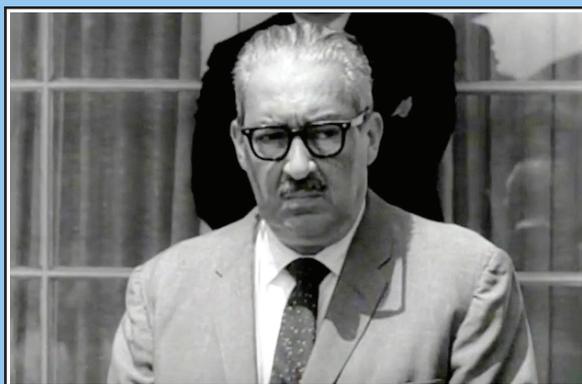


This is the “Material Version” of the Green Bag’s

2017

ALMANAC & READER

of useful and entertaining tidbits for lawyers
and exemplary legal writing from the year just passed



featuring a commemorative flipbook edition* of
**Lyndon Johnson’s 1967 announcement of
Thurgood Marshall’s nomination to the
Supreme Court of the United States**

as well as our perennially popular annual reviews

The Year 2016 in Grammar, Language, and Writing

Bryan A. Garner

The Year in Law

Gregory F. Jacob, Rakesh Kilaru, Kristi Gallegos & Brian Quinn

A Year in the Life of the Supreme Court

Tony Mauro

A Year of Lowering the Bar

M. Kevin Underhill

The Year in Legal Information/Legal Tech

Wendy Everette, Catherine Gellis, Fatima Nadine Khan,
Eli Mattern & Whitney Merrill

(see back cover for details and legal writing honorees)

THE GREEN BAG
ALMANAC & READER
2017

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THE GREEN BAG
ALMANAC

OF USEFUL AND ENTERTAINING
TIDBITS FOR LAWYERS

&
READER

OF EXEMPLARY LEGAL WRITING
FROM THE YEAR JUST PASSED

2017

EDITED BY
ROSS E. DAVIES
&
CATTLEYA M. CONCEPCION

Excerpt from UCLA Film & Television Archive's
"Hearst Metrotone News Collection"

THURGOOD MARSHALL NOMINATED
TO SUPREME COURT
Washington, D.C., 6/13/1967

Lyndon B. Johnson nominates African American judge
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First two-version edition.

There are two versions of the 2017 *Almanac & Reader*: the *Material Version* (it features videos in an ink-on-paper format, aka flipbooks), and the *Ethereal Version* (it features videos in an electrons-on-internet format, aka URLs). Each eligible *Green Bag* subscriber should receive one version or the other, but maybe not both.

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We'd hoped to honor a third article, but the author, a professor at a prominent Connecticut law school, never responded to our polite (we hope) and persistent (we know) pursuit of permission to republish. We view his non-response and the non-response by the Delaware lawyer (see above) as (a) denials of permission and (b) healthy reminders of the *Green Bag's* insignificance in the eyes of at least some (and maybe more than some) VIP lawyers.

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¹ From the "Hearst Metrotone News Collection" at the UCLA Film & Television Archive.

PREFACE

SELECTING SELECTORS AND FLIPPING BOOKS

Ross E. Davies

This is the 12th *Green Bag Almanac & Reader*. For an explanation of why we at the *Green Bag* think the world is a better place with the *Almanac & Reader* than without it, read the “Preface” to the 2006 edition. It is available on our website (www.greenbag.org).

Having kept the series afloat for a dozen years, we figure the *Almanac & Reader* is here for the long haul, if not forever. That is why we’ve added it to our basic *Green Bag* subscription, starting with this edition.

I. EXEMPLARY LEGAL WRITING

Our Tinkering Continues

Last year (and the first month of this year) was supposed to be our second round of conducting an open, two-step process for picking our “exemplary legal writing” honorees.¹

First, we invited everyone to nominate works throughout 2016 in fields in which they were active: judges could nominate judicial opinions; supreme-court litigators could nominate briefs filed in state supreme courts; law review authors could nominate law review articles; tweeters could nominate tweets.

Second, anyone who nominated in any category could vote at the end of the year (in January 2017, actually) in every category.

The idea was to (1) harness the expertise of practicing specialists to build a ballot of credibly

¹ See *Preface*, 2016 *Green Bag Alm.* 1-5.

Excerpt from UCLA Film & Television Archive's
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exemplary nominees in each category, and then (2) rely on the generalist sensibilities of a wide range of thoughtful reader-nominators to identify those works that impressed both non-specialists and specialists.

Unfortunately, it did not work out very well. Our best guess is that we were victims of our own success. In recent years, some legal writers have begun to value recognition in the *Green Bag Almanac & Reader*. We had some inkling of this pleasing trend, but developments during the 2016 nomination process really brought it home. Here are a few examples:

In 2016, we received more nominations of briefs than ever. And for the first time, every single one was nominated by a lawyer on the brief. A few admirably forthright nominators even volunteered that they were nominating their own best briefs, rather than the best briefs they had seen. At least one added “nominated for Green Bag award for excellence in legal writing” to his online c.v. after nominating his own brief. (Don’t bother looking for it. It’s not there anymore.)

In 2016, we received, as always, a healthy number of nominations of judicial opinions. For the first time, however, most opinions were nominated by judges sitting on the same courts as the authors of the nominated works.

In 2016, we received plenty of nominations of law review articles too. For the first time, most — and in this category it was a vast majority — had a hometown flavor. More than 80% of nominators nominated works written by scholars (or published in law reviews) based in the nominators’ home institutions. Tweeters self-nominated at about the same rate.

There is nothing wrong with what might be called the parochial promotional pursuit of prizes. Indeed, that approach may well be the norm. There are quite a few famous prizes and awards

PREFACE

that seem to work pretty much that way. And then there are the habits of mind developed by players of the *U.S. News & World Report* game.

But we at the *Green Bag* were thinking of our system differently. We imagined experts who read widely and wrote seriously in their day jobs — judges, litigators, law professors, and so on — applying their wisdom and experience to identify and honor the best legal writing they found anywhere. We did not imagine them focusing on putting their own work (or the work of their closest associates) in the spotlight.

We could be wrong. Maybe the connections between nominators and nominations are coincidences. Or maybe the experts — more worldly than the naïfs at the *Green Bag* — know that “read global, nominate local” is the best way to operate in this context. Or maybe, in the real world, experts don’t have time to read outside their own circles. Or maybe something else.

Wrong or right, though, we felt we had failed at the nominations stage of our process in 2016. So, we called off the vote and set to tinkering again. And we were fortunate to have a ready fix at our fingertips.

*Our New New System for
Last Year — 2016*

The fix is a black box.

First, some background. Every year we get unsolicited (but welcome) advice from a variety of first-rate legal writers. Most (but not all) are *Green Bag* authors or subscribers or advisers. In the course of our cordial (and often constructively critical) back-and-forths with these folks, they opine from time to time about what we ought to publish in the *Almanac & Reader*. They ignore our limits on who is allowed to nominate what sorts of works, probably because their main interest is simply the exchange of ideas about interesting



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writing, not the placement of particular pieces in a particular book. In the past, we've read and enjoyed and learned from their comments, and then, with regret, ignored them when the time came to run our process for picking exemplary legal writing to honor in the *Almanac & Reader*. We had a process, and we stuck to it.

Now — and you can probably guess where this is headed — a bit more about our new black box.

For this *Almanac & Reader*, we reversed ourselves. We abandoned the process we had planned to use and instead adopted our correspondents' cranky (and thoughtful, and good-spirited) freelancing as our process.

We enlisted a bunch of them — more than a dozen, less than a hundred — to be the voters for our 2016 “Exemplary Legal Writing” honors. We are not going to disclose the name of any voter to you or to anyone else (including other voters), ever. We are hoping that a combination of electoral anonymity and editorial resistance to parochial promotion might foster impartiality about exemplariness. You will just have to rely on the *Green Bag's* willingness and ability to build a good ballot, select a good electorate, and administer the vote honestly.

We sent each voter a ballot listing some of our correspondents' jawboning suggestions and some non-parochial nominees from the nomination process we'd planned to use. They did their reading and their voting. Then we did our tallying. We think the results — most of which appear in this *Almanac & Reader* — are, well, exemplary.

*Our New New System for
This Year — 2017*

We like our new system. To us, it feels pure (or at least not yet noticeably corrupt) and sturdy (or at least hard to corrupt) and fair. But then, we feel that we are honest and diligent and fair-

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minded, and that the voters on our secret panel are too. We might be wrong about some of that. Our readers will, of course, salt to taste, and we will carry on as best we can.

So, we will select exemplary legal writing from 2017 for publication in the 2018 *Almanac & Reader* using pretty much the same system we ended up using for this one. We are recruiting some knowledgeable, thoughtful, good-spirited, and sometimes nicely cranky people to do the choosing. They will make their choices from a ballot provided by the *Green Bag*.

And that brings us to the one big change: nominations. For 2017 — meaning starting now — anyone can nominate anything published in 2017 in any of the categories we intend to honor in the 2018 *Almanac & Reader*. To nominate something (this is the only way to do it), send an email to editors@greenbag.org with this information in the body of the message:

- full name(s) of the author(s)
- full title of the work
- full citation or a working hyperlink
- full name of the nominator
- working email address for the nominator

If you send us less than all of that, then you are giving us a research assignment that we will not do. Instead we will delete your message.

And here are the categories for 2017:

- judicial opinions
- briefs filed in a state or federal appellate court
- law review articles published in 1992
- tweets
- regulations issued by a state or federal agency

Our respectable authorities (whose number may grow) will continue to recommend good books. Let the nominating begin!

Excerpt from UCLA Film & Television Archive's
"Hearst Metrostone News Collection"

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II. THE FLIPBOOKS

We are publishing two versions of this, the 2017 *Almanac & Reader*. One version — the *Material Version* — features videos in an ink-on-paper format (aka flipbooks). The other — the *Ethereal Version* — features videos in an electrons-on-internet format (aka URLs). Please adjust your outlook to match the version you are viewing.

If you page through the *Material Version*, you will see that it is about 50% pictures. If you do your paging quickly enough, you will see that the pictures move. How does that work? No idea. Here at the *Green Bag* we do not know how flipbooks work their magic, but we do know that they are fun. And that's enough for us, because we believe enjoyable content improves the odds that you will keep an *Almanac & Reader* long enough, and open it often enough, to get through much of the good, meaty material inside.

Similarly, if you copy-and-paste or type the URLs from the *Ethereal Version* into your web browser you will see on your computer screen the same moving pictures that are in the *Material Version*. But you won't have to do any work to make the moving happen — no flipping of pages for you! Viewing videos on the web can be great fun too. But, once those URLs are in your browser, you will be able to have that kind of fun without holding onto the *Almanac & Reader*, so I guess we will just have to hope that you'll find other reasons to come back for more of the good, meaty material inside.

Let's return to the flipbooks for a moment. Why do they still exist at all? Why are they still popular? (If you doubt their popularity, search for "flipbook" at amazon.com and browse the 10,208 — the count as I write this — products that pop



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PREFACE

up.) Shouldn't flipbooks have been superseded a long time ago by ever-cheaper and ever-easier video recording (think smartphones) and playback (think YouTube)? But they persist. YouTube, for example, is well-stocked with, of all things, digital video recordings of old-fashioned, ink-on-paper flipbooks being flipped by old-fashioned, flesh-and-bone human hands. It's weird. Or maybe it isn't.

We are corporeal beings, connected to the physical world in ways that are sometimes hard to define and explain, and yet, for some folks in some contexts, easy to dismiss. Maybe they shouldn't. Consider this episode from the *Green Bag's* own ongoing engagement with worlds both physical and digital:

The Case of the Environmentally Friendly Bobblehead

Several years ago, I was engaged in a friendly email back-and-forth with a *Green Bag* subscriber. He was arguing that we should abandon ink-on-paper and go pure-digital. He gave two excellent — and, I believe, correct — reasons: (1) it would reduce the *Green Bag's* production costs and (2) it would reduce our environmental impact. Manufacturing ink and paper, processing them, moving them around, and returning them to the earth all cause wear and tear on our home planet, and all cost money. I made a few countervailing arguments in favor of ink-on-paper (I won't waste ink and paper on them here), which he rejected as insufficient to overcome the moral imperative to reduce the *Green Bag's* environmental impact.²

² Being a smart aleck, I also suggested that we will know when the best legal minds have concluded that ink-on-paper publishing is truly a bad idea because the great courts and best law schools will stop doing it, and he will stop placing his own work in ink-on-paper publications. That got me a smiley.

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As our cordial chitchat was progressing, the *Green Bag* was producing a bobblehead doll of Justice Ruth Bader Ginsburg.³ When the Justice Ginsburg bobbleheads arrived, Cattleya Concepcion made a video of the bobbling doll for the *Green Bag* and we posted it on the web.⁴ I emailed my correspondent a link to the video, with a note explaining that the *Green Bag* was giving him the digital Justice Ginsburg bobblehead rather than the usual ink-on-paper certificate to redeem for a paint-on-ceramic doll, thus saving the *Green Bag* some money and reducing the environmental impact of the bobblehead project. He got the joke, and replied with a “haha” and a request for an ink-on-paper certificate. I declined, citing his imperative morality and convincing economics. He was not so amused. But we did manage to move on, on friendly terms.

The point is probably obvious: None of us should underestimate our own attachment to the material world. Nor should we ignore the possibility that our own material-vs.-digital preferences reflect no principle more sound than our own tastes and self-interest.

Anyway, in an attempt to honor the values and celebrate the joys of both the physical world and the digital world, we are publishing this, our first *Material & Ethereal Almanac & Reader*. And we also have two more reasons for publishing the material/ethereal flipbook/URL parts.

First, it was 50 years ago today that President Lyndon Johnson announced that he was about to nominate Solicitor General Thurgood Marshall to be an Associate Justice of the Supreme Court of the United States. That moment, that act, and

³ Manufactured by the best bobblehead makers in the world, Alexander Global Promotions.

⁴ See *Ruth Bader Ginsburg bobblehead opera*, GBRC1 (2012) (Cattleya Concepcion, producer and director), www.youtube.com/watch?v=ITiR7Vg38eo.

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the lawyer at the center of the action deserve celebration. So, the main flipbook feature of this *Almanac & Reader* is the Hearst newsreel report of Johnson's announcement. (We, and you, have the generosity of the UCLA Film & Television Archive to thank for that.)

Second, the flipbooks printed in the *Material Version* may eventually become useful examples for courts, their reporters of decisions, and people who write about courts and their reporters.

Here's why: Using video recordings in courtrooms and judicial opinions is still controversial — *Scott v. Harris*⁵ (a case involving a car chase that ended in tragedy) is a prominent example — but the practice seems to be here to stay. The practicalities, however, are more up in the air. There are, for example, at least four reasons to worry about how videos that appear in judicial opinions are reported: (1) inequality of access (not everyone has access to the web, or to the software needed to view videos in whatever formats a court or reporter might choose to use); (2) link rot and software obsolescence (keeping things up-to-date is notoriously difficult, and notoriously neglected); (3) security (neither Article III nor a state equivalent bestows immunity from hacking and other nefariousnesses); and (4) integrity (the temptation to secretly, or at least sneakily, revise documents post-publication can be difficult to resist, and tinkering of that sort are easier to engage in, and may be harder to detect and police, when everything involved is digital-only). Are these concerns legit? Could ink-on-paper flipbooks be useful tools for dealing with any of them? Maybe. All we are trying to do now is demonstrate the ease with which even a low-budget independent publisher can put such things in print.

⁵ 550 U.S. 372 (2007).

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III.
OTHER BUSINESS

Homer's Nodding

More than a decade of practice producing a big book in a hurry has made us better at making mistakes, not better at catching them. Fortunately, we have kindly readers who help us with the catching. And so we have a bundle of corrections to last year's *Almanac & Reader* — the 2016 edition, that is — to share with you.

First, from Harold Kahn (a judge with the kind of temperament many of us can only, but should always, aspire to):

Page 45:

I was the trial judge in the *Pao v. Kleiner Perkins* sex discrimination and retaliation trial which ended in a jury verdict in favor of Kleiner Perkins on all claims. As the trial was in a California state court, it was not a “federal jury” that rendered the verdict, as stated in the March 27 entry on page 45. I suspect that this is an error that only the trial judge might care about, and even he is untroubled by it.

Second, from Shannon Sabo at W.S. Hein & Co. (operators of the superb HeinOnline database):

Page 146, footnote 87:

Replace “Luanne von Schneidemesser” with “Lynne Murphy” — she is the author of the blog post cited there.

Third, from our friend Ira Brad Matetsky (who is better at catching his own mistakes than we are) we have a handful of corrections:

Page 153, footnote 91:

In the second paragraph, replace “195” with “168” in the citation of *Bram v. United States*.

Page 228, footnote 11:

Remove the comma between “note” and “2”.



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Page 231, footnote 21:

Replace the text with this: “Alternatively, a few sources speculate that it may have been the printed magazines themselves, rather than the printing plates, that crossed the Atlantic. This appears not to have been the case during the bulk of the American *Strand’s* existence, but has not been wholly ruled out for the earliest years.”

Pages 232:

Replace “[footnote here]” with the call for footnote 25.

That’s all for now. There is surely more to come.

Arthur Conan Doyle’s Pigs

In the 2016 *Almanac & Reader* we invited readers to pick up a pen and try a Victorian fad in which Arthur Conan Doyle and many other celebrities participated: drawing a pig with eyes closed (the artist’s eyes, not the pig’s).⁶ We heard from a lot of readers who did, and enjoyed it. But only nine were brave (or foolish) enough to share their artwork with us so that we could share it with you. And so the fine porcine portraits by Ben Baring, Ross Campbell, Timothy Delaune, Kevin Elliker, Paul Kim, Jack Metzler, Sutton Smith, Jason Steed, and Maggie Wittlin appear on the calendar pages of the first nine months of this *Almanac & Reader*. The last three months feature related pigs.

Our pig project did provide an unanticipated benefit for the study of detective fiction. Rachel Davies wrote to us to flag a connection of a sort (there are many) between Sherlock Holmes (and his creator, Arthur Conan Doyle) and Nero Wolfe (and his creator, Rex Stout):

Just read on page 7 of Stout’s *And be a Villain*:
“By Sunday he [Nero Wolfe] had finished the

⁶ *Arthur Conan Doyle’s Pig, and Yours*, 2016 Green Bag Alm. 537.



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ROSS E. DAVIES

book of poems and was drawing pictures of horses on sheets from his memo pad, testing a theory he had run across somewhere that you can analyze a man's character from the way he draws a horse."

Our Goals

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 2016 exemplars in this volume are wide-ranging in subject, form, and style. 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.

Our Thanks

We always end up owing thanks to many good people for more acts of kindness than we can recall. And so we must begin by saying "thank you" and "we're sorry" to all those who deserve to be mentioned here but aren't. We cannot, however, forget that we owe big debts of gratitude to the generous, anonymous friends of the *Green Bag* who stepped up late in the game to bear the burden of selecting the exemplary writing honored here; to O'Melveny & Myers LLP (especially Nadine Bynum and Greg Jacob); to the Scalia Law School; to Kara Molitor and Danielle Faye of the UCLA Film & Television Archive; and to Ira Brad Matetsky — author, editor, and all-around literatus — who never fails to make any work he touches better.

Finally, the *Green Bag* thanks you, our readers. Your continuing kind remarks about the *Almanac* & *Reader* are inspiring.

Ross E. Davies
June 13, 2017