



# TO THE BAG

## HEADING IN THE RIGHT DIRECTION

To the *Bag*:

The Justices of the Supreme Court of the United States are not well known for their willingness to dabble in fresh approaches to legal writing. Indeed, stylistic innovations emerge from the chambers of the Supreme Court only about once or twice each century. So it should never pass without comment when one of the Justices occasionally experiments with a novel approach to writing an opinion, especially when the result is a decided improvement in the work of the Court.

An excellent resource on legal writing, co-authored by Justice Antonin Scalia and Bryan Garner, recently offered this eminently sensible advice for writers of briefs and judicial opinions:

*Use captioned section headings.* Many court opinions dispense with captions for sections and subsections, relying on numbers and letters alone (I, II, and III; A, B, and C within each). Whatever the value of that practice in opinions (and even that is questionable), it's not a good approach for briefs. Since clarity is the all-important objective, it helps to let the reader know in advance what topic you're about to discuss.<sup>1</sup>

The part of this passage criticizing time-honored judicial convention as “questionable” was presumably written by Garner, who has campaigned for some time with only modest success to get courts to reconsider the practice of using numbers as headings for the sections

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<sup>1</sup> Antonin Scalia and Bryan Garner, *Making Your Case: The Art of Persuading Judges* 108 (2008) (italics added).

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of a judicial opinion. At the time this book was published three years ago, even Justice Scalia – the finest and most innovative writer on the Supreme Court – followed that customary practice as consistently as any other member of the Court.

But although Garner’s counsel has had limited impact thus far, the wisdom of his advice is easy to appreciate. When a Supreme Court opinion is carved into consecutive sections with catchy titles like III(A)(5) and III(B), for example,<sup>2</sup> readers working through the opinion sometimes feel a bit like Hansel and Gretel, trying to make their way out of the forest before nightfall by retracing the almost indistinguishable trail of bread crumbs they left behind on the way to their present location. It is unlikely that any member of the Court would gladly take the time to decipher a brief written that way, and not so obvious why the Justices insist on writing that way themselves.

In a solitary dissent written earlier this term, however, Justice Scalia has at long last taken his own advice and made a bit of legal writing history. In *Gonzalez v. Thaler*,<sup>3</sup> Scalia’s dissenting opinion is still divided into numbered sections (old habits die hard), but the longest of those sections is divided into subsections captioned with actual titles. And those titles are composed not of numbers but (brace yourself) *words*, with perfectly sensible headings like these:

- Fair Meaning of the Text
- Past Treatment of Similar Provisions
- Jurisdictional Nature of Predecessor Provision
- *Stare Decisis* Effect of *Torres*

So far as I am aware, no other opinion in Supreme Court history has ever been written in this fashion, and crafted with such obvious regard for the reader. Perhaps Justice Scalia felt especially free to experiment with a new style because he was writing a dissent that was not joined by any other member of the Court. In any event, there is great self-evident wisdom in Garner’s view that a judicial

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<sup>2</sup> These were the headings of two consecutive sections in *Planned Parenthood v. Casey*, 505 U.S. 833, 860-61 (1992) (plurality opinion).

<sup>3</sup> 565 U.S. \_\_\_, 132 S.Ct. 641 (2012).

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opinion, just like a brief, can be much easier to follow and enjoy when it is written this way.

Justice Scalia's readers were inspired to hope that his tantalizing dissent in *Gonzalez* might be a sign that he had finally come around to agreeing with his co-author, and a sign of things to come. But it was not meant to be, at least not yet. Since *Gonzalez* was decided, Justice Scalia has authored several more opinions, but not one of them follows the novel format of that historic dissent. Is his opinion in *Gonzalez* a precursor of a bold new writing style we can expect to see from Justice Scalia from time to time in other cases? Or was it merely a device that he thought would somehow be especially appropriate for that case? Only time will tell. In the meantime, those of us who read Supreme Court opinions for a living can only wait and hope.

James J. Duane  
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## VESTED INTEREST

To the Bag:

I have in my collection of books on trials and trial advocacy several old bound copies of *The Green Bag*. I was not aware that it was again being published until I was doing some research for an upcoming presentation, and I came across Jacob Stein's article on Howe & Hummel.

I have Richard Rovere's book and was aware of the wonderful story of Howe & Hummel, but what amazed me in Mr. Stein's article was his reference to T. Edward O'Connell.

I have been an Anglophile for years, and typically appear in court in a morning suit and wearing one of my collection of colorful vests that I purchased in the Burlington Arcade in London. I was astonished to learn from Mr. Stein's article that I am not the first person who had this idea. Apparently T. Edward O'Connell had previously done the same thing. Also, like him, I obtained my law degree at night school. I am almost beginning to believe in reincarnation.

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