

THE GREEN BAG

AN ENTERTAINING JOURNAL OF LAW

SPRING 2006

2D SERIES • VOLUME 9 • NUMBER 3

Nobody expects the Spanish Inquisition!

Cardinal Ximinez of Spain

Michael Palin, THE SPANISH INQUISITION (1970)



THE GREEN BAG

AN ENTERTAINING JOURNAL OF LAW

ROSS E. DAVIES
Editor-in-Chief

DAVID M. GOSSETT & MONTGOMERY N. KOSMA
Executive Editors

Senior Editors

GREGORY F. JACOB THOMAS B. NACHBAR

Contributing Editors

DANIEL G. CURRELL
SUSAN M. DAVIES
THOMAS H. DUPREE, JR.

CURTIS E. GANNON
BRITTON B. GUERRINA

DAVID B. SALMONS
KEITH SHARFMAN
AMY STEACY

Board of Advisers

ROBERT C. BERRING
A. MORGAN CLOUD
DAVID P. CURRIE
RICHARD A. EPSTEIN
SAMUEL ESTREICHER
LEONARD GARMENT

SUZANNE GARMENT
BRYAN A. GARNER
MARY ANN GLENDON
R.H. HELMHOLZ
PHILIP B. HEYMAN
DENNIS J. HUTCHINSON

HENRY P. MONAGHAN
JAMES M. ROSENBAUM
SUZANNA SHERRY
A.W.B. SIMPSON
KATE STITH-CABRANES
WILLIAM W. VAN ALSTYNE

The *Green Bag 2d* is published quarterly. ISSN 1095-5216. © 2006 The Green Bag, Inc., an Ohio nonprofit, except where otherwise indicated and for original U.S. governmental works. "The Green Bag" and the *GB* logo are our registered trademarks. Thanks to Jones Day; Mayer, Brown, Rowe & Maw LLP; and Gibson, Dunn & Crutcher LLP.

SUBSCRIPTIONS. Visit www.greenbag.org to subscribe, or use the form at the back of this issue. For back-issues, call Hein at (800) 828-7571. Claims must be filed within 3 months of the publication date (5/1/06) via subscriptions@greenbag.org. When you buy a subscription to the *Green Bag*, that is all you are buying – one copy of each issue of the journal for the duration of your order. Everything else we produce is either a gift that may or may not be delivered to some or all of our subscribers (e.g., a bobblehead) or a product that you may purchase separately (e.g., *Judge Dave & the Rainbow People*). In addition, to the extent that the *Green Bag* does occasionally and arbitrarily give away goodies, we do not give multiple goodies to anyone carrying more than one *Green Bag* subscription.

EDITORIAL POLICY. We publish authors' ideas in their own words. We fix typos and mistakes we notice, and do our best to produce beautiful text, consistently formatted. Our additional suggestions are just that.

AUTHOR NOTES. Gratitude to research assistants is nice.

Colleagues who make major contributions should share the byline; those who help in small ways should be recognized in something printed by Hallmark, not the *Green Bag*.

SUBMISSIONS. Send them to editors@greenbag.org. We welcome anything short, clear, interesting, and law-related – meaning no more than 5,000 words and zero to 50 footnotes (which count against your 5,000). Letters are welcome.

DEALING WITH AUTHORITY. Citations should be accurate and unobtrusive. Authors may use any form they like. We edit only to keep footnotes from looking like goulash.

COPYRIGHT. If a copyright notice appears in an author note, get permission to copy from the author. Otherwise, we hold the copyright (except for original U.S. government works). You may copy such items for classroom use, if you: (1) distribute copies at or below the cost of reproduction; (2) identify the author and the *Green Bag*; (3) affix proper copyright notice to each copy; and (4) tell us. All other copying requires advance written permission.

NOTE. This episode of the *Green Bag* is brought to you by the letter H, for Hamantashen, courtesy of our good friend Marsha Nagorsky's mother, Sandra Ferziger Grimm.

CORRESPONDENCE. The Green Bag, Inc., 6600 Barnaby Street NW, Washington DC 20015. Phone (703) 993-8049. Please visit our website at www.greenbag.org or email us at editors@greenbag.org. *GB*

Contents

Ex Ante

- 213 Correction: Misnominator
 213 Carolina Promotional Press

To the Bag

- 215 Judge McGowan & President Kennedy
Jodie McGowan Gardner
Joseph C. Zengerle
- 216 The Reason Why Scalia
Harold J. Spaeth
- 216 A Ghostly Reply
Thomas McIntyre Cooley
- 218 Equal Time for Hamantashen
Marsha Ferziger Nagorsky
- 219 World's Best Hamantashen
Sandy Ferziger Grimm
- 221 Scholars United Against Suppression of the Cleveland School
Arthur D. Austin, Edgar A. Hahn & Erik M. Jensen

Articles

- 223 Justice Jackson's Unpublished Opinion in *Ex parte Quirin*
Jack Goldsmith
- 232 Memorandum, *Ex parte Quirin*
Robert Jackson
- 243 Lesson 7: Overplaying
Steven Lubet

247 Is Constitution Day Constitutional?
Nelson Lund

253 Fustum Funnidos Tantaraboo
Rt. Hon. Sir Robert Megarry

263 Making the Bar Review Fun
Charles H. Whitebread

From the Bag

271 Pebbles From The Paths Behind

CHAPTER VI

Warner W. Gardner

Reviews

303 Formative Years

GEORGE W. LIEBMANN

THE COMMON LAW TRADITION: A COLLECTIVE

PORTRAIT OF FIVE LEGAL SCHOLARS

Edmund W. Kitch

309 Palsgraf

THE REST OF THE STORY

WILLIAM H. MANZ

THE PALSGRAF CASE: COURTS, LAW AND SOCIETY IN 1920s NEW YORK

Michael I. Krauss

Ex Post

317 Rooker Feldman

(1923–2006)

Samuel Bray