



EX ANTE

OUR MISTAKES

Attentive reader Dan Terzian sent us this useful note:

A minor quibble with Prof. Vladeck’s *Petty Offenses and Article III* in the Autumn 2015 *Bag*. In discussing the territories’ jury trial rights, the article states (at n.46) that “each of the territories have incorporated these constitutional rights by statute.”

That’s part right.

The Northern Mariana Islands statute incorporates a jury trial right only for offenses “punishable by more than five years imprisonment or a \$2,000 fine.” *Commonwealth of N. Mar. Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir. 1984); *see also* 7 N. Mar. I. Code § 3101(a).

Doubtless Prof. Vladeck knows this. But most probably don’t. And it’s misleading to say that a statute incorporates a right (yes, I read the local rules) when it really incorporates just part of it (actually just the first two).

And here is Vladeck’s reply:

Not only is Dan absolutely right, but his helpful clarification only reinforces the larger doctrinal fog that surrounds the contemporary scope of non-Article III federal adjudication – and the need for the Supreme Court to clarify how and why a muddled holding about a quasi-state court of general jurisdiction in D.C. supports non-Article III federal district courts of limited jurisdiction in the CNMI, Guam, and the U.S. Virgin Islands – to say nothing of how and why it supports the Fifth Circuit’s result in *Hollingsworth*.

Ex Ante

Equally attentive reader Adam Hoock caught a classic editorial error – the kind that happens when you’re moving footnotes around – in our most recent issue. He wrote to us about it, gently:

I really enjoyed reading the article by Judge Posner in your recent volume. However, I wanted to bring to your attention an error in the text that perhaps can be easily corrected for your online copy of the article.

On page 197 of the article, in the second full paragraph, the text says that there are further examples in footnote 15. However, if you go down to footnote 15, it is the citation to a book review. It appears that footnote 16 is the one that has examples of judicial phrases.

It appears the tactful Mr. Hoock is correct. We are chagrined and grateful.

We have more to say on our own account about the Posner article. We received a number (more than several, less than a slew) of notes along these lines:

I liked Judge Posner’s article in your winter issue (19 GREEN BAG 2D 187 (2016)), but he did err on one topic. He writes, “much that I’ll be saying is applicable to state judiciaries as well, all of which (so far as I know) have a tripartite structure (trial court, intermediate appellate court, supreme court) similar to that of their federal counterpart.” Some states in fact have no intermediate appellate court – only trial courts and a supreme court.

The notes were all short, polite, and well-written. They were, after all, sent by *Green Bag* readers. After giving personalized replies to the first couple of notes, we came up with a standard one:

Thank you for your thoughtful note. Our best guess is that Judge Posner included the “(so far as I know)” to flag two things: (1) explicitly, that he did not bother to conduct a 50-state survey, and (2) implicitly, that the difference between “all” and “most” or “many” would be zero in terms of its significance for the argument he was making. In other words, the parenthetical was not only actual notice of the state of his knowledge, but also symbolic evidence of his own commitment to one of his arguments in the article: judges should invest efficiently in the useful and not invest inefficiently in the useless. This is merely our reading, not his (and we haven’t asked him about it). So, we would suggest that to say

Ex Ante

Posner erred when he failed to flyspeck something that he told the reader he had not flyspecked is to say that failure to flyspeck is an error even with notice and in a context where flyspecking would be practically useless. If you would like to argue in a brief and otherwise appropriate letter that our reading is wrong and that Posner did in fact err, we would be happy to publish it. But you might be inviting a citation to the letter in a future work by Posner. Whether it would be the kind of citation the letter-writer would cherish is another matter.

We heard back from most of the writers of notes. Everyone was as polite as they had been at the outset, and everyone said they did not feel the need to pursue the matter further. Nice and sensible (and probably busy) people, those *Green Bag* readers. But we might be wrong – we could be giving Posner more, less, or different credit than he deserves. We do hope that someday legal scholars will look back on this as a watershed moment, when the tide turned against useless flyspecking in law reviews.¹

ALMANAC NOMINATING AND VOTING FOR 2016

For our 2016 *Green Bag Almanac & Reader* we are making a few changes to our nominating rules and processes – for the better, we hope.

Nominating

All nominations must be sent to editors@greenbag.org and must include the following in the body of the email: (a) an accurate citation or functional link to the nominated work, (b) the nominator's real name, and (c) an email address and a snailmail address for the nominator (for a tweet, also include a Twitter handle). The nomination deadline is January 1, 2017.

Category #1: Judicial Opinions – *Who can nominate?* Any judge in active service in 2016 on a state or federal court. *What can they nominate?* One or two signed judicial opinions issued in 2016.

Category #2: State Supreme Court Briefs – *Who can nominate?* Anyone listed as counsel on a brief filed in a state supreme court in 2015 or 2016. *What can they nominate?* A brief filed in that court in 2016.

¹ Cf. Aerosmith, *Aerosmith* side 1, track 3 (1973).