A Term in the Life of the Supreme Court

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A summary of developments involving the Supreme Court of the United States in 2014 that are not likely to be memorialized in the United States Reports.

Jan. 1: *Times Square*. Justice Sonia Sotomayor rang in the New Year by pressing the button that started the descent of the crystal ball for the final 60-second countdown to 2014 in New York's Times Square. The justice's recent predecessors in the role included Lady Gaga and the Rockettes. Sotomayor's assignment is a first for a Supreme Court justice, though other justices have played prominent parts in similar events. In 2005, Justice Antonin Scalia, another New York native, served as grand marshal for the city's Columbus Day Parade. Justice Sandra Day O'Connor, since retired, was the grand marshal of the Rose Bowl Parade in Pasadena in January 2006, a year after Mickey Mouse served in that role.

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Jan. 14: *Awkward Moment*. During oral argument in *Marvin Brandt Revocable Trust v. U.S.*, a property rights case, a nervous first-time advocate appeared to be reading from a prepared text when Justice Antonin Scalia interrupted and asked: "Counsel, you are not reading this, are you?" The lawyer, Steven Lechner, froze and did not answer, staying silent until Justice Stephen Breyer broke the tension by saying "It's all right." The Court's Rule 28 states, "Oral argument read from a prepared text is not favored." And the court clerk's guide to oral argument warns advocates, "Under no circumstances should you read your argument from a prepared script." But Scalia's comment drew criticism, with Supreme Court blogger, law prof and author Josh Blackman calling it "a dick move," adding that "just because [Scalia] wears a robe does not entitle him to be a jerk, and embarrass the lawyer for something like this."

Feb. 26: Argument Interrupted. A protester loudly interrupted an oral argument to criticize the court's *Citizens United* decision and proclaim that "Money is not speech." Court police quickly removed the man, Kai Newkirk, and he was charged with violating a law that prohibits "loud, threatening, or abusive language" in the Supreme Court building. Compounding the uniqueness of the event, a video clip of the episode soon surfaced online — evidently taken with a pen camera or other device brought into the court secretly by an ally of Newkirk. It was the first time in decades that a live court session had been photographed. The court was later criticized for deleting the audio of Newkirk's statement from the recording of the oral argument. In April, Newkirk pleaded guilty to a D.C. Superior Court judge and was given a light sentence. A Supreme Court police officer also handed Newkirk a "barring notice" prohibiting him from setting foot on Supreme Court property for the next 12 months.

All year: *Script Change*. Chief Justice John Roberts Jr. subtly changed the "script" he uses during court bar admissions in the court chamber — a change that may anticipate the inevitable day when a lawyer will ask the court to admit a same-sex spouse. For years, members of the Supreme Court bar who move the admission of close relatives have been allowed to mention that relationship, as in, "I move the admission of my wife, Jane Doe." Then, Roberts — like his predecessors — would typically say, "Your wife will be admitted." In recent months however, the chief justice's response has omitted the relationship, instead stating that, for example, "Ms. Doe will be admitted." Roberts would not comment on the

reason for the change. But it may serve to "neutralize" the ceremony before the day comes that a man explicitly moves the admission of his husband, or a woman moves the admission of her wife. By taking the relationship out of the reply, Roberts could turn the ritual into a routine matter that would incorporate same-sex couples into the bar admission process, without calling attention to it.

May 27: *New Terminology*. In its death penalty decision *Hall v. Florida*, the court for the first time used the phrase "intellectual disability" to describe the condition formerly known by the now disfavored term "mental retardation." As recently as 2013, the court used the term "mental retardation" in a Medicaid case, *Wos v. E.M.A.*, but the court appeared to respond to advocates for the intellectually disabled who have tried to banish the old term from the legal lexicon. The ruling rejected Florida's standard for determining whether a death-row inmate who claims to have intellectual disability could be executed. Early in the majority opinion, Justice Anthony Kennedy wrote, "Previous opinions of this court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon." In 2010, Congress passed "Rosa's Law," named after a Maryland girl whose family campaigned against the term. It replaced mental retardation with "intellectual disability" in specific federal laws.

June 30: *Vasil Retires*. On the final day of the court's term, Chief Justice Roberts announced several retirements from the court staff, including that of Chris Vasil, the chief deputy clerk, after 32 years at the court. "Mr. Vasil has performed the vital role of assisting both the bench and bar in the management of our docket, and in navigating the nuances of our rules, practice and customs," Roberts said from the bench. "He has done so with grace, good judgment, and distinction." Since then, court clerk Scott Harris has abolished the position as such, though Jordan "Danny" Bickell in the position of deputy clerk for practice and procedure will take on many of the duties of the position.

Aug. 11: *Faint Praise*. Chief Justice Roberts made a rare appearance before the American Bar Association's House of Delegates, hailing the importance of the Magna Carta as a foundation of "our fundamental freedoms" on the eve of its 800th birthday. The chief justice's appearance kicked off a commemoration of the British charter's birthday that will include a meeting in London in 2015 and re-dedication of a monument to

the Magna Carta in Runnymede, first placed there by the ABA in 1957. The document was sealed by King John of England in 1215. It was not a perfect document, however, Roberts told the audience. It was aimed at resolving a quarrel between "a venal king and selfish barons," and it includes distasteful provisions, including one that disparages Jews. But it is worth celebrating, Roberts said, because it planted seeds of modern-day concepts of due process, separation of powers, trial by jury, and the rule of law. It helped lead the United States and other nations "down the path to constitutional democracy."

Sept. 19: *Keep it Brief*. Chief Justice Roberts made a plea for brevity by appellate advocates, complaining about the unnecessary length of briefs filed with the court. Speaking at the University of Nebraska College of Law, Roberts was asked for tips on writing persuasive briefs. He answered without hesitation: "I know that every judge in this room will agree with me: Be brief! Be concise." For most Supreme Court briefs, Roberts said, lawyers are limited to roughly 50 pages. As a result, Roberts said with a long-suffering tone, "every brief you pick up is 50 pages — every one of them, the next one, and the next one, and the next one." But then, he said, "all of a sudden, you pick up a brief that's 35 pages long. The first thing you do is look at the cover, because you like that lawyer." Briefs should be balanced as well, he said. "So many briefs say the case is so clear, that the statute can have no other meaning and . . . your client should clearly win. You pick up the next brief, and it's the same on both sides." When both sides tell the court that their position is the only possible way to rule, Roberts continued, "They're telling you basically that you are going to be an idiot whichever way you rule."

Sept. 22: *Kneedler's Work.* Deputy Solicitor General Edwin Kneedler won a career achievement award for his nearly 40 years of public service in the U.S. Department of Justice. Attorney General Eric Holder presented Kneedler with a "Sammie" award — the Samuel J. Heyman Service for America Medal — from the Partnership for Public Service, which sponsors the awards for distinguished service by federal employees. Holder praised Kneedler as the "institutional memory and the institutional conscience" of the solicitor general's office. "He has worked long hours in the service of our country," Holder said, joking that Kneedler had started his federal career in the Abraham Lincoln administration. It was actually the Gerald Ford administration, he hastened to note. At the Justice De-

partment, the 68-year-old Kneedler has argued 125 cases before the Supreme Court, more than any other person currently in practice. He has no plans to retire.

Sept. 23: *Not Yet*. Justice Ruth Bader Ginsburg explained, in the most explicit terms yet, why those who are calling for her to retire are "misguided." In an interview with *Elle* magazine, Ginsburg said, "Who do you think President Obama could appoint at this very day, given the boundaries that we have?" She added, "If I resign any time this year, he could not successfully appoint anyone I would like to see in the court." She went on to explain that while new Senate rules bar filibusters for the confirmation of lower court judges and other nominees, "it remains for this court. So anybody who thinks that if I step down, Obama could appoint someone like me, they're misguided. As long as I can do the job full steam . . . I think I'll recognize when the time comes that I can't any longer. But now I can." It is rare for Supreme Court justices to publicly handicap the moves of other public officials in such explicit terms.

Oct. 6: *Web Makeover*. The Supreme Court's 14-year-old web site took on a new appearance as the 2014-2015 term began. The site has "a new look and improved functionality," according to a press release from the court. The new home page presents frequently requested information, including transcripts and audio from the most recent oral arguments. The update also features "enhanced images and graphics, improved search features and updated access on mobile devices," the court stated. Launched in April 2000, the site has gotten mixed reviews from the beginning. Critics have said it is difficult for those unfamiliar with how the court works to find docket and other information. An earlier redesign came in 2010, when the court began hosting the website in-house, taking it over from the Government Printing Office.

Oct. 10: *Roberts and Clinton*. Documents released by the Clinton Presidential Library led to a startling revelation: Chief Justice Roberts, then in private practice, considered representing President Bill Clinton before the U.S. Supreme Court in 1997 in the legal battle over Paula Jones' allegations of sexual harassment. The then-acting solicitor general, Walter Dellinger, approached Roberts about the possible representation in 1996 and Roberts did not say no. Clinton ultimately stuck with Robert Bennett, a veteran litigator who had represented him in earlier stages of the Paula Jones case but had not previously argued before the Supreme Court. An ambig-

uous four-page handwritten note from Elena Kagan, then associate White House counsel, led to the intriguing possibility that the conservative Roberts could have joined Clinton's legal team. Titled "John Roberts / Hogan," the note mentions "counsel change?" Roberts, former deputy solicitor general under President George H.W. Bush, was a partner at Hogan & Hartson at the time. Bennett said he was unaware Roberts ever had been contacted to argue the case. "There was no finer Supreme Court advocate at the time than John Roberts," Bennett said. "If the decision had been 5-4, he might have made a difference. But not when it was 9-0."

Oct. 22: *Errata*. In a rare announcement, the court said that an error in a recent order written by Justice Ginsburg had been discovered and corrected. Ginsburg's mistake came in her dissent to an order in the Texas voter ID case, *Veasey v. Perry*, released at 5 a.m. on Oct. 18. In describing provisions of the law that tightens identification requirements, Ginsburg wrote: "Nor will Texas accept photo ID cards issued by the U.S. Department of Veterans' Affairs." The *Election Law Blog* soon reported that such cards are an acceptable form of identification for voters. By Oct. 22, the sentence was deleted, and, apparently at Ginsburg's request, the error was announced. The misstep followed other high court mistakes in recent months. In *EPA v. EME Homer City Generation*, Justice Scalia on April 29 incorrectly summarized a precedent — a 2001 decision he had written. Justice Kagan's turn came on May 5 in her dissent in *Town of Greece v. Galloway*, when she incorrectly stated that Newport, R.I., was the home of the first community of American Jews. In an investigative law review article, Harvard Law School professor Richard Lazarus also focused on the court's secretive process for fixing postpublication errors. That prompted David Zvenyach, a lawyer for D.C.'s city council, to launch *@SCOTUS_servo*, a Twitter feed that reports on regular, automated sweeps that search the court's online opinions for changes. The feed picked up the changes in Ginsburg's dissent.

Nov. 3: *Time Flies*. The Supreme Court is often accused of "turning the clock back" on one doctrine or another. But on the Monday after the end of Daylight Saving Time, when it came to turning the clock back — literally — at the court building, it seemed not to be up to the task. Before the court session began at 10 a.m., clocks in several parts of the building were inaccurate by several hours. At 9 a.m. the clocks read 6 a.m. Upon entering the court from behind the velvet curtains, Chief Justice Roberts

turned around and looked up at the wayward timepiece. Before calling the first argument, Roberts offered words of caution to the advocates about to stand before the court. The clock, he said, is "not accurate." Court spokeswoman Kathy Arberg confirmed that the end of Daylight Saving Time triggered a problem with the signaling system that governs the clocks. Electricians from the Architect of the Capitol's office, which has jurisdiction over the court building, were working to make repairs.

Nov. 12: *Lift the Veil*. A new organization targeting the Supreme Court over transparency began airing television ads that describe the court as the "most powerful, least accountable" government institution. The group is called Fix the Court and will campaign not only for cameras in the Supreme Court, a perennial issue, but other measures that would shed more light on the justices in areas of financial disclosures, recusals, ethics and media access. "Most Americans now view the Supreme Court unfavorably. Is it any wonder? The Supreme Court's outsized power is only matched by its disdain for transparency," said Gabe Roth, executive director of Fix the Court. Roth was formerly manager of the Coalition for Court Transparency, also a pro-openness group that will continue in existence.

Nov. 26: *Heart Trouble*. Justice Ginsburg underwent a heart catheterization procedure to clear blockage in her right coronary artery. The procedure took place at MedStar Heart & Vascular Institute at MedStar Washington Hospital Center in Washington and resulted in placement of a stent too. Ginsburg, 81, experienced "discomfort" during routine exercise the previous night, and was taken to the hospital. She was sent home after the procedure and attended the next oral argument at the court, just days after her surgery. Since joining the court in 1993, Ginsburg has survived two bouts with cancer and has impressed colleagues with her resilience and exercise regimen, supervised by a trainer.

Dec. 8: *Flawed Petition*. The Supreme Court issued an extraordinary order telling a Washington practitioner to show cause why he should not be sanctioned for "his conduct as a member of the bar of this court" in connection with a pending petition in a patent case. Howard Shipley, a Foley & Lardner intellectual property partner, was the target of the order, and his petition was in the case *Sigram Schindler Beteiligungsgesellschaft MBH v. Lee*. Under the order, Shipley was given 40 days to show why he should not be sanctioned. No documents on file with the court shed any light on the reasons for the order. It was possible that the court's dis-

pleasure was triggered by a footnote on the final page of Shipley's petition. It states, "Prof. Sigram Schindler, the primary inventor of the '453 patent, should be recognized for significant contributions to this petition." In other cases involving the German high-tech firm, Schindler is described as a computer sciences professor at the Technical University of Berlin. The clerk's published guide for lawyers states, "Names of non-lawyers such as research assistants, law students, and advisors may not appear on the cover [of the petition] under any circumstances; nor are they to be credited with having contributed to the preparation of the petition either in the text, in a footnote, or at the conclusion of the petition."

Dec. 15: *Quacks Like a Duck*. It was a coup for the University of Mississippi School of Law that Justices Kagan and Scalia agreed to appear together at the school for a public conversation. But the justices may have had ulterior motives in saying yes. After the talk, the two went duck hunting together on an expedition hosted by former federal judge Charles Pickering. Kagan previewed the adventure at an appearance in November at Princeton University, her alma mater. As she has before, Kagan recounted how she asked Scalia about hunting soon after she joined the court in 2010. They began with skeet shooting, Kagan said. "Then we went on to the real thing." She told the audience that she and Scalia go on hunting trips a couple of times of year for quail and pheasant, adding that in December they would go to Mississippi for duck hunting. "I do like it," Kagan said. "I'm a competitive person. You know, you put a gun in my hand and say the object is to shoot something, I'm like, 'All right! Let's do it!'"

Dec. 31: *Annual Report*. The Supreme Court is developing an electronic filing system that will make all case filings available to the public online, Roberts announced in his annual year-end report. Roberts said the new system "may be operational as soon as 2016," even as a "next generation" case management and electronic case filing system is under development for lower federal courts. But the chief justice, responding to increasing calls for greater transparency of the judicial branch, in effect asked the public to be patient with an institution that is — and, in his view, should be — slow to embrace technological change. "The courts will often choose to be late to the harvest of American ingenuity," Roberts said, in his most detailed explanation of the judiciary's thinking on transparency issues. He made no mention of the long-running debate over camera access to the federal courts.