

PREFACE

[parallel citation: 2016 Green Bag Alm. 1]

This is the eleventh *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).

EXEMPLARY LEGAL WRITING

I. OUR DILIGENT ELECTORATE

Our selection process for “Exemplary Legal Writing of 2015” 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 who know it when they see it and bring it to our attention;
- (b) coordinate the winnowing of nominators’ 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) poll the people who nominated works during the year 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.

Unlike past years’ processes, however, this one did not limit the pool of nominators to our hand-picked advisers. Instead, we opened things up.

II. THE NEW SYSTEM

A. *Categories and Nominators*

For 2015 we went with four categories, each with its own nominators and all with the same deadline: January 1, 2016. I expect that in the next few years we will refine our current categories, add new ones (legal jour-

nalism? student writing?), add new vintages for scholarly writing, and so on. Suggestions are welcome. Please send them to editors@greenbag.org. And please spread the word.

• Category #1: Judicial Opinions •

Who could nominate? Any judge who issued a signed opinion in 2014 that was available in WestlawNext's "Cases" or "Trial Court Orders" database. *What could they nominate?* One or two signed judicial opinions issued in 2015 that were available in either one of those databases.

• Category #2: U.S. Supreme Court Briefs •

Who could nominate? Any member of the Supreme Court bar whose name was on the cover of a merits-stage brief — filed on behalf of a party or an amicus curiae — in a case decided by the Court on the merits in 2014. Also, any member of the Court's press corps. *What could they nominate?* One or two briefs in cases decided by the Court on the merits in 2015.

• Category #3: Law Review Articles •

Who could nominate? Anyone who (a) authored a work with a 2014 publication date that is available in WestlawNext's "Law Reviews & Journals" database, and (b) was not a law student at the time. *What could they nominate?* One work with a 1965 publication date in any law review at a U.S. law school. This is a test of durability and timeliness: What legal scholarship published 50 years ago is the most readable and worth reading today?

• Category #4: Books •

Who could nominate? We enlisted a few respectable authorities to give us lists of their five favorite new law books — with short explanations, which we have published, with the listers' bylines, in this *Almanac*. *What could they nominate?* This time around, any books about law with 2015 publication dates. We will treat other types of writing this way in the future — news reporting, scripts, and poetry seem like good candidates — but for this year we started simple.

B. Winnowing and Voting

Voting on opinions, briefs, and articles was conducted in January (books are simply listed by recommender in the *Almanac & Reader*).

PREFACE

Who could vote? Anyone who (a) sent a valid nomination in any category to rdavies@greenbag.org, and (b) provided a snailmail address with the nomination (so we could send a ballot) got to vote in all categories.

What did they actually vote on? A ballot of finalists winnowed from the pools of nominees. It was mostly a popularity-and-persuasion contest — opinions, briefs, and articles receiving the most nominations made the ballot. So did a few others whose nominations were accompanied by especially persuasive explanations of their sterling qualities. We divided the “Judicial Opinions” nominees into two categories — “Opinions for the Court” and “Dissents, Concurrences, Etc.”

C. Confidentiality & Publication

These are areas where nothing has changed. Confidentiality of nominator-nominee and voter-nominee connections was and is complete. And this year, as ever, we are publishing as many of the top vote-getters as we can.

III. CHANGES FOR 2016

For 2016 we are making a few changes — for the better, we hope.

First, 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 Category #5, also include a Twitter handle).

Second, we have tinkered with some categories, given up on one, and added two new ones:

- Category #1: Judicial Opinions •

We are expanding the pool of nominators for this category. Any judge in active service in 2016 on a state or federal court may nominate one or two signed judicial opinions issued in 2016.

- Category #2: State Supreme Court Briefs •

We are ditching “U.S. Supreme Court Briefs” as a category. We had zero nominees in 2015. It is easy to imagine reasons for this failure, and none of the most likely involves conditions the *Green Bag* is in a position to influence. So, we are declaring defeat and moving on. Instead, for 2016, Category #2 is “State Supreme Court Briefs.” Anyone listed as counsel on

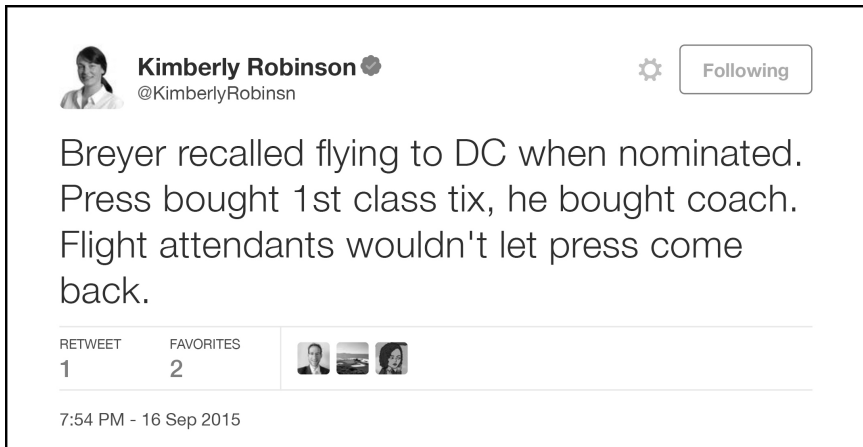
a brief filed in a state supreme court in 2015 or 2016 may nominate a brief filed in that court in 2016.

• Category #3: Law Review Articles •

We are pretty happy with this category, so the only changes are the qualifying years for nominators and nominees. Anyone who (a) wrote something with a 2015 publication date in any law review at a U.S. law school, and (b) was not a law student at the time, may nominate in this category any article with a 1991 publication date in any law review at a U.S. law school. This is, as it was last year, a test of durability and timeliness: What legal scholarship published 25 years ago is the most readable and worth reading today?

• Category #4: Books •

We are happy with this category as well. We hope that all four of this year's respectable authorities return for 2016. We might add one or two.



• Category #5: Tweets •

This is a new category. Anyone with a Twitter account may nominate an exemplary law-related tweet by sending a link to editors@greenbag.org (along with the information specified at the top of page 5 above). Hashtags, likes, and retweets are irrelevant in this context. We will have no stuffing of ballot boxes at the *Green Bag*, or at least we will resist as best we can. To get you thinking about excellence in tweeting we've in-

PREFACE

cluded a tweet by Kimberly Robinson (of Bloomberg BNA) that we think is mighty good — compact, articulate, and interesting, with a point and an edge but no barb. There might be one or two other examples elsewhere in this *Almanac*.

Third, we have tinkered slightly with the voting qualifications, just to make them line up with the other changes we've made:

Who can vote? Anyone who (a) sends a valid nomination in any category to editors@greenbag.org, and (b) provides the information specified at the top of page 5 above, gets to vote in all categories.

What will they actually vote on? A ballot of finalists winnowed from the pools of nominees. It will be mostly a popularity-and-persuasion contest — opinions, briefs, articles, and tweets receiving the most nominations are most likely to make the ballot. A few others whose nominations are accompanied by especially persuasive explanations of their sterling qualities are likely to make it too. We will probably divide the “Judicial Opinions” nominees into two categories — “Opinions for the Court” and “Dissents, Concurrences, Etc.” — again. And we might end up doing similar things in other categories, depending on how the nominations look overall.

And, finally, there is the nomination deadline: January 1, 2017.

• • • •

THIS YEAR'S THEME

I. ANOTHER SHERLOCK HOLMES PUZZLER

The theme of this year's *Almanac* is, as it was last year, the world of Sherlock Holmes and John Watson. This time around the centerpiece is “The Reigate Puzzle,” a Holmes-and-Watson story set in Reigate in 1887 and first published in 1893.

You will find here, among many other interesting and entertaining items, several versions of the “The Reigate Puzzle” (sometimes with that title and sometimes under one of its aliases, “The Adventure of the Reigate Squire” or “The Adventure of the Reigate Squires”), including a lawyerly annotated edition with contributions by several leading Holmes scholars and an introduction by Catherine Cooke of the Sherlock Holmes Society of London. Those other Sherlockian items include:

- an early “Hound of the Baskervilles” quiz (1904),
- copyright records relating to the work of renowned cartographer Julian Wolff (1940),¹
- the first (to the best of our knowledge) republication in its entirety of the rare issue of Edinburgh University’s *The Student* magazine in which Arthur Conan Doyle’s first Sherlock Holmes pastiche — “The Field Bazaar” — appeared in 1896,

and a good deal more.

II. SHERLOCK’S ALMANAC

This time around we are also paying attention to the fact that Sherlock Holmes was himself an almanac user.

More than a century ago, in *The Valley of Fear*, Holmes and his friend John Watson searched for a book in common use that could have been the basis for a coded message:

HOLMES: There are difficulties, Watson. The vocabulary of Bradshaw² is nervous and terse, but limited. The selection of words would hardly lend itself to the sending of general messages. We will eliminate Bradshaw. The dictionary is, I fear, inadmissible for the same reason. What, then, is left?

WATSON: An almanack!

HOLMES: Excellent, Watson! I am very much mistaken if you have not touched the spot. An almanack! Let us consider the claims of *Whitaker’s Almanack*.³ It is in common use. It has the requisite number of pages. It is in double columns. Though reserved in its earlier vocabulary, it becomes, if I remember right, quite garrulous towards the end. . . . [cont’d on page 536]

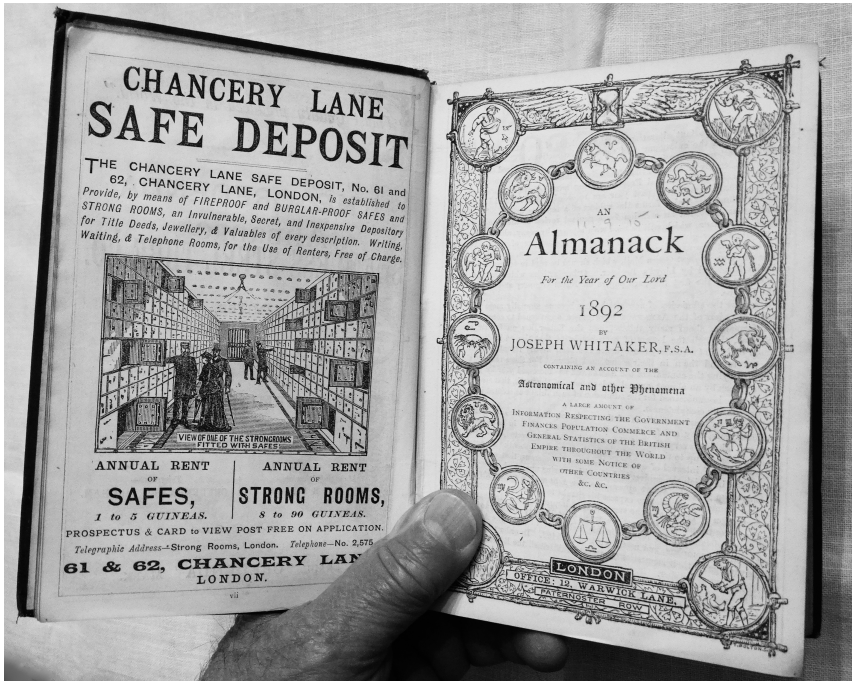
This year — 2016 — is a leap year that began on a Friday. So was 1892. So, we have taken a page (actually, 12 of them) from Holmes and Watson.

¹ See *Preface*, 2015 GREEN BAG ALM. 9-13.

² “[T]he most complete of the numerous British railway guides, published monthly.” JACK TRACY, *THE ENCYCLOPEDIA SHERLOCKIANA* 44 (1977); see also ARTHUR CONAN DOYLE, *THE VALLEY OF FEAR* 7 & n.24 (1914-15; Sherlock Holmes Reference Library ed. 1999) (Leslie S. Klinger, ed. & annot.).

³ “[T]he most popular and best known of British almanacks.” TRACY, *ENCYCLOPEDIA SHERLOCKIANA* at 394; see also CONAN DOYLE, *THE VALLEY OF FEAR* at 8 & nn.26-27 (Klinger).

PREFACE



Whitaker's Almanack (1892). Thumb courtesy of Richard A. Davies, BSEE, MIT, 1958.

We have taken the monthly calendars from the 1892 edition of *Whitaker's Almanack* and made them our own for this year's *Almanac & Reader*.⁴

In addition, each month of this year's *Almanac & Reader* begins with a calendrically appropriate passage from a Sherlock Holmes story. The first 17 readers who fill out the form on page 11 with correct citations for all 12 passages (plus one) will receive a congratulatory gift.

OTHER BUSINESS

I. HOMER KEEPS NODDING . . .

We continue to struggle, and fail, to produce a flawless big fat book in a hurry. Fortunately, we have attentive and communicative readers who help us straighten things out. This year we have the following admirably thorough and correct message from Joseph N. Mazzara (Captain, USMC),

⁴ See pages 86, 104, 172, 196, 250, 272, 288, 302, 438, 458, 476 & 522 below.

who has tactfully improved upon and corrected the work of one of our own much-less-than-perfect editors.

Almanac & Reader 2014, pages 121-22: I was preparing for class recently, and the materials for the first day included an excerpt from Ross E. Davies, *Breakfast with the Justices: Networking in the Nineteenth Century*, 2014 GREEN BAG ALM. 109. On page 121 of the 2014 *Almanac*, Davies quotes from the autobiography of Samuel W. Pennypacker, sometime-Governor of Pennsylvania. In the quote Pennypacker describes the circumstances under which he was admitted to the Supreme Court Bar, and mentions that he sought admission because he had three cases going to the Supreme Court. Davies' footnote for the quotation states, "PENNYPACKER, THE AUTOBIOGRAPHY OF A PENNSYLVANIAN at 134-35. I found only two of his three cases, *Sheeder v. Bicking* and *Sheeder v. Shannon*, 131 U.S. 447 (1888)."

Seeing this footnote as something like a challenge — and out of what will likely end as a vain hope for a bobblehead — I started looking for the third case. I eventually found it hiding in the 154th volume of the *U.S. Reports*. The third case is *Ashenfelter v. Territory of New Mexico ex rel. Wade*, 154 U.S. 493 (1893), a case about one Singleton M. Ashenfelter and his refusal to depart the office of the United States District Attorney for the Territory of New Mexico.

The 1893 date of *Ashenfelter* does create the possibility that this was a fourth or later case of Pennypacker's, and not his third. This possibility is answered by the date of the filing of the record from *Territory of New Mexico ex rel. Wade v. Ashenfelter*, 4 N.M. 93 (S.Ct. 1887) with the Supreme Court: 5 Sept 1887. This filing date roughly corresponds with the timeline given by Pennypacker in his autobiography as quoted by Davies.

Of further concern were the facts that the *U.S. Reports* lists "S.W. Pennypacker" as counsel for the appellant (*Ashenfelter*) and not Samuel W. Pennypacker, the case came out of New Mexico while Pennypacker resided and practiced in Pennsylvania, and Pennypacker is not listed anywhere in the record or on the briefs. These details raise the question, is the S.W. Pennypacker residing on page 493 of *U.S. Reports* volume 154 the same Governor Samuel Whitaker Pennypacker who wrote the autobiography quoted by Ross E. Davies in 2014?

Pennypacker himself answers this question in his book, *The Autobiography of a Pennsylvanian*, at 68-69: "Another boy, Singleton M. Ashenfelter, a little in the rough, but with vital energies and good-hearted, afterwards the United States District Attorney for New Mexico, became my closest associate."

PREFACE

P.S. Page 135 of Pennypacker's *Autobiography*, as quoted on page 121 of the 2014 *Almanac*, says: "He turned that eye on *my* a little athwart . . ." The original says: "He turned that eye on *me* a little athwart . . ." (emphasis added).

Blessed as we are with such intelligent and generous readers, we are confident that all our errors will eventually be brought to our attention, and thence to yours.

II. 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 2015 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.

III. THANKS

Finally, the *Green Bag* thanks you, our readers. Your continuing kind remarks about the *Almanac* are inspiring. We also thank the thoughtful judges and other scholars who nominated and selected the exemplary legal writing honored here; O'Melveny & Myers LLP (especially Nadine Bynum and Greg Jacob); the George Mason University School of Law (especially Ashley Charles); Susan Davies and her eye for quality and accuracy; Frances MacRae of the Corstorphine Trust; Guzman Gonzalez of the Surrey History Centre; the many kind members of the Sherlockian community who pitched in to make this *Almanac* much better than it might otherwise have been; and Albert M. Rosenblatt, longtime *Green Bag* author and friend, who has been from the start an inspiration and a source of wisdom on all things Sherlock Holmes.

Ross E. Davies
February 1, 2016

RECOMMENDED READING

[parallel citation: 2016 Green Bag Alm. 12]

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 in the list below by a little ★. There were plenty of other good works on the ballot. We list them here. Congratulations to all.

OPINIONS FOR THE COURT

Cecilia Maria Altonaga, *In re Denture Cream Products Liability Litigation*, 2015 WL 392021 (S.D. Fla. Jan. 28, 2015)

★ Charles R. Breyer, *In re Hewlett-Packard Company Shareholder Derivative Litigation*, No. 3:12-cv-06003-CR (N.D. Cal. July 28, 2015)

The Court, *In re Hong Yen Chang*, 344 P.3d 288 (Cal. 2015)

Frank H. Easterbrook, *Iqbal v. Patel*, 780 F.3d 728 (7th Cir. 2015)

Judith L. French, *In re Complaint of Pilkington North America, Inc.*, 2015 WL 7485933 (Ohio 2015)

★ Elena Kagan, *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015)

★ Cornelia T.L. Pillard, *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015)

Jed S. Rakoff, *In re Petrobras Securities Litigation*, 104 F.Supp.3d 618 (S.D.N.Y. 2015)

Antonin Scalia, *Johnson v. United States*, 135 S. Ct. 2551 (2015)

★ Amul R. Thapar, *Wagner v. Sherwin-Williams Co.*, Civil No. 14-178-ART (E.D. Ky. Apr. 29, 2015)

William G. Young, *In Re Nexium (Esomeprazole) Antitrust Litigation*, 309 F.R.D. 107 (D. Mass. 2015)

CONCURRENCES, DISSENTS, ETC.

★ Carlos T. Bea, *John Doe I v. Nestle USA, Inc.*, 788 F.3d 946 (9th Cir. 2015)

★ Frank H. Easterbrook, *Thomas v. Clements*, 797 F.3d 445 (7th Cir. 2015)

Jennifer Walker Elrod, *Trent v. Wade*, 801 F.3d 494 (5th Cir. 2015)

Alex Kozinski, *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015)

Goodwin Liu, *People v. Grimes*, 340 P.3d 293 (Cal. 2015)

RECOMMENDED READING

Jill A. Pryor, *In re Rivero*, 797 F.3d 986 (11th Cir. 2015)

John G. Roberts, Jr., *McFadden v. United States*, 135 S.Ct. 2298 (2015)

★ O. Rogerie Thompson, *Sanchez v. Roden*, 808 F.3d 85 (1st Cir. 2015)

★ Don R. Willett, *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015)

U.S. SUPREME COURT BRIEFS

Interestingly, there was nothing to vote for in this category because we received zero nominations. We wonder why.

LAW REVIEW ARTICLES PUBLISHED 50 YEARS AGO

David L. Bazelon, *Law, Morality, and Civil Liberties*, 12 UCLA Law Review 13 (1964-1965)

John R. Brown, *The Trumpet Sounds: Gideon — A First Call to the Law School*, 43 Texas Law Review 312 (1965)

★ Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 Harvard Law Review 713 (1965)

Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harvard Law Review 56 (1965)

Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 Stanford Law Review 567 (1965)

Arthur E. Sutherland, Jr., *Crime and Confession*, 79 Harvard Law Review 21 (1965)

★ Herbert Wechsler, *The Courts and the Constitution*, 65 Columbia Law Review 1001 (1965)

BOOKS

Recommendations by our respectable authorities appear throughout this *Almanac*: Femi Cadmus (page 105), Lee Epstein (page 439), Cedric Merlin Powell (page 303), and Susan Phillips Read (page 173). Here is a list of all our recommended books:

Akhil Reed Amar, *The Law of the Land: A Grand Tour of Our Constitutional Republic* (Yale University Press 2015)

Adam Benforado, *Unfair: The New Science of Criminal Injustice* (Crown 2015)

Ellen Berrey, *The Enigma of Diversity: The Language of Race and the Limits of Race Justice* (University of Chicago Press 2015)

RECOMMENDED READING

- Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Alfred A. Knopf 2015)
- John Bronsteen, Christopher Buccafusco, and Jonathan S. Masur, *Happiness and the Law* (University of Chicago Press 2015)
- Irin Carmon and Shana Knizhnik, *Notorious RBG: The Life and Times of Ruth Bader Ginsburg* (HarperCollins 2015)
- Ta-Nehisi Coates, *Between the World and Me* (Spiegel & Grau 2015)
- John C. Coffee, Jr., *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Harvard University Press 2015)
- Alan M. Dershowitz, *Abraham: The World's First (But Certainly Not Last) Jewish Lawyer* (Schocken Books 2015)
- Nancy E. Dowd (editor) *A New Juvenile Justice System: Total Reform for a Broken System* (NYU Press 2015)
- Jeffrey A. Engel (editor), *The Four Freedoms: Franklin D. Roosevelt and the Evolution of an American Idea* (Oxford University Press 2016)
- Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press 2015)
- Gunnar Grendstad, William R. Shaffer, and Eric Waltenburg, *Policy Making in an Independent Judiciary: The Norwegian Supreme Court* (ECPR Press 2015)
- Wil Haygood, *Showdown: Thurgood Marshall and the Supreme Court Nomination that Changed America* (Alfred A. Knopf 2015)
- Dan Jones, *Magna Carta: The Birth of Liberty* (Viking 2015)
- Burt Neuborne, *Madison's Music: On Reading the First Amendment* (New Press 2015)
- Richard A. Posner, *Divergent Paths: The Academy and the Judiciary* (Harvard University Press 2016)
- Cass R. Sunstein, *Constitutional Personae* (Oxford University Press 2015)
- Michael A. Zilis, *The Limits of Legitimacy: Dissenting Opinions, Media Coverage, and Public Responses to Supreme Court Decisions* (University of Michigan Press 2015)