A Year in the Life of the Supreme Court

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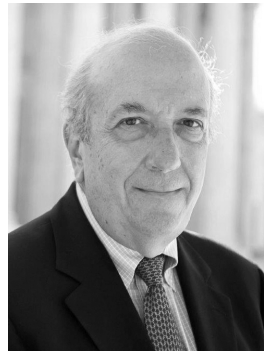

Tony Mauro[†]

A summary of developments involving the Supreme Court of the United States in 2015 that are not likely to be memorialized in the United States Reports.

January 21: Protesters disrupted a Supreme Court session, rising one after another to shout criticism of the Court's *Citizens United* campaign finance ruling on its fifth anniversary. "I rise on behalf of democracy," one demonstrator shouted. "Money is not speech," said another. The group 99Rise took credit. A year earlier Kai Newkirk, a leader of 99Rise, which opposes the domination of big money in politics, was arrested for a similar outburst. The dramatic scene unfolded as the court's session was beginning at 10 a.m. It was clearly a coordinated effort by a group of spectators who sat in the back row of the public seating inside the court. As soon as the first person rose to speak out, Supreme Court police moved quickly to remove him. But then, another rose from a different seat at the other end of the row, and police pounced on that person. After the first shouter, Chief Justice John Roberts Jr. tried to make light of it by saying, "Our second order of business is . . . ."

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February: Philip Alito, son of Justice Samuel Alito Jr., left Gibson, Dunn & Crutcher to become a staff counsel to Republicans on a Senate investigative subcommittee. The younger Alito, who clerked for Judge Brett Kavanaugh of the U.S. Court of Appeals for the D.C. Circuit in 2012 and 2013, began working as an associate at Gibson Dunn in 2013. Alito, a Duke Law School graduate, was a summer associate in 2011 at Gibson Dunn, where another son of a justice, Eugene Scalia, also practices. Alito's move drew criticism from American Enterprise Institute scholar Norman Ornstein, who follows Congress and U.S. politics. "For a court that is struggling for tangible reasons not to be viewed as partisan like every other institution in Washington, I wish it was not so," Ornstein said.

March 23: Two Justices firmly rejected proposals that would increase court transparency: allowing cameras to broadcast proceedings and requiring justices to reveal their reasons for recusal. Speaking at the court's annual budget hearing before a House appropriations subcommittee, Justices Anthony Kennedy and Stephen Breyer were asked why the court is not bound by the code of ethics that covers lower courts. Both said the court abides by the code in practice, and the fact that they are not legally bound is "just words," as Breyer put it. As for making a justice's reasons for recusal public, that "should never be discussed," Kennedy said without hesitation. As an example, he said he might recuse because his son is employed by a company that is a party in a case. "The case is very important for my son," Kennedy continued. "Why should I say that? That's almost like lobbying." Breyer said that revealing his reasons for recusal would make it "logically conceivable" that in future cases a lawyer might include an issue that would force a justice to recuse for the purpose of creating a "more favorable" eight-justice court to rule in his or her favor.

March 23: The Supreme Court rarely offers practice pointers to the advocates who appear before it. But it did just that when it admonished members of the bar to use "plain terms" when they write briefs. The advice came in an order that brought an end to an extraordinary proposed disciplinary action against Foley & Lardner partner Howard Shipley. The court in December 2014 ordered Shipley to show cause why he should not be sanctioned for submitting a jargon-filled petition in a patent case. The petition turned out to have been written mainly by the client, a German business executive who does not speak English as his first language. Former solicitor general Paul Clement, hired by Shipley to defend the

petition, acknowledged the petition was "unorthodox" and said it was filed on behalf of a client who "insisted on retaining primary control" over its content. The high court's reply was itself a model of brevity and plain language: "A response having been filed, the Order to Show Cause, dated Dec. 8, 2014, is discharged. All Members of the Bar are reminded, however, that they are responsible — as Officers of the Court — for compliance with the requirement of Supreme Court Rule 14.3 that petitions for certiorari be stated 'in plain terms,' and may not delegate that responsibility to the client." In August, Shipley left Foley & Lardner for another firm, Gordon & Rees.

April 6: Chief Justice Roberts's offhand 2011 criticism of law review articles has stung legal academics ever since. Nearly four years later, his comment finally met its match in the form of a law review article. "Someone had to do it," said George Washington University Law School professor Orin Kerr, the author of the piece. What Kerr did was the first, and probably the last, examination of the influence of German philosopher Immanuel Kant on the law of evidence in 18th-century Bulgaria. That stunningly obscure topic begged to be addressed when Roberts said at a conference of the U.S. Court of Appeals for the Fourth Circuit in June 2011: "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar." Kerr decided to write a response while he was a scholar-in-residence at the Law Library of Congress from 2012 to 2014. With help from the library's global legal research center, Kerr found that Kant's influence did not spread to Bulgaria until the second half of the 19th century, and even then had little impact on its legal system. The first reference to Kant in a Bulgarian text came in 1859 and said his work was "obscure and awkward." Kerr concluded in the article published by *The Green Bag* that "Kant had no influence on evidentiary approaches in 18th century Bulgaria."

May 15: Retired Supreme Court Justice John Paul Stevens criticized Major League Baseball's antitrust exemption in a speech that came as the high court prepared to review a challenge to the immunity. "It simply makes no sense to treat organized baseball differently from other professional sports under the antitrust laws," Stevens said on May 15 before the Sports

Lawyers Association in Baltimore. The city of San Jose filed a petition with the Supreme Court in April challenging the exemption and claiming that Major League Baseball violated antitrust laws by preventing the Oakland Athletics from moving to San Jose, thereby protecting the San Francisco Giants from competition. The court denied review on October 5.

June 15: Justice Antonin Scalia apologized from the bench after he accidentally called his longtime friend and colleague Ruth Bader Ginsburg "Justice Goldberg." Scalia was announcing his opinion in the immigration case *Kerry v. Din*, and Ginsburg was in dissent. At the end of his summary of the case, Scalia said, "Justice Breyer filed an opinion dissenting, which Justices Goldberg, Sotomayor and Kagan joined." Chief Justice Roberts leaned over to tell Scalia what he had said. "What did I say?" Scalia asked incredulously. When he finally understood, he said: "Goldberg's gone!" and added, "Sorry about that, Ruth." At first it seemed that Scalia was channeling Justice Arthur Goldberg, who served on the high court from 1962 to 1965. But in fact, Scalia may have had another Goldberg in mind. The *Din* decision Scalia was announcing involved the due process rights of a woman, a naturalized citizen of the U.S., whose husband, an Afghan citizen, was not allowed to enter the U.S. A key Supreme Court precedent in due process cases is the landmark 1970 decision in *Goldberg v. Kelly*. The appellant in that case was Jack Goldberg, then the New York state commissioner of social services.

June 24: Sixteen members of Congress, including Senate Judiciary Committee chairman Chuck Grassley (R-Iowa), asked the Supreme Court to allow live broadcast of opinion announcements in the historic pending cases on same-sex marriage, the Affordable Care Act, capital punishment and housing discrimination. Rep. Mike Quigley (D-Illinois), said in a statement, "Allowing live audio coverage will give more Americans the ability to closely follow the proceedings as they occur." The court did not agree to the request. Release of opinion announcements is an especially prickly issue with the justices. The announcements are summaries written by the justice who wrote the majority, and the other justices in the majority don't sign off on the wording. Current and former justices have said they are sometimes surprised to hear the announcement, which may overstate or oversimplify the holding in ways they don't approve. As a result, some justices don't want the opinion announcements to be featured in the news media as an accurate representation of court decisions.

June 30: An autobiography titled *A Time for Truth*, by presidential candidate Sen. R. Ted Cruz (R-Texas), included numerous anecdotes about his time as a law clerk to the late Chief Justice William Rehnquist and as an advocate before the court. Justice Ginsburg has the "prim demeanor . . . of a legal librarian," Cruz wrote. And for his first argument in 2003, *Frew v. Hawkins*, in his role as solicitor general of Texas, he reluctantly set aside his lucky black ostrich "argument boots." He had worn them for all arguments in lower courts, but he knew that then-Chief Justice Rehnquist was a "stickler for wardrobe." But after John Roberts Jr. became Chief Justice in 2005, Cruz said he asked Roberts if it was acceptable to wear boots during oral argument. "Ted, when representing the state of Texas, they are not only appropriate, but required," Roberts responded.

July 11: The much-anticipated comic opera about Supreme Court justices Ginsburg and Scalia made its debut at the Castleton Festival in Rappahannock County, Virginia. The opera titled *Scalia/Ginsburg* was composed by Derrick Wang while he was a student at the University of Maryland Francis King Carey School of Law. Wang graduated from law school in 2013. The Castleton Festival described the opera as a "valentine to law and opera." Both justices had seen parts of the opera performed for them, and Ginsburg attended the debut. Before the debut, Ginsburg said it was delightful, though she said, "my feminist friends" asked her why Scalia's name was first in the name of the opera, not Ginsburg's. She explained, "In the court, we do everything by seniority."

July 20: In a rare interview, Justice Alito criticized the court's June 26 ruling declaring a right to same-sex marriage, warning that "we are at sea" in defining the limits of constitutional protections of liberty. The court majority, Alito said, has adopted a "post-modern" concept of liberty protected by the 14th Amendment's due process clause. Alito described that concept as: "It's the freedom to define your understanding of the meaning of life. It's the right to self-expression." With that broad understanding of liberty, Alito said, a future libertarian justice could attack minimum wage and zoning laws, and a socialist justice could argue in favor of a guaranteed annual income or free college education for all. "There's no limit," he told conservative commentator Bill Kristol.

July 30: After an especially contentious term at the Court, Justice Ginsburg said that it is still "the most collegial" place she has ever worked. "If there is momentary distress, you just have to get over it," Ginsburg

said, speaking in Washington before an audience of Duke University students and alumni. The justices' practice of often having lunch together helps promote collegiality, she said, noting that in the early days of the court, justices lived together in the same boarding house. Still, Ginsburg said the term just ended felt like the longest of her 22-year tenure, and she longed for the days when the court was rarely in the spotlight. "Every year I keep waiting for when we will be out of the headlines. It hasn't happened yet," she said.

September: Often a nonissue in presidential campaigns, the Supreme Court emerged as a point of conflict in the run-up to the 2016 election. Candidates from both parties attacked justices and pledged to use once-taboo "litmus tests" to ensure ideological discipline in their future nominees. "We have an out-of-control court," Sen. Cruz said. Former Florida Gov. Jeb Bush said, "The history in the recent past is to appoint people that have no experience so that you can't get attacked." For their part, Democratic candidates have also embraced "litmus tests" — often viewed in the past as a distasteful practice that undermines judicial independence. "I will do everything I can do to appoint Supreme Court justices who will protect the right to vote and not the right of billionaires to buy elections," former Secretary of State Hillary Clinton said in May. Sen. Bernie Sanders (I-Vermont) also pledged that his nominees "will say that we are going to overturn this disastrous Supreme Court decision on *Citizens United* because that decision is undermining American democracy."

September 14: Justice Breyer appeared on late-night television to promote his new book, but he ended up answering questions about cameras in the court and the collegiality of the justices. Stephen Colbert, host of the *CBS Late Show*, introduced Breyer as the least known justice on the court. Polls show that only three per cent of the public could name him, Colbert said, joking that the other 97 percent "think he's Mr. Burns," Homer Simpson's boss on *The Simpsons*. About a minute into the interview, Colbert asked Breyer why the court is "the last place where I couldn't bring my camera crew" to let the public see what is happening. Breyer's first answer was along the lines that justices are not supposed to be personalities while on the bench. "I'm in a job where we wear black robes, in part because we're speaking for the law," Breyer said. The public is not and should not be concerned about "the Constitution according to Breyer" or any other justice, he added. "They want to know the answer."

September 23: Pope Francis made an unscheduled visit to the Little Sisters of the Poor with the aim of showing support for the group's battle against the Affordable Care Act's contraceptive mandate before the Court. "This is a sign, obviously, of support for them [in their court case]," Father Federico Lombardi, the head of the Holy See press office, said after the visit, according to a Vatican news site. The Little Sisters have been persistent challengers of the law, arguing that it requires them to provide health insurance that offers contraceptive services to employees in violation of their Catholic faith. The sisters operate nursing homes nationwide. On September 24, the pope addressed a joint session of Congress on a range of issues including the death penalty and immigration. Chief Justice Roberts and Justices Kennedy, Ginsburg, and Sotomayor attended — all Catholics except for Ginsburg.

October 5: The court announced policy changes concerning secret changes to the justices' decisions, hiring "line-standers" for high-profile oral arguments, and "link rot" in the court's rulings. The announcement came on the first day of the court's fall term. For the first time, changes or "edits" made to court opinions after they are handed down will be made apparent on the court's web site. The announcement also addressed a sore point for many members of the Supreme Court bar who show up at the crack of dawn, hoping to get a seat inside the courtroom for high-profile arguments. Instead they find themselves in the back of the bar line because a "line stander" — often highly paid — is holding another member's place. Under the new procedure, only bar members who plan to attend arguments will be allowed in the line for the bar section, both inside and outside of the court building. The court also announced new procedures to confront "link rot," the phenomenon where web-based links that are included in court opinions disappear or become broken, making it difficult for scholars and others to recover materials that were pertinent to court decisions. Web-based content included in court opinions beginning with the 2005 term forward will be made available on the court's website, with copies preserved in the court clerk's office.

November 2: Ten Supreme Court law clerks from October Term 2014 joined Jones Day as associates, the firm announced, topping its record-breaking number of seven clerk hires the previous year. Beth Heifetz, who heads Jones Day's issues and appeals practice and clerk hiring, confirmed that the firm "pays the market" in hiring bonuses for former clerks, which

is now $300,000 or more — meaning at least $3 million in bonuses alone for the new associates. The 10 hires represent about one-fourth of the 39 law clerks hired by sitting and retired justices last term. The new associates will work in Jones Day's issues and appeals practice. "We're pleased that so many more of these best-and-brightest are coming to Jones Day," said Heifetz, a former clerk to Justice Harry Blackmun. Some court watchers said the large number of clerks arriving at Jones Day raises concern about the firm's strategy and dominance. "Ten Supreme Court clerks from one term going to a single law firm is unquestionably a stunningly large number," Harvard Law School professor Richard Lazarus said.

November 9: Neal Katyal's 26th argument before the Supreme Court, given in an otherwise routine case, marked a major milestone: He has appeared at the lectern more times than any other male minority lawyer except for Thurgood Marshall. "It is not, frankly, about me as much as it is recognition of the fact that the [legal] profession is changing," Katyal said before his argument. With his 26th appearance, Katyal has passed former Solicitors General Wade McCree and Drew Days III, and now-judge Sri Srinivasan, each of whom argued 25 cases before the high court. Marshall, the late civil rights lawyer and Supreme Court justice, argued 32 times before the high court. Marshall, McCree, and Days are African-Americans, and Srinivasan was born in India.

December 31: In his annual year-end report, Chief Justice Roberts urged federal judges and lawyers to redouble their efforts to make civil litigation more just and efficient, admonishing them to change the legal culture and narrow the scope of discovery. Roberts highlighted new revisions in the Federal Rules of Civil Procedure that took effect on Dec. 1. "They mark significant change, for both lawyers and judges, in the future conduct of civil trials," Roberts wrote. The new rules added language that expressly states the obligation of judges and parties to make civil litigation move more quickly and efficiently. Another provision requires discovery requests to be relevant and "proportional" to the needs of the case, weighing whether "the burden or expense of the proposed discovery outweighs its likely benefit." Judges need to take an early and active stewardship role in managing cases, Roberts said, rather than deferring to the parties about the scope of discovery and the pace of the litigation. "A well-timed scowl from a trial judge can go a long way in moving things along crisply," Roberts wrote.