

# GREEN BAG READER

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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

2008

EDITED BY ROSS E. DAVIES



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2007

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Every post is honorable in which  
 a man can serve his country.

*George Washington (1775)*

# PREFACE

This is the third *Green Bag Almanac & Reader*. To learn why the world needs our almanac, please read the “Preface” to our first (2006) edition. It is available on our web site ([www.greenbag.org](http://www.greenbag.org)), in the “Almanac & Reader” section.

## WHERE ARE THE BLOGS?

I am often asked by bloggers, “Why doesn’t your *Almanac* have a category for blogs?” My standard answer comes in two parts.

“First,” I say (cursed by experience with the near certainty that I will be called upon to give the second part of my answer), “we encourage our advisers to nominate good legal writing from any source, including blogs. Alas, so far no one has nominated anything from a blog. If we get any good ones, we will put them where they belong — in ‘short articles’ if they are short, in ‘long articles’ if they are long, and in ‘miscellany’ if they are miscellaneous. If we get a critical mass<sup>1</sup> of distinctively bloggish nominations, we might set up a new category ...”

And then the interruption, which is invariably along these lines: “But you obviously don’t have advisers who read blogs.” Implying that if we had a more sophisticated, cosmopolitan, cutting-edge board of advisers the *Almanac* would be festooned with strings of glowing pearls harvested from the legal blogosphere.

This reply reflects an all-too-common — but by no means universal — operating procedure in the blogosphere: The querulous blogger has made his or her factual claim (here, the absence of blog-readers from our board of advisers) without bothering to do any research to test its accuracy. In this case, perhaps a quick look at our list of advisers. It is easy to find on the back cover of the *Almanac*, and on our web site. It features several internet celebrities (including pillars of a few of the most prominent law blogs), along with many other sages and luminaries who routinely read and contribute to blogs. Which brings me to the second part of my answer.

“Second,” I resignedly add (having been depressingly confirmed in my earlier near certainty), “our board includes respected bloggers and inveterate blog-readers. I suppose the fact that they aren’t sending us any blog posts might suggest that

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<sup>1</sup> See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 452 (2002) (Kennedy, J., concurring).

while blogs perform many useful functions — including the sharing of good (and bad) legal writing found elsewhere — they are not yet near the top of the heap when it comes to generating original, well-researched, well-thought-out, and eloquent legal writing. Perhaps the wisdom of crowds is not matched by their muse.<sup>2</sup> But my suppositions are often wrong, and I would be happy to learn that this is one of that sort.”

Bring it on.

### OUR BOARD, THEIR PICKS

Our selection process for “Exemplary Legal Writing of 2007” 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 ex-

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<sup>2</sup> Why, for example, did James Surowiecki write *The Wisdom of Crowds* (2004)? Would the book (which is quite good, by the way) have been better if it had been written by the many diverse and independent members of a decentralized group?



## PREFACE

perienced 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 one hundred or more 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 2009 *Almanac*.

Despite the substantial work involved in this business, most of our advisers seem to enjoy participating. Those who don’t enjoy it appear to view this business as some sort of professional duty. Either way, we’re glad to have them. But these are people with day jobs, other substantial commitments, and minimum sleep requirements. So not everyone can pitch in every year. Being listed as an adviser implies that a body has done some advising, however, and it just doesn’t seem right to burden someone with some small slice of the collective responsibility (or credit, if there is any) for a project in which they did not participate, at least this

time around. So the list of board members published on the inside and the outside of this *Almanac* has changed since last year and will, we expect, continue to change from year to year. The fact that people come and go from the board does not necessarily indicate anything about their ongoing commitment to the *Almanac*, other than when they have had the time and inclination to participate. Of course, we hope they always will.

### 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. 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. To those ends we have made a few small changes to the *Almanac* for this year. We welcome suggestions for future additions and subtractions.

Prognostication postponed, calendars cluttered: We are giving up on prognostication for the time being. Instead, we are using the *Almanac's* traditional monthly calendars to impart a few hundred extra morsels of interesting information.

Cry for help #1: Doubtless you will notice that we have come up with a good presidential campaign tidbit for almost every day of the year. We would feel better if we had covered every day, and if every tidbit were equally and obviously good. Having failed to complete this project, we seek your aid. Please help us fill the empty dates and upgrade the rest. Send suggestions to [editors@greenbag.org](mailto:editors@greenbag.org).

Maybe someday we will come back to the tea leaves, but for now this is more fun.

Almanac-within-an-almanac: In bygone days, the almanac was an essential resource for the day-to-day operation of most American households. And so it should come as no surprise that enterprising politicians sought to draw to themselves some of the daily attention directed to the almanac. We have a complete sample in our own *Almanac*, beginning on page 145: *The Harrison Almanac* (1841). We had hoped to also bring you the *Jackson Almanac* (1836), but the price on eBay was too high.

## PREFACE

Cry for help #2: If you have the *Jackson Almanac* (or any other 19th-century presidential almanac), and you would permit reprinting by the *Green Bag*, please do let us know.

New favorites by *Green Bag* authors old and new: From the beginning, our readers have been happy with Bryan Garner's review of the year in grammar, usage, and writing (see page 11), and with John Elwood's review of the year in law (page 29). Last year Tony Mauro wrote his first review of nuggets from the past term of the Supreme Court, and he, like Garner and Elwood, is back again this year (page 40). All three of these authors are fit and trim and in the prime of life, and filled with love of law and language. It is thus with some justifiable optimism that we look forward to many more years of their distinctively useful and entertaining contributions to the *Almanac*.

This year we invited a few other fine people to contribute original works. Norman Dorsen provided us with a series of short essays — profiles of the members of the U.S. Supreme Court, circa 1958 — with which to introduce the twelve months of the *Almanac*. Combined with his introductory essay and his concluding remarks (pages 47 & 585), Dorsen's vignettes make an engaging memoir of his year as a law clerk to Justice John Marshall Harlan. Paul Edelman and Tracey George published a fascinating study of Professor Cass Sunstein and collaboration in legal scholarship in the autumn 2007 issue of the *Green Bag* ("Six Degrees of Cass Sunstein"). Edelman and George have extended that work for the *Almanac* (page 473), substantially increasing the likelihood that you will be able to determine your own Sunstein number.

### AND HOMER JUST KEEPS ON NODDING ...

... like a bobblehead. We continue to struggle, and fail, to produce a flawless big fat book in a hurry. Here is a list of the errors we are sure we made in the 2007 *Almanac*, with apologies for the re-mangled name:

Page 4: "Our advisers makes some good points" should be "Our advisers make some good points."

Page 7: Bob Berring extolled the wisdom of Meredith Wilson, not "Mary Willson." See Mary Whisner, *Almanac Errata Errata*, 10 *Green Bag* 2d 277 (2007). Professor Berring tactfully asks, "Could this lead to an infinite series of corrections, like some-

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thing drawn from M.C. Escher or perhaps based on Steven Colbert's portrait of Steven Colbert standing in front of a portrait of Steven Colbert ... ?”

Page 45: “Leiv Blad” should not have been followed by a comma.

Page 58: As John Van Voorhis gently pointed out to us, “reigned in the formalism” should be “reined in the formalism.”

Page 130: “the words of his own Counsel” should be followed by a period.

Page 174: Professor Suzanna Sherry does a better job than we could of explaining our error here, and its significance: “I am enjoying my 2006 Almanac. But I have found something that I think is a mistake ... . On page 174, you purport to give the text of old Rule 14. But you miss most of Rule 14(a), providing only the last sentence of a very long and thoroughly confusing multi-sentence paragraph. The new Rule 14 is actually one of the more justifiable of the changes because it breaks up that long paragraph into subsections — whenever I teach Rule 14, I tell my students to number the sentences in Rule 14(a) so we can talk about them individually; now I won't have to do that. But in any case, comparing what you have as the old Rule 14 to the new Rule 14 certainly makes it look as if the restyling is significantly altering the substance, which it's not.”

Page 276: The first apostrophe in Sandra Bowen's poem is not smart. It should be.

Page 531: And again from Mr. Van Voorhis, the first “many” on this page should be “man.”

We will keep trying.



Finally, the *Green Bag* nods — intentionally this time — to you, our readers. Your continuing kind remarks about the *Almanac* are inspiring. A little love goes a long way. 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 support of the *Green Bag*; Susan Davies, the *Bag*'s ministering angel; Femi Cadmus, Amy Flanagan, Allison Hayward, Ee-Ing Ong, Suzanna Sherry, John Van Voorhis, and Mary Whisner; and especially Brenda Haseman and Christine Kymn.

Ross E. Davies  
December 25, 2007

# 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

Carlos T. Bea, *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007)

Stephen Breyer, *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007) (dissent)

Ruth Bader Ginsburg, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (dissent)

★ Ruth Bader Ginsburg, *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) (dissent)

★ Daniel L. Harris, *Doherty v. Wizner*, 210 Or. App. 315 (2006)

Cornelia Kennedy, *Connection Distributing Co. v. Keisler*, 2007 U.S. App. Lexis 24734 (6th Cir.)

Samuel B. Kent, *BNSF Railway Co. v. United Transportation Union*, 462 F. Supp. 2d 746 (S.D. Tex. 2006)

Mark P. Painter, *Pupco Property Mgmt. v. Cincinnati*, 170 Ohio App. 3d 641 (2007)

★ Richard A. Posner, *Gilles v. Blanchard*, 477 F.3d 466 (7th Cir. 2007)

Richard A. Posner, *United States v. Chambers*, 473 F.3d 724 (7th Cir. 2007)

Reena Raggi, *Policano v. Herbert*, 453 F.3d 79 (2d Cir. 2006) (dissent)

John G. Roberts, Jr., *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007) (dissent)

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<sup>1</sup> Some publishers require consideration for reproduction that exceeds the *Green Bag's* modest resources. For the most part it didn't matter, but it was a publisher's high demand for money, not a low supply of votes, that precluded our republication of short articles by Anthony Lewis and Adam Liptak. Interestingly, the publisher agreed to waive its regular republication fee, but insisted on charging its regular "service fee." Unfortunately, that publisher's "service fee" is higher (in our limited experience) than most publishers' republication fees, and most publishers do not impose a separate "service fee" at all. One does wonder what would happen to philanthropy if small, impoverished non-profits were generally required to pay large "service fees" in order to receive small gifts.

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- ★ Antonin Scalia, *Zuni Public School District No. 89 v. Department of Education*, 127 S. Ct. 1534 (2007) (dissent)
- Bruce M. Selya, *United States v. Sampson*, 486 F. 3d 13 (1st Cir. 2007)
- Bruce M. Selya, *United States v. Smith*, 2007 US App Lexis 19819 (1st Cir.) (dissent)
- Bruce M. Selya, *Torres v. Puerto Rico*, 485 F.3d 5 (1st Cir. 2007)
- ★ Laurence H. Silberman, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007)
- ★ David H. Souter, *Bowles v. Russell*, 127 S. Ct. 2360 (2007) (dissent)
- David H. Souter, *Lopez v. Gonzales*, 127 S. Ct. 625 (2006)
- J. Harvie Wilkinson III, *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348 (4th Cir. 2006)

## BOOKS

(including articles more than 25,000 words long)

- Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267 (2007)
- Robert A. Ferguson, *The Trial in American Life* (Chicago 2007)
- ★ Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (Norton 2007)
- ★ Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (Penguin 2007)
- John Grisham, *The Innocent Man: Murder and Injustice in a Small Town* (Doubleday 2006)
- Will Nathan, *Book of Business* (Philadelphian 2006)
- ★ Stuart Taylor, Jr. & KC Johnson, *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case* (Thomas Dunne 2007)
- Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (Doubleday 2007)
- ★ G. Edward White, *Oliver Wendell Holmes, Jr.* (Oxford 2006)

## SHORT ARTICLES

- Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 Yale L.J. 667 (2006)

## RECOMMENDED READING

- Richard Brust, *Setting Precedent in Two Wars: How Justice Stevens turned 60-year-old dissents into major rulings in the war on terrorism*, 93 ABA J. 48 (Sept. 2007)
- Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, N.Y. Times (Jan. 29, 2007)
- ★ Walter Dellinger, *Everything Conservatives Should Abhor*, Slate (June 29, 2007)
- Linda Greenhouse, *New Focus on the Effects of Life Tenure*, N.Y. Times (Sept. 10, 2007)
- ★ Dennis Jacobs, *The Secret Life of Judges*, 75 Fordham L. Rev. 2855 (2007)
- Anthony Lewis, *Not All Sources Are Equal*, N.Y. Times (Mar. 7, 2007)
- Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. Times (Mar. 19, 2007)
- James McGrath Morris, *Bloggers' Big News Needs Scaling Down*, Legal Times (Feb. 28, 2007)
- Matt Pulle, *Split Decision*, Dallas Observer (Jan. 11, 2007)
- ★ Kermit Roosevelt, *Originalism and the Living Constitution: Reconciliation*, ACS Issue Brief (July 2007), [www.acslaw.org](http://www.acslaw.org)
- Cameron Stracher, *Meet the Clients*, Wall St. J. (Jan. 26, 2007)
- ★ Cass R. Sunstein, *The Myth of the Balanced Court*, American Prospect (Sept. 2007)

## LONG ARTICLES

- Bruce Ackerman, *Interpreting the Women's Movement*, 94 Cal. L. Rev. 1421 (2006)
- Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 Buff. L. Rev. 717 (2006)
- Elizabeth Garrett, *The Promise and Perils of Hybrid Democracy*, 59 Okla. L. Rev. 227 (2006)
- Edward Hartnett, *Against (Mere) Restyling*, 82 Notre Dame L. Rev. 155 (2006)
- Dawn E. Johnsen, *All the President's Lawyers: How to Avoid Another "Torture Opinion" Debacle*, ACS Issue Brief (July 2007), [www.acslaw.org](http://www.acslaw.org)
- ★ Luther T. Munford, *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare*, 12 Harv. Negot. L. Rev. 377 (2007)

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- ★ Jeffrey Rosen, *The Dissenter*, N.Y. Times Magazine (Sept. 23, 2007)
- Jeffrey Rosen, *Roberts's Rules*, Atlantic Monthly, Jan./Feb. 2007
- Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 Hofstra L. Rev. 1337 (2006)
- Frederick Schauer, *Foreword: The Court's Agenda – and the Nation's*, 120 Harv. L. Rev. 5 (2006)
- Jeffrey Toobin, *An Unsolved Killing: What does the firing of a U.S. Attorney have to do with a murder case?*, New Yorker (Aug. 6, 2007)
- Jeffrey Toobin, *Killing Habeas Corpus: Arlen Specter's about-face*, New Yorker (Dec. 4, 2006)
- Christina E. Wells, *Katrina and the Rhetoric of Federalism*, 26 Miss. C. L. Rev. 127 (2006)
- ★ John Fabian Witt, *Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)*, 120 Harv. L. Rev. 754 (2007)

## MISCELLANY

- Gary M. Farmer, *Funny Cide Ventures, LLC v. Miami Herald Publishing Co.*, 955 So.2d 1241 (Fla. App. 2007)
- ★ Lisa Heinzerling et al., *Reply Brief for Petitioners in Massachusetts v. EPA*, 127 S. Ct. 1438 (2007)
- ★ Roger W. Hughes, *Legalese in the Age of IM (Instant Messaging)*, 8 Appellate Advocate 14 (Summer 2006)
- Shannon Minter et al., *Opening Brief in In re Marriage Cases*, Jud. Council Coord. Proc. No. 4365 (Cal. Apr. 2, 2007)
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