFACE: THE CAPACITY TO BE TAXED



Department of the Treasury
Internal Revenue Service
Ogden, UT 84201-0038



7161 7618 3636 1873 1577

049940,363455.0285,007 2 AT 0.384 1150



TE	
Notice	CPS048
Tax Period	2011
Notice date	September 9, 2013
Employer ID number	[REDACTED]
To contact us	Phone 1-800-829-0115
Your Caller ID	[REDACTED]
Page 1 of 4	



GREEN BAG INC



049940



Notice of intent to levy

Intent to seize your property or rights to property

Amount due immediately: \$212.39

As we notified you before, our records show you have unpaid taxes for the tax period ending December 31, 2011 (Form 1120). If you don't call us immediately or pay the amount due by September 19, 2013, we will seize ("levy") your property or rights to property and apply it to the \$212.39 you owe.

Billing Summary

Amount you owed	\$212.01
Interest charges	0.38
Amount due immediately	\$212.39

Continued on back...



GREEN BAG INC



Notice	CPS048
Notice date	September 9, 2013
Employer ID number	[REDACTED]

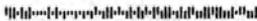
Payment

- Make your check or money order payable to the United States Treasury.
- Write your Employer ID number (31-1563469), the tax period (December 31, 2011), and the form number (1120) on your payment and any correspondence.

Amount due immediately

\$212.39

INTERNAL REVENUE SERVICE
KANSAS CITY, MO 64999-0202



311563469 RZ GREE 02 2 201112 670 0000000000

EXPERTISE ONLINE

Having endured several years of complaints about the unavailability of our fine front matter in a standard law journal format, we have come up with a solution. Starting this year, our annual reviews by Bryan Garner, Greg Jacob and Rakesh Kilaru, Tony Mauro, and Kevin Underhill, as well as prefaces like this one, will be published in the *Journal of Law*¹⁴ as well as the *Almanac*.

OTHER FINE WRITING

The *Green Bag* is not the only institution that salutes good legal writing. Here are a few of the others, and some honors they bestowed in 2012:

Scribes: The American Society of Legal Writers

Book Awards:

Gold: Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale University Press 2010)

Silver: Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America's New Global Detention System* (NYU Press 2011)

Bronze: Ronald K.L. Collins and Sam Chaltain, *We Must Not Be Afraid To Be Free: Stories of Free Expression in America* (Oxford University Press 2011)

Law Review Award (best student-written article): Michael Vincent, *Computer-Managed Perpetual Trusts*, 51 *Jurimetrics* J. 399 (2011)

The Burton Awards for Legal Achievement

Dozens of awards are listed on the Burton Awards website, at www.burtonawards.com/2012event.html

University of Alabama School of Law and the ABA Journal

Harper Lee Prize for Legal Fiction: Michael Connelly, *The Fifth Witness* (Grand Central Publishing 2011)

HOMER KEEPS NODDING . . .

We continue to struggle, and fail, to produce a flawless big fat book in a hurry. (And we are sure readers will find mistakes even in this relatively slim 2013 edition.) Here are the errors we are sure we made in the 2012 *Almanac*:

Page x: There should be quotation marks after “pernickety” at the bottom of the page.

¹⁴ See www.journaloflaw.us.

Pages 323, 325, and 327: “Their Famous Successors” in the running head should be “Legg, Culp, and the Evil Judge.”

Page 232: Carol Novak, a charter member of The Wolfe Pack,¹⁵ defended an innocent fictional man:

Just finished the one about lawyers in the corpus. [Emily Billey, *The Identity of Guilt*] The gist of the section is that the perps who get lawyers don't have the lawyers' names specified, usually, and the innocent parties who hire lawyers, usually have the lawyers' names specified. The chart depicting this phenomenon lists Boyden McNair (*The Red Box*) as a perp. I am almost certain he is a victim and his only misdeed is that he “lost” his daughter to the multi-victim murderess, Calida Frost. I have not had time to look this up, it's from memory, but I'm really sure it's correct.

Ira Brad Matetsky, co-editor of the 2012 *Almanac* and Werowance of The Wolfe Pack, “fear[s] that Carol is correct.”



The food sections of the 2012 *Almanac* were written by our resident culinary expert, Leiv Blad. His *Condiments* essay (pages 435-37) drew comments — not really corrections — from Daniel Polsby of the George Mason University School of Law:

I have not tried this and doubt anyone else will (indeed, I have my doubts that Stout ever did), but by inspection: if you treat dough in the way described it is going to be glutinous, which will bake up tough — not necessarily a bad thing — but virtue in biscuits is normally thought to consist in flakiness. Pinching shortening through the flour is meant to produce this characteristic. Half an hour of mallet-pounding would probably destroy it. . . .

Another thought, which Leiv can confirm: if you make mayonnaise using the Stout recipe (which I have, and other recipes besides, many times) there is a perfectly good reason why it would never occur to you (or Stout) to use it as a sandwich spread. Mayonnaise made that way (the correct way!) much more closely resembles Hollandaise sauce than it does the stuff that comes from a jar, which I like perfectly well by the way. It would never occur to anybody to put home-made mayonnaise on a sandwich — whether or not you put in the sour cream, which strikes me as gilding a lily.

Polsby also had this to say about “Nero Wolfe’s Beaten Biscuits” (page 504) from Rex Stout’s “*Too Many Cooks*” *Recipe Box*:

One more thing — check up on me: I would bet serious money that Marshall du Plessis’s chef knew perfectly well what would

¹⁵ See www.nerowolfe.org.

happen when he put egg yolks and oil together and that it was not a happy accident. If you don't believe it, set all the ingredients in the correct proportions out on a counter and ask someone who has never done it before to make mayonnaise out of it, and see what happens. I bet the chef had done it twenty times before Minorca, but considered it *déclassé*. Oil — a staple of rustic tastes and kitchens — wouldn't be the first choice of a high-class pro; one may be very sure that that's what that guy was.

IN OTHER BUSINESS

Our goals remain the same: to present a fine, even inspiring, year's worth of exemplary legal writing, — and to accompany that fine work with a useful and entertaining potpourri of distracting oddments. Like the law itself, the 2012 exemplars in this volume are wide-ranging in subject, form, and style. This year there is not much potpourri; we hope (despite recent experience) that next year will be better. 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* thanks 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 its Law & Economics Center for their continuing generous support of the *Green Bag*; Ira Brad Matetsky of Ganfer & Shore for his attention to detail; former librarian Paul Haas; and former Green Bag Fellow Cattleya Concepcion.

Ross E. Davies
September 14, 2013

P.S. As we go to press we have more good news. In a letter dated September 19 the IRS says, "We are pleased to inform you that your request to remove the penalty(s) has been granted. However, this action has been taken based solely on the fact that this was the first time you were required to file a return. This type of penalty removal is a one-time consideration. The IRS will base decisions on removing any future penalty(s) on any information you provide that meets reasonable cause criteria." As best we can tell, this means that the notice on page 10 above is for a first-time penalty in the past that has now been removed, but the notice on page 11 above is for a second-time penalty in the future that has not (yet) been removed and therefore seizure is still in the offing. But we could be wrong. As you read this, we are probably either assembling reasonable cause information (and a couple of amended returns) or, having submitted them, are waiting for word from the IRS. And hoping.

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 in the list below by a little ★. There were plenty of other good works on the ballot. We list them here. Congratulations to all.

• • • •

OPINIONS FOR THE COURT

- Marvin R. Baxter, *People v. Manzo*, 270 P.3d 711 (Cal. 2012)
- ★ José A. Cabranes, *Rivas v. Fischer*, 687 F.3d 514 (2d Cir. 2012)
- Edward Carnes, *FTC v. Watson Pharm.*, 677 F.3d 1298 (11th Cir. 2012)
- Frank H. Easterbrook, *Soppet v. Enhanced Recovery*, 679 F.3d 637 (7th Cir. 2012)
- ★ John Gleeson, *U.S. v. Dossie*, 851 F.Supp.2d 478 (E.D.N.Y. 2012)
- Dennis Jacobs, *Windsor v. U.S.*, 699 F.3d 169 (2d Cir. 2012)
- Elena Kagan, *Caraco Pharm. Labs. v. Novo Nordisk*, 132 S.Ct. 1670 (2012)
- William C. Koch, Jr., *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436 (Tenn. 2012)
- Mark Kravitz, *Mitchell v. New Haven*, 854 F.Supp.2d 238 (D. Conn. 2012)
- ★ Royce C. Lamberth, *In re Grand Jury Subpoena*, 846 F.Supp.2d 1 (D.D.C. 2012)
- Gordon J. Quist, *MacDonald v. Thomas M. Cooley Law School*, 2012 WL 2994107 (W.D. Mich. 2012)
- ★ Ojetta R. Thompson, *Schatz v. RSLC*, 669 F.3d 50 (1st Cir. 2012)
- Joseph G. Will, *State v. Beauprez* (Fla. 7th Cir. 2012)

CONCURRENCES, DISSENTS, ETC.

- ★ Marsha Berzon & Richard Tallman, *Miles v. Ryan*, 697 F.3d 1090 (9th Cir. 2012)
- Ruth Bader Ginsburg, *NFIB v. Sebelius*, 132 S.Ct. 2566 (2012)
- ★ Neil Gorsuch, *U.S. v. Rosales-Garcia*, 667 F.3d 1348 (10th Cir. 2012)
- Stephen A. Higginson, *Doe ex rel. Magee v. Covington County School Dist.*, 675 F.3d 849 (5th Cir. 2012) (en banc)

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- Jerome A. Holmes, *U.S. v. Strandlof*, 667 F.3d 1146 (10th Cir. 2012)
- ★ Elena Kagan, *Williams v. Illinois*, 132 S.Ct. 2221 (2012)
- Damon Keith, *Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland*, 669 F.3d 737 (6th Cir. 2012)
- Alex Kozinski, *Nordyke v. King*, 676 F.3d 828 (9th Cir. 2012)
- James C. Nelson, *Western Tradition Partnership v. Attorney General*, 271 P.3d 1 (Mont. 2012)
- Antonin Scalia, *Pacific Operators Offshore v. Valladolid*, 132 S.Ct. 680 (2012)
- Anthony J. Scirica, *Sullivan v. DB Investments*, 667 F.3d 273 (3d Cir. 2011)
- Robert S. Smith, *Bordeleau v. State*, 960 N.E.2d 917 (N.Y. 2011)
- Sonia Sotomayor, *U.S. v. Jones*, 132 S.Ct. 945 (2012)

BOOKS

- Oren Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (Oxford University Press 2012)
- ★ Dale Carpenter, *Flagrant Conduct: How A Bedroom Arrest Decriminalized Gay Americans* (W.W. Norton & Company 2012)
- ★ David M. Dorsen, *Henry Friendly, Greatest Judge of His Era* (Harvard University Press 2012)
- Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* (Oxford University Press 2012)
- Anne Emanuel, *Elbert Parr Tuttle: Chief Jurist of the Civil Rights Revolution* (Georgia University Press 2011)
- Linda Greenhouse, *The U.S. Supreme Court: A Very Short Introduction* (Oxford University Press 2012)
- Virginia M. Kendall & T. Marcus Funk, *Child Exploitation and Trafficking* (Rowman & Littlefield 2011)
- Barry R. Schaller, *Veterans on Trial: The Coming Court Battles over PTSD* (Potomac Books 2012)*
- Ferdinand von Schirach & Carol Janeway, *Guilt: Stories* (Knopf 2012)
- Brian Z. Tamanaha, *Failing Law Schools* (University of Chicago Press 2012)
- ★ J. Harvie Wilkinson III, *Cosmic Constitutional Theory* (Oxford University Press 2012)

* This work was nominated for the *Almanac & Reader* by the author of that work.

RECOMMENDED READING

LONG ARTICLES

- Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 Virginia Law Review 2009 (2011)
- ★ Charles Fried, *On Judgment*, 15 Lewis & Clark Law Review 1025 (2011)
- Jamal Greene, *The Anticanon*, 125 Harvard Law Review 380 (2011)
- Chris Hickman, *Courting the Right: Richard Nixon's 1968 Campaign against the Warren Court*, 36 Journal of Supreme Court History 287 (2011)
- Joan H. Krause, *Skilling and the Pursuit of Health Care Fraud*, 66 University of Miami Law Review 363 (2012)
- Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 Yale Law Journal Online 601 (2012)
- ★ Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 South Carolina Law Review 465 (2012)
- Karen Petroski, *Does It Matter What We Say About Legal Interpretation?*, 43 McGeorge Law Review 359 (2012)
- Glenn H. Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 85 Colorado Law Review 247 (2012)
- ★ Carol Sanger, *"The Birth of Death": Stillborn Birth Certificates and the Problem for Law*, 100 California Law Review 269 (2012)
- Christopher Yoo, *When Antitrust Met Facebook*, 19 George Mason Law Review 1147 (2012)

NEWS & EDITORIAL

- Matt Bai, *How Much Has Citizens United Changed the Political Game?*, New York Times Magazine, July 17, 2012
- Andrew Cohen, *The Supreme Court Splinters Apart Over the Confrontation Clause*, The Atlantic, June 19, 2012
- Justin Driver, *Ignoble Specificities*, The New Republic, April 5, 2012
- ★ Tom Goldstein, *We're getting wildly differing assessments*, SCOTUSblog, www.scotusblog.com, July 7, 2012
- Linda Greenhouse, *Never Before*, New York Times, opinionator.blogs.nytimes.com, March 21, 2012
- Marci Hamilton, *Why the Summer of 2012 Will Go Down in History as the Breakthrough Summer for Child-Sex-Abuse Victims*, Verdict, verdict.justia.com, July 26, 2012

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Charles Lane, *John Roberts's Compromise of 2012*, Washington Post, June 29, 2012*

Simon Lazarus, *The Conservative Legal Stars Who Presaged John Roberts' Health Care Decision*, The New Republic, August 17, 2012

★ Jill Lepore, *Benched: The Supreme Court and the struggle for judicial independence*, The New Yorker, June 18, 2012

★ Dahlia Lithwick, *Extreme Makeover: The story behind the story of Lawrence v. Texas*, The New Yorker, March 12, 2012

★ Jonathan Macey, *Tackling the Power of the 1%*, Politico, November 29, 2011

William T. Robinson III, *President Obama's remarks on upcoming U.S. Supreme Court ruling on national health care*, Apr. 7, 2012

Carrie Sharlow, *Kim Sigler*, Michigan Bar Journal, May 2012

Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, The New Yorker, May 21, 2012

Jason Zengerle, *The Paul Clement Court*, New York, March 18, 2012

MISCELLANY

S Venkat Balasubramani, *Letter to Charles Carreon, Re: FunnyJunk — The Oatmeal* (June 11, 2012)

Philip C. Bobbitt, *Brief Amicus Curiae in Support of Petitioners, Department of Health and Human Services v. Florida*

J. Michael Eakin, *Commonwealth v. Goodson*, 33 A.3d 611 (Pa. 2011)

★ Frank H. Easterbrook, *Commencement Address*, Swarthmore College, www.swarthmore.edu/commencement-2012/frank-easterbrook-70.xml

John P. Elwood & Eric A. White, *What Were They Thinking*, The Volokh Conspiracy, www.volokh.com (Aug. 7, 2012)

Peter D. Junger, *The Original Plain Meaning of the Right to Bear Arms*, 63 Case Western Reserve Law Review 145 (2012)

Peter Kageleiry, Jr., et al., *Final Brief on Behalf of Appellant, U.S. Ali*

★ Bob Kohn & Julia Alekseyeva, *Brief of Bob Kohn as Amicus Curiae, U.S. v. Apple, Inc.*, Civil Action No.12-CV-2826 (S.D.N.Y.) (filed Sept. 4, 2012)

★ Christy Susman & David Gooder, *Letter to Patrick Wensink, Jack Daniel's*, July 12, 2012

* This work was nominated for the *Almanac & Reader* by the author of that work.