Confessions at the Supreme Court

JUDICIAL RESPONSE TO SOLICITOR GENERAL ERROR

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ABSTRACT

As the chief litigator for the US government, the solicitor general plays a crucial role in the Supreme Court decision-making process. The justices and solicitor general share a mutually beneficial relationship that is reinforced by the solicitor general's willingness to provide legal advice when asked. In this article, we examine whether and how this relationship changes when the solicitor general files a formal "confession of error." Using data on confessions filed between the 1979 and 2014 terms, we find the justices are significantly less likely to support the solicitor general's position at multiple stages of the Court's decision-making process if the solicitor general confesses error in light of a policy change. This punishment is harshest when the solicitor general provides advice as an amicus curiae participant, but it is only temporary. These results provide new insight into the scope and limitations of benefits allotted to the Court's "tenth justice."

When Solicitor General Charles Fahy appeared before the Supreme Court to defend President Franklin Roosevelt's exclusion and internment of Japanese Americans during World War II in *Korematsu v. United States* (323 U.S. 214 [1944]), he provided the justices with an army report that suggested Japanese Americans on the West Coast threatened national security (Stone 2004). More recent navy intelligence contradicted this finding, but the

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federal government's chief litigator decided to violate the custom of providing the justices with all necessary information and offered the Court only documents that favored the president's preferred outcome (Savage 2011). The justices predictably trusted Fahy and sided with Roosevelt, producing an opinion unanimously described as one of the Court's worst (Greene 2011; Liptak 2014). With *Korematsu* still a technically valid precedent in 2011, one of Fahy's successors, Neal Katyal, decided it was time for the Office of the Solicitor General to address Fahy's deceit. Using a procedural act called a "confession of error," Katyal formally admitted that Fahy had suppressed information that, if known, would have changed the outcome in *Korematsu* (Katyal 2011). He then suggested that the decision might negatively affect future cases and that, in light of this admission, the justices should consider finding a way to overturn it (Katyal 2013), which the Court did 7 years later in *Trump v. Hawaii* (138 S. Ct. 2392).

As Fahy's role in the *Korematsu* decision suggests, the solicitor general plays an outsized role in the Supreme Court decision-making process. Over the course of 150 years of managing the US government's appellate litigation, the Office of the Solicitor General has become synonymous with professionalism, independence, and legal excellence (Salokar 1992). As a result, the solicitor general appears before the justices more than any other advocate, and the US government wins more cases than any other party (Black and Owens 2011). Because the solicitor general produces excellent and legally sound work, Supreme Court justices treat the people who hold the office as trusted legal advisers to whom the justices can turn for advice and assistance regarding their caseload and opinions (Caplan 1987; Perry 1991; Collins 2008). By helping the justices, the solicitor general gains trust and deference that ultimately results in unparalleled success and influence (Black and Owens 2012c). This relationship exists as long as solicitors general avoid leaning into the executive branch policies of the presidents who nominated them, as their influence before the Court suffers when their behavior looks political (Pacelle 2003; Wohlfarth 2009). But what happens to this mutually beneficial relationship when the solicitor general confesses that her office identified an error that resulted in an undeserved win for the government? And what happens to that trust if the "error" is purposeful or politically motivated, as Fahy's was in *Korematsu*?

We seek to better understand if and how the justices react to the solicitor general's decision to file a confession of error. Confessions of error are a quirk of the solicitor general's relationship with the justices; because the solicitor general and the Supreme Court deal with the long-term development of federal law (Salokar 1992), the solicitor general is the only Supreme Court litigator who is expected to tell the Court that an error resulted in an undeserved win for their client in federal court (Murray 2012). When the US government achieves such a win, the Court expects the solicitor general to formally "confess error" in the case and ask the justices to grant review, vacate the favorable ruling, and then remand the case to the lower court for further proceedings (Bruhl 2009). While this expectation might suggest the justices understand and accept the occasional fallibility of their trusted legal partner, our research suggests this is not always the case. Not all

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confessions of error are the same, and some, notably those that ask for reevaluation in light of an executive branch policy change, can look blatantly political. These confessions paint the solicitor general as an executive branch advocate attempting to use the Court as a vehicle for partisan ends (Murray 2012). We consider whether, despite their expectations, the justices might punish the solicitor general for using confessions of error this way.

Using a data set of the more than 22,000 justice-votes in over 2,500 cases involving the solicitor general between the 1979 and 2014 Supreme Court terms, we find that Supreme Court justices are significantly less likely to support the solicitor general's position at multiple stages of the Court's decision-making process if the solicitor general has recently confessed error in light of a legislative or executive policy change. In contrast, the justices do not systematically punish the solicitor general following a confession of error brought on by a nonpartisan technical mistake. We also find that this punishment is harshest when the solicitor general is providing "extra" advice to the justices as an amicus curiae participant and that the punishment is temporary, with the relationship between the solicitor general and the justices returning to normal within just a few weeks. Our results suggest that the justices welcome the solicitor general to correct errors when needed but respond poorly when the solicitor general uses error correction as a guise for political behavior.

This article contributes to the literature in three distinct ways. First, our work offers new insight into the solicitor general's reputation with the justices. In the ongoing debate on what makes the solicitor general the most successful party before the Court (see Black and Owens 2012c), we suggest the justices expect the Office of the Solicitor General to produce expert legal advice and respond negatively when the solicitor general uses the legal tools of the office to engage in overtly partisan behavior. But we also find that while the justices might exhibit uncharacteristic circumspection toward the solicitor general after a confession, the wariness is short-lived. Consequently, this work reinforces a literature that suggests the Office of the Solicitor General's unique relationship with the judicial branch contributes to the solicitor general's influence.

Additionally, we offer a new way of examining politicized behavior in the Office of the Solicitor General. Wohlfarth (2009) shows the justices respond negatively to solicitors general who continually file voluntary amicus briefs that favor their administrations' positions, suggesting the justices respond negatively to politicized solicitors general. As our analysis shows, solicitors general can use confessions of error for similarly political purposes, and the justices also respond negatively to that behavior. By systematically analyzing the content of the confessions of error, we are able to look at politicization through a different mechanism. And, importantly, our results show that while solicitors general can use confessions of error to try and align the law with the popularly elected branches' preferences, the justices do not respond favorably to those actions either.

Finally, we expand the discussion surrounding the politicization of legal institutions. While the need for legal continuity over time should keep solicitors general relatively apolitical (Black and Owens 2012c), researchers understand the solicitor general can use amicus briefs or the office's influence over the agenda-setting process to advance

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the president's political agenda (Pacelle 2003; Bailey, Kamoie, and Maltzman 2005; Wohlfarth 2009). Of course, when solicitors general choose to use these tools for political purposes, their decision to act in a political manner only hurts their office's reputation. Confessions of error are different because they implicate judges, both as victims of bad advice and as custodians responsible for fixing the solicitor general's error (Salokar 1992). This directly exposes a vulnerability of the court system to the political games of the executive branch that the justices would prefer to publicly avoid (Baum 2006). Our findings offer an insight into the protective stance the justices assume as a response to this vulnerability.

THE SOLICITOR GENERAL'S REPUTATION

When Congress created the Department of Justice in 1870, it placed within that agency an "officer, learned in the law, to assist the Attorney-General in the performance of his duties, to be called the Solicitor-General, who shall be appointed by the President, by and with the advice and consent of the Senate."[1] The attorney general would head the Justice Department and broadly oversee federal law enforcement while the subordinate solicitor general would mange all appellate litigation involving the US government, including deciding which cases to appeal and how to approach the justices when appearing before the Court (Pacelle 2003). The Office of the Solicitor General excels at these tasks, getting more cases on the Court's docket and winning more at the merits stage than any other advocate (Black and Owens 2011, 2012a). While scholars have, at various points, attributed this incredible success to the office's expertise and professionalism (Perry 1991; Salokar 1992), repeated interactions with the justices (McGuire 1995), and ideological alignment with the Court (Bailey et al. 2005), research ultimately shows solicitors general are so successful because they sit in the office itself (Black and Owens 2012c).

Part of the solicitor general's success is dependent on the unique, mutually beneficial relationship the Office of the Solicitor General has with Supreme Court justices. By agreeing to appeal only the "best" federal cases to the Supreme Court, the solicitor general keeps thousands of cases off the Court's docket and helps the justices manage their caseload (Black and Owens 2011). The solicitor general and the attorneys who work in the office have become so skilled at identifying cases worthy of review that the justices often ask the solicitor general to advise them on cases to which the US government is not a party, filing a Call for the Views of the Solicitor General (CVSG), to which the solicitor general always responds (Black and Owens 2012b).[2] Even when the justices do not file a CVSG, the solicitor general's input is always welcome at the Court (Collins 2008), and the appearance

1. *The Revised Statutes of the United States, 1873–1874*, Title VIII, § 347.

2. While the formal language of a CVSG suggests this is an optional request from the Court, the solicitor general treats the invitation as an order and always produces a brief. The Court calls on the solicitor general about 10 times a term across the period under study here (see also Thompson and Wachtell 2009; Anders 2017).

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of an amicus brief by the solicitor general can signal a case's certworthiness and importance (Caldeira and Wright 1988; Black and Boyd 2013; Schoenherr and Black 2019). In exchange for the help, the Court rewards the solicitor general with considerable sway over the decision-making process, following the office's docket recommendations up to 90% of the time (Black and Owens 2012c) and siding with the government's position two-thirds of the time when it is a party on the merits (Segal and Reedy 1988; Segal 1990; Deen, Ignagni, and Meernik 2003; Johnson, Wahlbeck, and Spriggs 2006) or participates in the case via an amicus brief (Bailey et al. 2005; Black and Owens 2012c). This advantage disappears when a former solicitor general enters private practice (Black and Owens 2012a), underscoring that only the attorney serving as the "tenth justice" receives this unparalleled advantage.

Importantly, the Office of the Solicitor General's domination is dependent on its ability to maintain a reputation as a professional legal resource for the Court. The solicitor general's power stems from an ability to navigate the duties of an advocate for the executive branch while still acting as a "small, elite law firm that has been populated by some of the greatest legal minds and attracts the best staff attorneys" (Pacelle 2003, 5). Much like the justices themselves, the solicitor general must appear to be a model public servant who places national interest over immediate ideological gains when interacting with the Court. While the solicitor general's office is always dealing with political questions (Salokar 1992), and solicitors general do use their influence over the justices to make political gains (Pacelle 2003), its inhabitants must keep the office from looking political in order to retain the greatest amount of influence with the justices. When the office looks political, the justices lessen their dependence on the solicitor general and side with the government less frequently (Wohlfarth 2009). Put plainly, solicitors general receive this great advantage only when they are viewed as the Court's trusted legal adviser and not as a political advocate for the executive branch.

There are, of course, disadvantages to maintaining this relationship with the Court. Unlike private litigants who may attempt to win a case at all costs, attorneys who work for the Department of Justice in general, and in the Office of the Solicitor General specifically, have a stated mission to "ensure fair and impartial administration of justice for all Americans" (https://www.justice.gov/about). Both the Department of Justice and the Supreme Court have acknowledged the responsibility of the solicitor general to maintain the public's trust in the American judicial system, which includes admitting when legal errors are committed by US government attorneys and correcting them in court, something no other attorney is obligated to do. Supreme Court justice Frank Murphy, who served as attorney general and worked closely with Franklin Roosevelt's solicitors general, wrote in *Young v. United States* (315 U.S. 257 [1942]) that "the public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent." The formal practice of issuing "confessions of error" when erroneous information led to a legal victory for the government grew out of this obligation to uphold the public trust.

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CONFESSIONS OF ERROR

Confessions of error typically begin when the solicitor general realizes the US government has won a case it should have lost. While reviewing Supreme Court petitions filed by opponents who lost to the US government in a lower court, the solicitor general occasionally identifies some sort of mistake in the legal record that contributed to the government's victory (Salokar 1992). Because the Office of the Solicitor General is bound by duty and custom to report legal errors (Bruhl 2009), the solicitor general must then alert the justices to the problem. The solicitor general usually does so by writing a response brief that identifies the error and asks the justices to grant review in the case, vacate the government's win, and remand the case to the lower court in light of the confessed error (Bruhl 2009).[3]

This sequence of events happens, on average, about two times a term. The appearance of a confession of error is not entirely predictable, as figure 1, which illustrates the prevalence of confessions of error across solicitors general from Wade McCree to Donald Verrilli, suggests. Looking at the 72 confessions of error filed in the 36 terms under study here, the figure shows that solicitors general like George H. W. Bush solicitor general Kenneth Starr, Clinton solicitor general Drew Days, and Obama solicitor general Verrilli filed several confessions of error during their tenures, while others, like Clinton's second solicitor general Seth Waxman, failed to file any in 4 years. The patterns suggest that solicitors general do not confess error very often, nor do they do so with any sort of systematic timing.

A brief overview of confessions of error reveals that not all confessions are created equal. Confessions can broadly be placed into one of three different categories: (1) mistakes made by the solicitor general or someone else within the Department of Justice, (2) mistakes made by a lower court judge, or (3) decisions that are incorrect in light of administrative policy changes.[4] Confessions that fall into the first category involve clear attorney mistakes, such as when a US government attorney encouraged a district court judge to use the wrong version of the federal sentencing guidelines in *Collier v. United States* (552 U.S. 1092 [2008]). In the second category are confessions suggesting the lower court judge made a mistake, such as when Solicitor General Kenneth Starr concluded that the lower court should have vacated a drug conspiracy conviction in *Mohwish v. United States* (507 U.S. 956 [1993]) in light of the binding precedent set in *Jeffers v. United States* (432 U.S. 137 [1977]). The third category involves cases that stem from US government policy changes, usually executive although occasionally legislative, that occurred in the midst of an ongoing case. For

3. Rarely, the solicitor general may also issue a statement for public consumption, absent an existing case, as acting solicitor general Neal Katyal did when he confessed error in *Korematsu*. These types of confessions are less common, but they usually arise when the solicitor general is preparing to argue a new case with a similar legal question.

4. The cases in which confessions of error are filed also cover a range of issue areas, although they most commonly concern criminal procedure, as fig. A1 (figs. A1 and A2, along with tables A1–A5, available online) shows.

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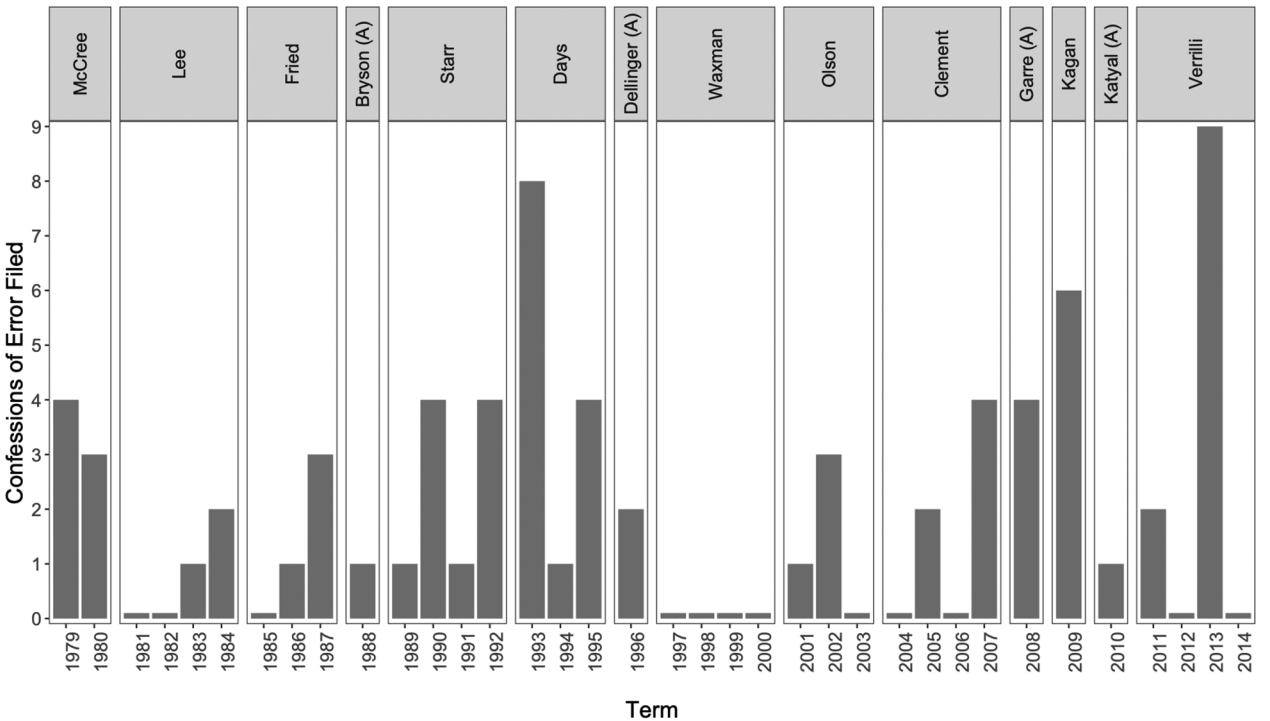


Figure 1. Number of confessions of error filed between the 1979 and 2014 terms. Terms are grouped by the solicitor general who ran the office for most of that term. Solicitors general denoted with an "A" served as acting solicitor general.

an example of this, consider *Russell v. United States* (572 U.S. 1056 [2014]), in which the Office of the Solicitor General confessed that the Department of Justice had changed its interpretation of certain welfare statutes and that, as a result of those interpretations, the government could not convict a man who claimed ignorance of policies for welfare fraud. Confessions can fall into multiple categories, as some cases just appear to have gone wrong from end to end.[5]

The majority of the confessions of error filed over this period are made in light of some sort of mistake (44 total confessions, 7 regarding solicitor general error and 37 involving lower court error), although confessions involving policy changes like the one filed in *Russell* appear almost as often (39 total confessions). As figure 2 shows, with the exception of Days and Verrilli, all solicitors general file more confessions regarding mistakes than they do confessions involving policy changes.

Traditionally, the Supreme Court has relied entirely on the solicitor general's judgment regarding confessions of error, issuing the requested "grant-vacate-remand" order without independently reviewing the confession's merit (Rosenzweig 1994; Katyal 2013). This automatic action would suggest that the justices treat all confessions of error the same. But the errors are clearly different. Confessing error based on an actual mistake, whether made by the lower courts or the solicitor general, is a technical correction (Rosenzweig 1994), but confessions of error that derive from policy changes made by the popularly elected branches of government look more political. These are the types of confessions that get filed when a new administration enters the White House or when the president appoints a new department head, and these confessions of error simply look different from the more technical ones (Rosenzweig 1994). Anecdotal evidence reveals that several jurists have voiced concern about the potential to abuse confessions of error for political gain (Murray 2012). As then associate justice William Rehnquist summarized in *Mariscal v. United States* (449 U.S. 405 [1981]), he "harbored serious doubts that our adversarial system of justice is well served by . . . vacating judgments which only the Solicitor General questions." In addition, the infamous Court of Appeals judge Learned Hand spoke for a number of lower court judges when he said, "It is bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General" (Rosenzweig 1994). Both Rehnquist and Hand worried that the process of confessing error gave solicitors general a power they could conceivably harness for purposes less genuine than correcting the legal record.

In an era in which politicization of the Office of the Solicitor General is increasingly normal (see Wohlfarth 2009), any abuse by solicitors general is most likely to occur in the political confessions brought on by executive and legislative policy changes. As we have already mentioned, a long line of research has shown the justices are wary of solicitors general who behave in a political manner and advocate their administration's policies at the

5. *Petty v. United States* (481 U.S. 1034 [1987]) is a good example of this, although the case facts are too complicated to discuss here.

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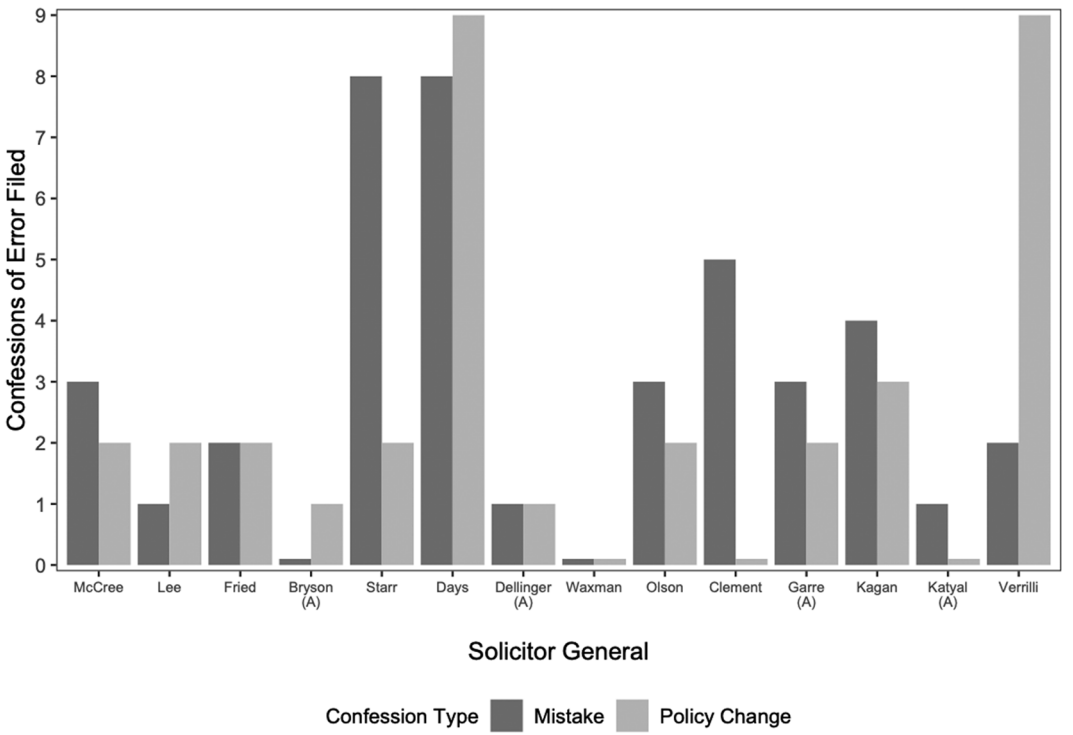


Figure 2. Number of confessions of error involving mistakes (*dark gray*) and policy changes (*light gray*) for each solicitor general between the 1979 and 2014 terms. Solicitors general denoted with an "A" served as acting solicitor general. Categories are not exclusive, and confessions can fall into multiple categories.

expense of legal quality (Salokar 1992; Pacelle 2003; Wohlfarth 2009), and the evidence suggests that wariness extends to confessions of error as well (Liptak 2017). In *Kiobel v. Royal Dutch Petroleum* (569 U.S. 108 [2013]), for example, Obama solicitor general Donald Verrilli advocated an amended government position, at odds with the previous position advanced by solicitors general in Republican administrations. In a tense exchange, Justice Antonin Scalia asked Verrilli, "Why should we listen to you rather than the Solicitors General who took the opposite position? Why should we defer to the views of the current administration?" Chief Justice John Roberts provided an answer: "Whatever deference you are entitled to is compromised by the fact that your predecessors took a different position" (Liptak 2017). Solicitors general are not above using legal maneuvers if such maneuvers might serve their administration's political purposes.

When solicitors general confess error as a result of a policy change, they ask the Court to help cement new executive branch policy by vacating rulings that relied on older policies and positions. In these situations, the solicitor general is not behaving as the Court's trusted partner, but rather as an executive branch advocate using the Court as a vehicle for political ends (Murray 2012). It is a clear violation of the terms of the mutually beneficial relationship on which the solicitor general's influence relies. As a result, we expect to find that the solicitor general loses influence in all areas of the Court's decision-making process following a policy-based confession of error.

> Hypothesis 1. Supreme Court justices will be less likely to side with a solicitor general following a confession of error brought on by a policy change, relative to the other types of confessions.

This expectation begs an important question: Why would solicitors general continue to confess error if they are susceptible to judicial punishment? We believe there are three reasons that solicitors general continue to engage in this behavior. First, as we pointed out before, not all confessions of error are created equal, and some can actually help the solicitor general before the justices. As former longtime deputy solicitor general Michael Dreeben explained, the Office of the Solicitor General can boost its reputation by confessing technical errors and mistakes, in part because confessions of error are "indications that we are looking really carefully at everything and are not just reflexively defending anything that the lower courts have done (in the government's favor)."[6] Second, solicitors general have a relationship with the executive branch they are charged with representing in court. Because the justices automatically respond to the confessions, solicitors general have an incentive to use them to enact new legal policies that will curry favor with their superiors, a move that could potentially help them later in their careers. Finally, solicitors general can

6. Dreeben made these remarks in a 2010 interview at the Duke University School of Law. A recording of the interview can be found at https://www.youtube.com/watch?v=EmeHI4TryIw&t=1177s.

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be confident that the Court will come back to them for help. At the end of the day, the justices need the solicitor general's help to manage their workloads and to provide expertise in certain issue areas.

While all three of these reasons contribute to the persistence of confessions of error, we believe the mutually beneficial relationship that the justices share with the solicitor general is most responsible for the survival of this tradition. While confessions of error, particularly political ones, anger the justices and damage the reputation of the solicitor general, the relationship is too valuable for either party to give in to permanent discontent. The justices have no incentive to cut off the free help they receive from the solicitor general, and solicitors general have no incentive to stop helping if that help offers an advantage before the justices. We already know that solicitors general use confessions of error sparingly, but we also expect the justices to do the same with their punishments of any abuse of those confessions. Specifically, we believe this punishment will be confined to a short period of time—a slap on the wrist before both solicitor general and justices return to normal. We believe the status quo returns within one sitting session of the Court, or a period of about 2 weeks.

> Hypothesis 2. Supreme Court justices will punish solicitors general only over the course of a single sitting.

DATA

To see how the justices respond to confessions of error in different environments, we analyze the justices' dispositions in a case in three different situations: (1) when the solicitor general appears as a party on the merits, (2) when the solicitor general produces an amicus brief in response to a CVSG, and (3) when the solicitor general voluntarily files an amicus brief in a case. As we pointed out earlier, the justices' records suggest they defer to the solicitor general's suggestions more often than not in these three areas (Black and Owens 2012b), indicating that studying all three together will create a complete picture of the justices' reactions to confessions of error.

Examining the justices' responses to the solicitor general on the merits and recommendations both requested (CVSG) and offered (voluntary amicus briefs) offers insight into two contrasting aspects of the solicitor general's relationship with the justices: the solicitor general as a litigator appealing to the justices for support in the first and the solicitor general as trusted adviser offering help in the second. We want to know whether the justices are less likely to decide a case in favor of the solicitor general when a confession of error is present in any of the three situations. Our analysis of the justices' votes in favor of the solicitor general as a party to a case covers 13,655 justice-votes over 1,539 cases heard by the Court between the 1979 and 2014 terms; our analysis of the justices' votes siding with the solicitor general's position in a CVSG covers 2,073 justice-votes over 227 cases in that same period; and the analysis of the justices' votes siding with the solicitor general's position in a

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voluntary amicus brief covers 6,935 justice-votes over 780 cases over the same 36-term period. In all situations, our dependent variable is whether a justice did (coded as 1) or did not (coded as 0) vote with the solicitor general's preferred position.

Our data come from Black and Owens's (2012c) examination of the Office of the Solicitor General, updated through the 2014 term. These data cover the 10 Senate-confirmed solicitors general, six acting solicitors general, and three groups of career officials who maintained the office between solicitors from the Carter to the Obama administrations.

In order to empirically model the justices' reactions to a confession of error, we first had to consider how and when a cert-level action could affect the judicial decision-making process. As we noted earlier, the solicitor general files the confession of error when responding to a petition that the Court review a lower court decision (Rosenzweig 1994; Bruhl 2009). The justices discuss these confessions and their response to them when they review petitions at their conferences, which happen within a Court "sitting," the 2-week period of every month in which the justices hear cases. Importantly, the justices make preliminary decisions about cases immediately after reviewing the cert petitions,[7] which means that the justices decide how to respond to the solicitor general as a litigant and adviser shortly after reviewing confessions of error filed by that very solicitor general. Analyzing the data at a sitting level thus allows us to see how the justices respond to confessions of error when making decisions. Ultimately, then, we operationalized the existence of a confession of error by examining whether the solicitor general confessed any of the three types of errors during a Court sitting: (1) confessions in light of a policy change, (2) confessions in light of a technical mistake by either the solicitor general or the lower court, or (3) some other kind of confession.[8]

To identify the timing of these confessions, we used Bruhl's (2009) data on confessions of error that resulted in a grant-vacate-remand and updated it through the 2014 term. We used the filing dates on the confessions to sort them into sitting sessions. Any confession received between the end of one sitting session and the beginning of another counts as being filed in the new sitting session, as that is when the justices review the confession.[9] Solicitors general rarely file more than one confession of error in a sitting session, doing so only 14 times over the 256 sitting sessions under study here. Additionally, because we

7. These votes are fairly stable and only rarely change after conference (Maltzman, Spriggs, and Wahlbeck 2000).

8. The Office of the Solicitor General has put every response brief it has filed since the 1998 term online for public reference, but locating pre-2008 briefs and the confessions contained with them was a challenge, even with the help of Westlaw and LexisNexis. We were able to ascertain the type of confession filed in 67 of the 72 confessions of error under study here, and we placed the remaining five into an "other" category rather than removing them from the analysis. Taking these out altogether does not substantially change the results.

9. The solicitor general does occasionally file a confession of error over the summer, which the justices discuss when they hold their "long conference" before the start of the term. If the solicitor general filed a confession of error over the break, we counted it as occurring during the first week of the term, since that was when it got discussed by the judicial conference.

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are interested in addressing the length of the punishment associated with confessing error, we include a dichotomous indicator of a confession of error occurring in the previous sitting.

We include a number of control variables to account for factors that could influence the justices' approaches to a case. First, given that solicitors general enjoy the benefits of their mutually beneficial relationship with the justices only as long as they behave like legal-minded and professional elite attorneys, we control for the politicization of the Office of the Solicitor General in our analysis. To identify the level of politicization of the Office of the Solicitor General, we employ an updated version of Wohlfarth's (2009) measure of solicitor general politicization, which is a running tally of the percentage of voluntary amicus briefs previously filed by the solicitor general that advocate the appointing president's position. The tally runs up to the day before a case is orally argued, which guarantees it is the politicization of the office before the justices review the case in conference and not while the justices are reviewing the case in conference.[10]

We also control for whether the solicitor general confessed error in a criminal procedure case. We control for these cases because our analysis suggests they involve such strange and insular details that they cannot set long-term policy, even if they do suggest that policy changes are imminent. The next is the total number of confessions of error filed by each solicitor general up to the current sitting session. Some solicitors general are more likely to file confessions than others—consider, for example, that George H. W. Bush's appointee Kenneth Starr filed 10 over the course of 4 years, while Bill Clinton's appointee Seth Waxman filed none over the same length of time. Such behavior could look like a political maneuver and increase the justices' irritation with the office, or, alternatively, it could help convince the justices that the solicitor general is simply trying to correct past errors and soothe their irritation. We are indifferent as to the direction of the relationship, but we do believe that the total number of confessions could influence the justices' vote on a case.

To control for ideology's influence on the outcome of a case, we include a measure of the absolute value of the ideological distance between the solicitor general and the voting justice. To do this, we take the squared difference between a justice's Judicial Common Space Score (Epstein, Segal, and Westerland 2008) and the Common Space score of the president who nominated the solicitor general; after all, the president nominates the solicitor general and can ask the latter to pursue cases that align with the president's ideological interests (Pacelle 2003). We also control for outlier signals, or times when a solicitor

10. There are other ways to conceptualize political behavior in the Office of the Solicitor General, including using dichotomous indicators for confessions of error filed on cases begun by a previous administration, indicators of a dissent filed in the first year of a new presidential administration, or indicators of dissents filed in response to the Court's order to grant, vacate, and remand in light of an error. Our results remain substantively the same regardless of the way we operationalize this variable (see tables A2 and A3), and the AICs (Akaike information criteria) of the models suggest all four specifications are similar. We discuss all four of these measures and the logic behind them in the appendix, but we ultimately used Wohlfarth's measure because it is the most commonly used one (see Black et al. 2020).

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general is more liberal (conservative) than a justice and advocates a conservative (liberal) position. Bailey et al. (2005) suggest that a justice is more likely to side with the solicitor general when these signals are present. This variable takes the value of the justice's Judicial Common Space Score when the outlier signal is present and takes the value of 0 otherwise.

Following Wohlfarth (2009), we also include three variables to control for case-specific factors that can influence the outcome of the case. Because the Supreme Court has a well-documented proclivity for reversing a lower court's decision (Palmer 1982), we control for cases in which the solicitor general is the petitioner, rather than the respondent. We also note whether the case involved a constitutional question or whether the case involved an act of Congress being declared unconstitutional (both dichotomous indicators). Additionally, given that civil rights cases make up a large portion of the solicitor general's work and make up the area in which the office is most likely to exhibit political behavior (Pacelle 2003), we also control for civil rights cases. Finally, we control for the salience of the case using Collins and Cooper's (2015) measure of case salience. The authors develop a 0-to-8 scale of case salience that reflects (1) mentions of a case in a top-four newspaper (*New York Times*, *Washington Post*, *Los Angeles Times*, and *Chicago Tribune*) and (2) placement of the discussion on the front page or inside the paper. We include this control variable because the justices alter their behavior when a case is salient to the public.

METHOD AND RESULTS

Because the dependent variables for the merits, CVSG, and voluntary amicus brief models are dichotomous, we employ logistic regression for all three, with standard errors clustered by justice to account for correlated errors (Wohlfarth 2009; Black et al. 2020).[11] Given that the nonlinear nature of the logistic regression models makes facial interpretation of the coefficients difficult, we use predicted values to discuss our results, which we calculate using the observed-value approach (Hanmer and Kalkan 2013). The complete results of the logistic regression models of the probability of a justice voting for the solicitor general when the government is a party to a case or siding with the solicitor general's recommendation in a CVSG or in a voluntary amicus brief (col. 3) are in table 1.

11. Given the hierarchical structure of the data, we could employ multilevel modeling techniques here, which are useful when the data are nested and exhibit sufficient group-level variation (i.e., there are wide differences between judicial or solicitor general characteristics). Ultimately, we decided not to employ these techniques after discovering it was not possible to use them with the CVSG model, which has significantly fewer observations than the other two. To compare results across models, we decided to use a modeling technique that worked with all three sets of data, and thus we used a pooled logistic regression with standard errors clustered by justice (see table 1). As table A1 and fig. A2 show, the data suggest that a mulitlevel modeling approach is better (cf. AICs of 17,164 and 8,264 for the pooled logistic regression models for merits and voluntary amicus briefs, respectively, with AICs of 17,001 and 8,189 for the multilevel models), but the results remain substantively the same whether we use the pooled logistic regression approach with clustered standard errors or the multilevel modeling approach. To deal with other potential sources of heterogeneity, we also specified the model using fixed effects for presidential administrations (table A4) and standard errors clustered by term (table A5). All results remain substantively the same as the ones we present here.

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Table 1. Logistic Regression Results, Justice Votes in Favor of Solicitor General

	Merits	CVSG	Voluntary Amicus
Policy Change Confession	−.118	−.851***	−.295***
	(.079)	(.203)	(.114)
Admission of Mistake	.021	.028	.103
	(.069)	(.193)	(.104)
Other Type of Confession	.106		−.440**
	(.141)		(.186)
Confession Filed in Previous Session	.086*	.238*	−.069
	(.049)	(.137)	(.074)
Solicitor General Politicization	.152	.215	.063
	(.104)	(.273)	(.138)
Confession in Criminal Procedure Case	−.079	.513**	.091
	(.083)	(.210)	(.116)
Total Past Confessions Filed by SG	.009	−.005	.029***
	(.006)	(.019)	(.009)
Solicitor General–Justice Ideological Distance	−.459***	−.461***	−.770***
	(.035)	(.104)	(.052)
Outlier Signal	.191***	−.313**	.370***
	(.053)	(.150)	(.078)
Solicitor General Is Petitioner	.724***	.448***	.604***
	(.037)	(.109)	(.055)
Constitutional Case	−.035	−.051	−.053
	(.045)	(.193)	(.061)
Law Declared Unconstitutional	−.848***	−.253	−.424***
	(.093)	(.297)	(.119)
Civil Rights Case	−.049	.124	−.221***
	(.051)	(.134)	(.069)
Case Salience	−.049***	−.161***	−.095***
	(.008)	(.025)	(.012)
Constant	.434***	1.194***	1.020***
	(.072)	(.194)	(.101)
Observations	13,655	2,073	6,935
AIC	17,164	2,321	8,264
Log likelihood	−8,567	−1,147	−4,117

Note.—AIC = Akaike information criterion. Standard errors clustered by justice in parentheses.
* $p < .10$.
** $p < .05$.
*** $p < .01$.

We begin by addressing our first hypothesis, which says that, all else being equal, Supreme Court justices will be less likely to side with the US government if the solicitor general has recently filed a confession of error in light of a policy change. Within each panel of figure 3 are three predicted probabilities: the probability that a justice sides with the US government when the solicitor general has not filed a confession (left), the probability that a justice sides with the US government when the solicitor general has filed a confession of error in light of a policy change (center), and the probability that a justice sides with the US government when the solicitor general has filed a confession that admits a technical

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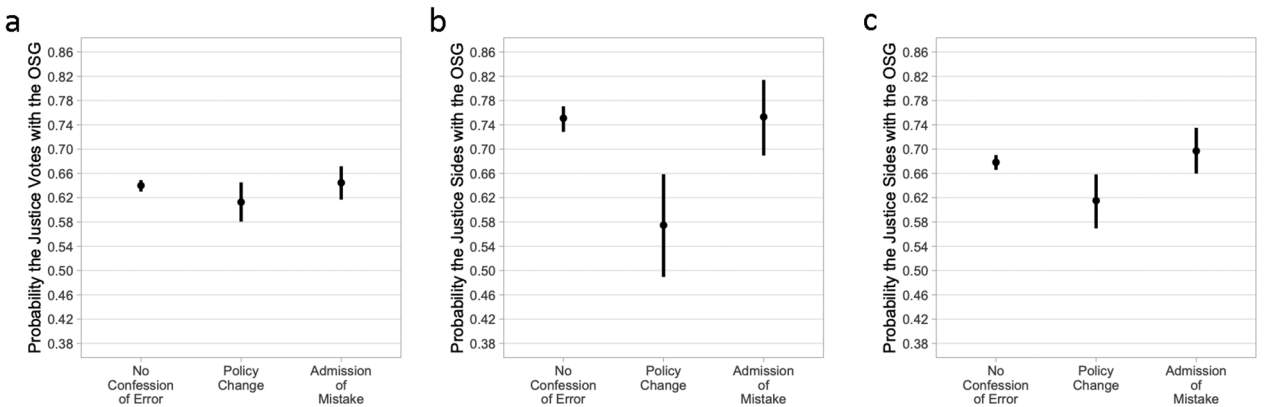


Figure 3. Probability a Supreme Court justice sides with a solicitor general who has recently confessed error in light of a policy change or in light of a mistake or has not confessed error at all. *a*, Probability of voting for the solicitor general when the government is a party on the merits; *b*, probability of siding with the solicitor general's recommendation in a CVSG; *c*, probability of siding with the solicitor general's recommendations in a voluntarily filed amicus brief. *Vertical lines*, 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.

mistake (right). Figure 3*a* displays the probability that a justice votes with the solicitor general when the government is a party on the merits. It shows that when the solicitor general has not filed a confession of error in the most recent sitting, a justice has a .64 probability of voting in favor of the federal government in a case. This probability decreases slightly but insignificantly to .61 if the solicitor general has confessed error in light of a policy change, and stays at .64 if that error is related to a mistake, which is obviously not a significant difference ($p < .05$). These results suggest that the justices do not react to confessions of error when making decisions on the merits of a case, which is not what we were expecting to find.

Our results do suggest, however, that the justices respond to policy-centric confessions of error when the solicitor general offers the justices advice they requested. Turning next to figure 3*b*, we examine the probability that a justice sides with the solicitor general's advice in a CVSG. As the figure shows, when the solicitor general has not filed a confession of error in the most recent sitting, a justice has a .75 probability of siding with the recommendation the solicitor general made in a CVSG. This probability decreases by a significant and dramatic .18, to .57, when the solicitor general has recently filed a confession of error in light of a policy change ($p < .05$). Supreme Court justices are significantly less likely to follow advice they sought when they believe the solicitor general has recently behaved in a political manner. Notably, this dramatic decrease in the probability of siding with the solicitor general does not exist when the solicitor general files a confession of error that notes a technical mistake by either the solicitor general or a lower court; in that case, a justice still has a .75 probability of siding with the solicitor general's suggestion. As we expected, Supreme Court justices respond negatively in subsequent cases to confessions of error in light of a policy change, but they do not react to the identification of actual technical mistakes.

This trend holds when the solicitor general volunteers advice in a case as well. As figure 3*c* shows, a justice has a .68 probability of siding with the solicitor general's suggested outcome in a voluntarily filed amicus brief. This probability decreases significantly to .62 if the solicitor general has filed a confession of error in light of a policy change ($p < .05$). Again, as we saw with CVSGs, a justice is no more or less likely to side with the solicitor general's suggested outcome when the solicitor general has recently filed a confession of error that addresses a technical mistake, as the probability that a justice sides with the solicitor general's suggestion goes up slightly but insignificantly to .70 ($p < .05$). These results, in conjunction with those in situations in which the Court has issued a CVSG, indicate the justices are less willing to accept the solicitor general's input in a subsequent case when the solicitor general has used a confession of error to enforce policy changes.

We believe these results offer support for hypothesis 1, as the justices clearly react negatively to the solicitor-general-as-trusted-adviser who has recently confessed error in light of a policy change. The fact that the justices do not respond like this to confessions involving mistakes fortifies our confidence in accepting our hypothesis. But we do note this trend is not true for all three situations under examination here, as the justices do not react

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this way to the solicitor-general-as-litigator. We can only speculate as to why this happens, but we believe it is partially because it is easier to discount advice than it is to discount an entire legal argument, especially one from a premier advocate. Regardless of the reason, however, we are confident in saying that our results suggest that the justices punish solicitors general and ignore their advice when a solicitor general uses a confession of error to enact policy change.

Turning to our second hypothesis, we address the length of this punishment for misusing a legal tool for political purposes. Figure 4 shows the probability that a justice votes for the solicitor general when the US government is a party on the merits (fig. 4*a*), when the solicitor general is asked to provide advice via a CVSG (fig. 4*b*), and when the solicitor general offers advice voluntarily in an amicus brief (fig. 4*c*). Beginning with figure 4*a*, recall that, as also seen in figure 3, a justice has a .61 probability of voting for the US government on the merits if the solicitor general has recently filed a confession of error in light of a policy change, which is not significantly different from the probability of voting for the government when there is no confession (.64, as the dotted line shows). Unsurprisingly, if there is no punishment, there is no recuperation—one session after filing the policy-centric confession, the probability that a justice sides with the federal government on the merits is .66, which is not significantly different from the baseline probability of a justice siding with the solicitor general ($p < .05$).

But, again, our results suggest that the justices behave differently in light of a confession of error when the Office of the Solicitor General offers advice. Looking at figure 4*b*, we again see that a justice has a .57 probability of siding with the solicitor general's suggestion in a CVSG if the solicitor general has recently filed a confession of error in light of a policy change. One sitting after that error, the probability that a justice sides with the solicitor general's suggested outcome increases significantly to .78, a difference that is not significantly different from the baseline probability of siding with the solicitor general's advice in a CVSG, which is .75 ($p < .05$). We see the same pattern play out in figure 4*c* as well: if the solicitor general has recently confessed error in light of a policy change, a justice has a .62 probability of siding with the solicitor general's suggested outcome in an amicus brief, which increases significantly to .67 just one sitting later ($p < .05$), suggesting all has returned to normal, as .67 is statistically indistinguishable from the baseline of .68 ($p < .05$). These results suggest that whatever negative feelings the justices have toward the solicitor general after seeing these policy-change confessions of error are temporary, which aligns with our expectation that the justices are willing to forget the issue and move on in relatively short fashion.

Turning to our controls, we first see that, as the literature would expect, larger ideological distances between the solicitor general and a justice significantly decrease the probability that a justice sides with the solicitor general in any situation, and the presence of an outlier signal significantly modifies the probability that a justice sides with the solicitor general. We also see that case facts matter, to some extent. The justices are significantly more likely to side with the solicitor general when the government is the petitioner or

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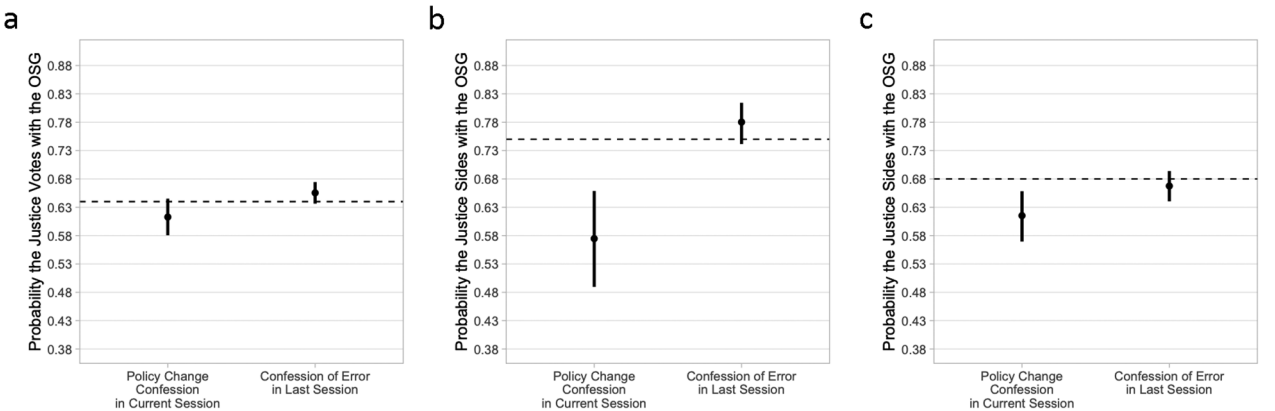


Figure 4. Probability a Supreme Court justice sides with a solicitor general who has confessed error in the current and previous sitting sessions. *a*, Probability of voting for the solicitor general when the government is a party on the merits; *b*, probability of siding with the solicitor general's recommendation in a CVSG; *c*, probability of siding with the solicitor general's recommendations in a voluntarily filed amicus brief. *Vertical lines*, 95% confidence intervals. *Dashed lines*, baseline probability of the justice siding with the solicitor general.

supports the petitioner in a case, and they are significantly less likely to side with the solicitor general in a case in which a law might be declared unconstitutional. The case involving a law that is declared unconstitutional does not significantly affect the probability that a justice sides with the solicitor general, however. Additionally, the results also suggest that the justices are significantly less likely to side with the solicitor general in a salient case.

We found two particularly interesting results that are worth pointing out as well. The first is that the increasing politicization of the Office of the Solicitor General does not significantly increase the probability that a justice sides with the solicitor general. This result is the reverse of what Wohlfarth (2009) found, but we believe this results from the time period we study here. To wit, Wohlfarth looked at solicitors general back to the Eisenhower administration, an era when solicitors general were venerated for their ability to place the law over politics (Pacelle 2003), but our analysis begins in 1979, which places our analysis almost entirely in the age of the politicized solicitor general (Salokar 1992). This would indicate the solicitors general in our analysis are all politicized, which dampens the effect of the variable. The second interesting result is that the justices are significantly less likely to side with the solicitor general's suggestion when it is made in a voluntary amicus brief in a civil rights case. This aligns with Pacelle's (2003) suggestion that solicitors general have historically been most willing to go along with their administration's needs in civil rights cases, and it indicates the justices might be less willing to listen to this particular kind of advice.

CONCLUSION

We began this article with a question about confessions of error and how their existence might interfere with the solicitor general's relationship with Supreme Court justices. Drawing on research regarding the politicization of the Office of the Solicitor General and ample anecdotal evidence (Salokar 1992; Pacelle 2003; Wohlfarth 2009), we hypothesized that solicitors who used the theoretically technical confession-of-error process to achieve partisan goals would lose influence in all phases of the Court's decision-making process. We also hypothesized that the Court's reliance on the solicitor general's expertise throughout the decision-making process would lead the government to "forgive" the solicitor general for these procedural abuses in short order. Using data on the confessions filed between the 1979 and 2014 terms, we find that Supreme Court justices are significantly less likely to support the solicitor general's position as an amicus participant in cases following a confession of error brought on by a policy change, while confessions that atone for technical mistakes are not equally punished. We also find that the punishment is only temporary, with the solicitor general's influence returning to preconfession levels after one of the Court's sitting sessions. These results largely confirm our hypotheses, with the exception of there being no systematic loss of solicitor general influence in cases in which the US government is a party.

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Our results speak to the judicial reaction to the politicization of the Office of the Solicitor General specifically and to the politicization of legal institutions more broadly. While Court scholars have examined the solicitor general's use of agenda-setting power and amicus participation to inject the administration's policy agenda into the Supreme Court docket (Salokar 1992; Pacelle 2003), we are among the first to look at the effect of the politicization of an honored tradition of the US legal system. The use of a confession represents a sacred trust between the solicitor general and the Court dating to the first publicly documented confession by then solicitor general William H. Taft. Our results show that a violation of that trust matters to the justices. If the solicitor general uses a confession of error to further political and partisan goals, the justices respond negatively, and, at least temporarily, the solicitor general loses influence with the justices. We suggest and research confirms that these defensive responses occur across a multitude of politicized actions in the Office of the Solicitor General (Wohlfarth 2009).

One avenue in which researchers could expand this research would be to examine more of the political actions that might influence the justices' decisions. Consider, for example, Trump solicitor general Noel Francisco's request that the justices grant emergency review in a case challenging the decision to eliminate the Deferred Action for Childhood Arrivals or DACA program (Howe 2018). Historically, the Court has only agreed to bypass the circuit courts and directly review a district court decision in times of war or constitutional crisis, such as when Richard Nixon refused to turn over the Watergate tapes to the special prosecutor (Liptak and Shear 2018). Francisco claimed he was also dealing with a tight and demanding timeline, but many suggested he was also using this maneuver to get the case out of the politically unfavorable Ninth Circuit and into the more politically favorable Supreme Court (Chabria 2018; Wolf 2020). Even though the justices denied Francisco's request, is it possible that this example will embolden future solicitors general to try the same move in a different situation? Was he punished for doing this? And, in an age in which elected officials use Twitter to dispute federal judges' decisions (Okun 2020), threaten to change the composition of circuit courts after unfavorable decisions (Westwood 2017), and openly endorse judges defying Supreme Court rulings (Lerner 2015), are solicitors general using the tools of their office to support these claims? In an age of polarization and politicization, scholars should pay attention to how the federal judiciary reacts to attempts to influence its judgment, particularly when the solicitor general is involved.

Finally, our evidence that the Court's punishment of the solicitor general does not appear to extend to merits decisions warrants further examination. In this article we speculate that it may be easier to discount advice than it is to discount an entire legal argument from the attorney representing the US government. This may be because certain justices are influenced by the principles of judicial restraint when the government is officially a party or because they are able to overcome any feelings of animus toward the solicitor general when the office is not simply offering extra "advice" but rather is directly involved in the case. Either way, there is reason to believe the justices may treat parties differently based on their status as an amicus participant or as a party on the merits. Is this unique to the Court's

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relationship with the solicitor general? Or is this phenomenon present with other repeat players who practice before the Court? In our effort to better understand the behavior of the Court, there is, as always, more work to be done.

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