

THE
GREEN BAG

ALMANAC
OF USEFUL AND ENTERTAINING TIDBITS
FOR LAWYERS

&

READER
OF GOOD LEGAL WRITING FROM THE PAST YEAR
SELECTED BY THE LUMINARIES AND SAGES
ON OUR BOARD OF ADVISERS

2006

EDITED BY ROSS E. DAVIES



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TABLES OF CONTENTS

Preface.....	1
--------------	---

READER

Choosing Exemplars: An Introduction.....	3
Recommended Reading	7

★ EXEMPLARY LEGAL WRITING 2005 ★

OPINIONS

PAUL G. CASSELL	
<i>U.S. v. Angelos</i> , 345 F. Supp. 2d 1227 (D. Utah 2004)	114
ALEX KOZINSKI (dissenting)	
<i>In re Complaint of Judicial Misconduct</i> , 425 F.3d 1179 (9th Cir. 2005)	51
MARK P. PAINTER	
<i>Kohlbrand v. Ranieri</i> , 823 N.E.2d 76 (Ohio Ct. App. 2005)	256
JAMES M. ROSENBAUM	
<i>Rohwer v. Federal Cartridge Co.</i> , 2004 U.S. Dist. Lexis 23744 (D. Minn.).....	316
ANTONIN SCALIA (dissenting)	
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	376
DIANE P. WOOD	
<i>Gore v. Indiana University</i> , 416 F.3d 590 (7th Cir. 2005)	200

BOOKS

DAVID P. CURRIE	
<i>The Constitution in Congress: Democrats & Whigs, 1829-1861</i> (Chicago 2005)	78, 424
LINDA GREENHOUSE	
<i>Becoming Justice Blackmun</i> (Henry Holt 2005).....	36
SADAKAT KADRI	
<i>The Trial: A History, from Socrates to O.J. Simpson</i> (Random House 2005).....	261

SHORT ARTICLES

ELAINE E. BUCKLO	
<i>Putting Your Worst Foot Forward</i> , <i>Litigation</i> , Winter 2005	228
ALEX KOZINSKI	
<i>The Appearance of Propriety</i> , <i>Legal Affairs</i> , Jan./Feb. 2005.....	354
BURT NEUBORNE	
<i>Courting Trouble</i> , <i>The American Prospect</i> , Jan. 4, 2005	290
MARGARET TALBOT	
<i>Supreme Confidence</i> , <i>The New Yorker</i> , Mar. 28, 2005	394

GREEN BAG ALMANAC & READER 2006

LONG ARTICLES

ANONYMOUS

Jazz Has Got Copyright Law & that Ain't Good, 118 Harv. L. Rev. 1940 (2005)..... 203

BRYAN A. GARNER

Don't Know Much About Punctuation, 83 Tex. L. Rev. 1443 (2005) 152

BRIAN C. KALT

The Perfect Crime, 93 Georgetown L.J. 675 (2005)..... 359

JOHN H. LANGBEIN

Questioning the Trust Law Duty of Loyalty, 114 Yale L.J. 929 (2005)..... 431

BRIEFS AND MOTIONS

WALTER DELLINGER ET AL.

Amicus Brief in *Rumsfeld v. F.A.I.R.* 166

MARK A. PERRY ET AL.

Amicus Brief in *Van Orden v. Perry*..... 294

MISCELLANY

JON O. NEWMAN

It Can Only Get Better, 6 J. App. Prac. & Process 177 (2004)..... 164

CHARLES A. SULLIVAN

The Under-Theorized Asterisk Footnote, 93 Georgetown L.J. 1093 (2005)..... 89

ALMANAC

The Year 2005 in Law, by *John P. Elwood*.....13

The Year 2005 in Grammar, Usage & Writing, by *Bryan A. Garner*19

Your Fortune in a Tea Cup29

The Year 2006

January33

February.....75

March111

April161

May.....197

June.....225

July.....253

August287

September.....313

October351

November.....373

December.....421

TABLES OF CONTENTS

Correspondence from ...	
Bureau of Alcohol, Tobacco, Firearms and Explosives.....	73
William H. Rehnquist	485
Oddments	
<i>De Celis's Case</i>	429
Egg Nog, <i>by Harry Parker</i>	484
Endorsement of an Almanac, <i>by Joseph Story</i>	393
Endorsement of Hickey's Annotated Constitution, <i>by Roger B. Taney</i>	248
In Case of Scurvy, <i>by Sarah Livingston Jay</i>	234
Insignificance	249
Law Review Subscriptions, 1979-2005	260
Law Schools in 1840	428
Legalese	286
Maximization	312
Question No. 30	350
<i>Scott v. Reid</i> , 38 U.S. x (1839).....	314
Supreme Service.....	50
Supreme Sudoku	88
Old Favorites	
The Most Insignificant Justice, <i>by David P. Currie</i>	235
An Almanac of Liberty, <i>by William O. Douglas</i>	<i>passim</i>
The First TV Debate, <i>by John F. Kennedy & Richard M. Nixon</i>	324
The Law of the Jungle, <i>by Rudyard Kipling</i>	222
A Comment on Separation of Power, <i>by Philip B. Kurland</i>	304
Address in Honor of John Marshall, <i>by Morrison R. Waite</i>	193
Poetry	
Some Tea-Cup Lore in Rhyme	31
An Unsalacious Limerick, <i>by Francis A. Allen</i>	288
A Referee Case, <i>by Francis Dana</i>	311
The Lament of Littleton Coke, Esq., <i>by George Huddleston</i>	226
Morning Song in the Jungle, <i>by Rudyard Kipling</i>	419
The Six Carpenters' Case, <i>by Sir Frederick Pollock</i>	322
The Net of Law, <i>by James Jeffrey Roche</i>	374
UKL-RPTS, <i>by Westlaw</i>	422
Illustrations & Credits	486



GB

PREFACE

Here is why the world needs the *Green Bag Almanac and Reader*.

For centuries, almanacs were specialty calendars for people who worked out of doors — mostly farmers and sailors. They needed to know about the movements of the sun, moon, and stars, and almanacs packaged that information cheaply and neatly. Over time, almanac publishers expanded and diversified. First they built on their core product: in addition to predicting the future movements of the sun, moon, and stars, they began predicting the future of human events based on the movements of the sun, moon, and stars. Astrology. Second, they added other useful information — actuarial tables, government directories, home remedies, and so on — that made the almanac a useful resource for a wider audience. Finally, they transformed the almanac from a dry, technical reference tool into an entertaining and edifying periodical by commissioning or collecting parables, jokes, essays, poetry, pictures, puzzles, and the like.

By the middle of the 18th century, with the appearance of Benjamin Franklin's *Poor Richard's Almanac*, the almanac had become a distinct, attractive, enjoyable literary form. The 19th century witnessed the flowering of specialty almanacs for numerous professions and other groups, including the bar. Not every one featured all four categories of the highly evolved almanac — calendar, prognostication, information, and edification and entertainment — but they tended to have some content with color and character.

Almanacs have continued to thrive. On a recent afternoon Amazon.com listed 6,146 books with “almanac” in the title. But there is room for another — because modern publishers have leached the edification and entertainment out of most almanacs. (The reasons for this unfortunate development are beyond the scope of this short history.) The average modern almanac is a gray brick of data, efficiently and humorlessly organized for a narrow target audience of stock traders or politicians or lawyers or nurses. Functional tools all, but not likely to give the reader much entertainment value for the dollar.

The desiccation of the almanac is especially bad for lawyers, so much of whose work involves writing and so many of whom could use an hour of edifying and enjoyable reading once in a while. This almanac is designed to satisfy that need by presenting a useful and entertaining, perhaps even inspiring, monthly dose of our stock in trade — good legal reasoning, well-written — with moderate doses of the traditional almanac's calendar, prognostication, and information thrown in.

GREEN BAG ALMANAC & READER 2006

Calendar: The book is organized by month, with a month-at-a-glance calendar near the beginning of each section.

Prognostication: A survey of the case reporters — from *F. Supp.* to *N.E.2d* to *F.3d* to the *U.S. Reports* — leaves the reader with a strong sense that lawyers are more inclined to read tea leaves than to gaze at star charts. Therefore, we have based our prognostications on tea-leaf reading. We are still refining our special technology for this process, with an eye to customizing it for use on questions of law. So, for this year at least our forecasts should be taken with a grain of salt. For a short introduction to tea-leaf reading, see “Your Fortune in a Tea Cup,” beginning on page 29. The accomplished practitioner, however needs no such cumbersome aids to comprehension — the leaves, speaking silently but clearly, communicate directly to the reader.

Information: You will stumble on bits and pieces, scattered across these pages.

Edification and Entertainment: This is the meat of the matter, but there is no need to go on at length here because it is covered in “Choosing Exemplars: An Introduction,” beginning on the next page. Bryan Garner, a leading writer and speaker about law and language, encourages lawyers to read well in order to write better. “I suggest two kinds of texts,” he says, “those that illustrate good writing and those that explain how to do it.” This almanac fits in the first category.

By now you know that this is not a book to be read cover to cover. It should be sampled, two or three times a month. Thus its organization — a mishmash of some of the best legal writing of the past year, a few classic works worth re-reading, a few poems, kitschy games, and other oddments, and a collection of prognostications whose substantive value correlates directly with the credence you are willing to give to the process by which we arrived at them. Enjoy.

• • • •

The *Green Bag* thanks its 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 support of the *Green Bag*; Susan Davies, who, not occasionally, but systematically and continuously, has read proofs of *Green Bag* publications of every sort, to improve the work as a whole by criticism, and to enrich it by additions; Sandi Bowen, Clare Cushman, Russell Evans, and Amy Steacy; and especially Kathy Smith.

Ross E. Davies
December 25, 2005

CHOOSING EXEMPLARS

AN INTRODUCTION

Last fall, when we started this project, we sent a welcome letter to the members of our Board of Advisers. It outlined our plan. We've managed to follow it pretty closely, although the addition of the "Almanac" portions of the book more than offset the subtraction of the proposed introductory essays (described below), pushing the page count a little bit higher than we had anticipated. Which makes that welcome letter, reproduced after these remarks, a fairly fair description of how the "Reader" portion of this book came about.

Before turning to the letter, however, a few words about the invitation of advisers and the selection of the works featured in this volume.

We invited people to join the Board of Advisers on the basis of three theories. First, "it takes one to know one" — people who are good writers will recognize their peers. Second, "birds of a feather flock together" — people who associate themselves, by collaboration, by citation, by recommendation, with their fellow good writers have already demonstrated the good taste sought under the first theory. And third, "good stylists have substance" — people have to know the law (that is, be good lawyers or good observers of the law) in order to know whether they are looking at a good expression of it. As a result, it should come as no surprise that several of our advisers are also authors of exemplars appearing in this volume or included in our list of "Recommended Reading."¹ 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)² or its state-law equivalents — that none of the advisers whose works are published in this volume voted for themselves.

Our selection process was not your typical invitation to competitive self-promotion by authors and their publishers. 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);

¹ See page 7.

² "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

GREEN BAG ALMANAC & READER 2006

(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.

Our goals are to provide you with some reading pleasure, a few role models, and some reassurance that the nasty things some people say about legal writing are not entirely accurate.

• • • •

WELCOME LETTER TO ADVISERS, AUTUMN 2004

Dear Adviser:

Thank you very much for agreeing to exercise your good taste and good judgment on behalf of the *Green Bag's* annual book of good legal writing. I think you will enjoy participating in what should be a useful and entertaining enterprise.

In the broadest terms, the *Green Bag's* plan is to publish — sometime in December 2005, and annually thereafter — a roughly 300-page collection of examples of good legal writing that appeared in print sometime between the two preceding Halloweens. (So, the December 2005 volume will feature works published between October 31, 2004, and October 31, 2005, with some flexibility, as described below.)

I have attached the following: (1) a short description of the nomination and winnowing process we will be using to select the works that will appear in the book, and (2) a list of your fellow participants as it stands today. I expect that the final list for the 2005 edition will contain about 125 names. Before you turn to those materials, permit me to offer a few suggestions:

- Please take this project seriously, but not too seriously. Don't feel obliged to be constantly on high alert for good legal writing. Just let us know when something catches your eye.
- Invest as lightly or heavily as you see fit. Bear in mind that good nominations during the course of the year are as important as intelligent voting in the categories of your choice at the end of the process, and that no one is expected to invest too heavily in any aspect of the project. Whatever you can do will be useful and appreciated.
- Do not worry too much about publication dates. Nominate things when it makes sense to do so. Many magazines release issues long before their stated publication dates, and book publishers engage in similar behavior. Law reviews, on the other hand, have been known to release issues months and even years late. For judges, it may be inappropriate in some instances to nominate a brief or other document until the litigation of which it is a part has ended. As one of your colleagues in this project put it, "the best approach is probably to ask your nominators to use their sound discretion. Obviously

CHOOSING EXEMPLARS

the cover date could not possibly be an absolute — some articles would never be available for nomination. And trying to use the actual-issue date would be a hassle, if you were serious about ‘enforcing’ it. I wouldn't think the sort of folks you are inviting would be silly about this.” Please use your sound discretion.

- This is supposed to be an interesting and enjoyable exercise for everyone involved. If at any time there is anything about this business that overburdens or otherwise annoys you, please let me know.

And one request:

- If you think of a good title for the book, please let me know. To claim that we are publishing the “Best of” anything would be to claim too much. On the other hand a book with a title such as “Some Really Good Writing 2005” would trivialize a worthy publication.

We will, by the way, be selling this book. In the unlikely event that it makes money, the *Green Bag* will not share. We will spend the proceeds on other useful and entertaining *Green Bag* projects.

If you are called upon to attach a label to your role, I suggest that you say that you are a member of the Board of Advisers to the *Green Bag*'s good legal writing project. That is how we plan to describe you in the book.

I am looking forward to working with you.

Very truly yours,

Ross E. Davies

GREEN BAG BOOK OF GOOD LEGAL WRITING — OUTLINE OF THE SELECTION PROCESS

Step 1 — Read legal writing as you always have, and keep an eye out for short works and excerpts of longer works that belong in a collection of good legal writing. Do not worry about categorizing or justifying your selections; what's good is good. When you find a worthy morsel, call Ross Davies (703-993-8049), or send a copy or citation via email (rdavies@greenbag.org), fax (703-993-8124), or mail (6600 Barnaby Street NW, Washington, DC 20015).

“Good legal writing” should be read broadly for our purposes. “Good” means whatever you, the other advisers, and the volume editor (for now, Ross Davies) think it does. As one experienced person 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.” We 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.

GREEN BAG ALMANAC & READER 2006

Step 2 — Winnowing by individual advisers: On November 1 or thereabouts, we will send to each adviser a set of only the works that he or she has brought to our attention during the preceding year. Each adviser will be asked to select a personal favorite or two from that small set.

Step 3 — Voting by category from advisers' favorites: We will organize all of the advisers' favorites into categories once we know what we are working with, and then send a complete set to every adviser. Advisers' names will not be attached to the works they nominate. In other words, everything will be anonymized. You will be voting without knowing who nominated a piece. Similarly, your rankings will be secret. No one but the volume editor will ever see individual advisers' rankings or know who voted in which categories.

Advisers are free to vote in as many categories — or as few — as they desire. That is, although there may be one hundred or more nominated works in total, you may select the types of writing — *e.g.*, judicial opinions, editorials, law review articles — you want to evaluate. We may ask you to broaden your horizons slightly in the categories you review to the extent your fellow participants tend to choose the same categories.

Step 4 — Compilation: The volume editor will tally the rankings and compile the book 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 will be listed in the back in an honorable mention section. Thus, everyone will get at least their 2¢ in.

Step 5 — Introduction: If one of your nominees ends up in the book, you may write a short introduction explaining why that work is special, if you like. Or, if that idea does not appeal to you, the volume editor will write an introduction. [Editor's note: We ditched that idea.]

Step 6 — Start all over again for the 2006 edition.



A lawyer without history or literature
is a mechanic, a mere working mason;
if he possesses some knowledge of
these, he may venture to call himself an
architect.

Sir Walter Scott

RECOMMENDED READING

One member of our Board of Advisers, expressing common sentiments about both the quality of the nominees and the substantial time involved in serving on the board, wrote, “I immensely enjoyed reviewing the nominated writings. I can’t remember the last time I spent an entire day with such interesting and well-spoken folks as the group of authors you assembled.” And another said, “There’s so much garbage written, that we don’t notice that there is some very good writing going on out there, too. I’ve been really impressed with a lot of the stuff. I’m glad I’m not the one who has to pick.” But she was wrong. She, like most of our advisers,¹ did pick — by casting a ballot on which she voted for what she thought were the best bits of stuff.

We have tallied the ballots and printed most of the top vote-getters in this book.² 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, as the comments quoted above suggest. We list them here. Congratulations to all.

• • • •

OPINIONS & ORDERS

Danny Boggs, *U.S. v. Ostrander*, 411 F.3d 684 (6th Cir. 2005)

Stephen Breyer, *U.S. v. Booker*, 543 U.S. 220 (2005)

Laurie Smith Camp, *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139 (D. Neb. 2005)

J. Pariente Cantero, *Clines v. State*, 912 So.2d 550 (Fla. 2005)

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Karen Nelson Moore (dissenting in part), *Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005)

¹ A few advisers participated only in either the nominating or the balloting, but the greater part participated in both.

² Alas, some publishers want consideration for reproduction that exceeds the *Green Bag*’s modest resources, and others are simply beyond our reach. For the most part it didn’t matter, but it was a high demand for money, not a low supply of votes, that precluded our republication of Lawrence M. Friedman’s *A Final Word*, and our inability to get the attention of the publisher that kept Jeffrey Rosen’s *Rehnquist the Great?* out of this book.

GREEN BAG ALMANAC & READER 2006

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- Myron T. Steele, *Doe v. Cahill*, 884 A.2d 451 (Del. 2005)
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- ★ David P. Currie, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861* (Chicago 2005)
- ★ Linda Greenhouse, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (Henry Holt 2005)
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GREEN BAG ALMANAC & READER 2006

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