

## Supplemental Appendix: Confessions at the Supreme Court: Judicial Response to Solicitor General Error

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As we mention in the paper, confessions of error arise in a multiple issue areas. The majority come from criminal procedure cases that often involve sentencing guidelines. Figure A1 illustrates the frequency of these cases, but also highlights the multiple confessions in immigration, disability, and Title VII discrimination cases.

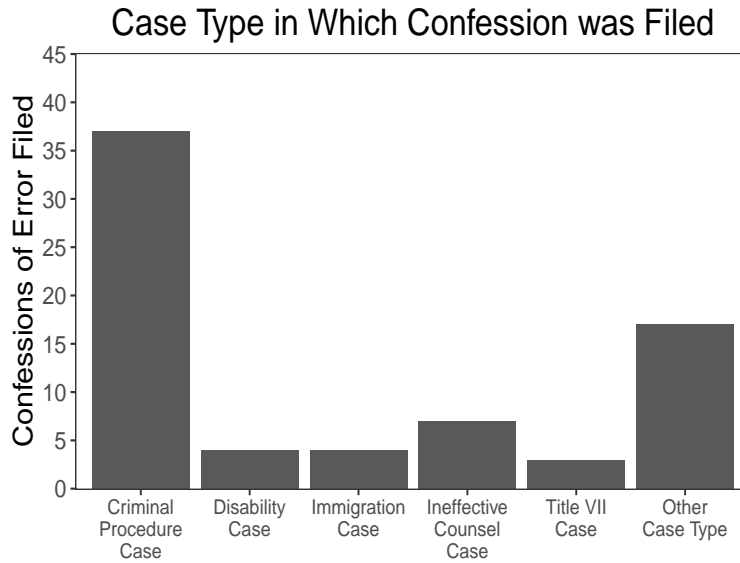


Figure A1: Bar graph of the number of confessions of error grouped by the issue area of the cases in which they were filed between the 1979 and and 2014 terms.

As we discuss in the paper, the structure of our data suggested that using a hierarchical logistic regression model with varying intercepts by justice and Solicitor General could have been appropriate. As the AIC for both the merits and voluntary amicus brief models suggest, a multilevel modeling approach is actually better here, but we do not have enough data to model the justices' responses to the suggestions made in a Call for the View of the Solicitor General in the same manner. Consequently, we proceed with the pooled approach in the paper. As the results in Table A1, graphically represented in Figure A2, show, the findings are substantively similar across both approaches.

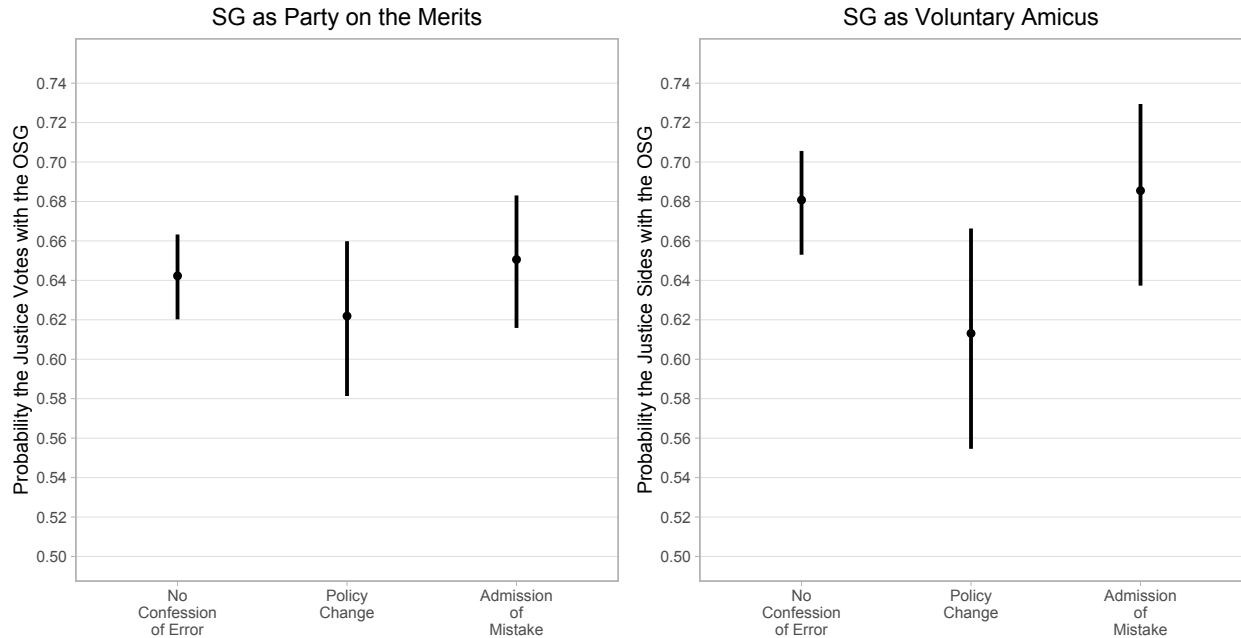


Figure A2: Judicial response to the Solicitor General's position as a party on the merits (left) and in a voluntarily amicus brief (right), based on the multilevel models presented in Table A1. Each panel shows the probability a justice sides with the Solicitor General's position when he has not confessed error (left), has confessed error in light of a policy change (center), and has confessed error in light of a mistake (right). Vertical lines identify 95% confidence intervals. Predicted probabilities calculated using the observed-value approach.

Table A1: Multilevel Logistic Regression Results, Justice Votes in Favor of Solicitor General

	Merits	Voluntary Amicus
Policy Change Confession	-0.094 (0.084)	-0.323*** (0.124)
Admission of Mistake	0.039 (0.074)	0.026 (0.117)
Other Type of Confession	0.159 (0.147)	-0.495** (0.197)
Confession Filed in Previous Sitting	0.110** (0.051)	-0.111 (0.078)
Solicitor General Politicization	0.106 (0.167)	0.111 (0.216)
Confession in Criminal Procedure Case	-0.020 (0.087)	0.204 (0.128)
Total Confessions Filed by Solicitor General	0.031*** (0.010)	0.024* (0.013)
Solicitor General-Justice Ideological Distance	-0.389*** (0.045)	-0.710*** (0.066)
Outlier Signal	-0.095 (0.073)	-0.057 (0.112)
Solicitor General is Petitioner	0.689*** (0.038)	0.653*** (0.057)
Constitutional Case	-0.043 (0.046)	-0.022 (0.063)
Law Declared Unconstitutional	-0.883*** (0.094)	-0.486*** (0.122)
Civil Rights Case	-0.073 (0.051)	-0.254*** (0.070)
Case Salience	-0.049*** (0.009)	-0.090*** (0.013)
Constant	0.359*** (0.135)	0.970*** (0.165)
Justice-Level Variance ( $\sigma_{justice}^2$ )	0.055 (0.234)	0.074 (0.273)
Solicitor General-Level Variance ( $\sigma_{sg}^2$ )	0.082 (0.287)	0.080 (0.283)
Observations	13,655	6,935
AIC	17001	8189
Log Likelihood	-8484	-4078

Standard errors in parentheses  
 \*  $p < 0.10$ , \*\*  $p < 0.05$ , \*\*\*  $p < 0.01$

While our results suggest the justices respond to the type of confession of error filed (confession in light of a policy change, confession admitting a mistake, or some other kind), it is possible the external political environment could also impact the justices' responses. We control for this possibility using Wohlfarth's (2009) measure of the politicization of the Office of the Solicitor General, which keeps a running tally of the proportion of the Solicitor General's voluntary amicus briefs that are ideologically aligned with the president's preferences. But, of course, there are alternative ways of addressing the political environment surrounding a Solicitor General's decision to confess error. In Table A2 and Table A3, we show that alternative operationalizations of this variable do not significantly explain judicial response to the Solicitor General and do not add explanatory power to our models. The results are substantively similar to those presented in Table 1 in the paper.

In Table A2, we control for the broad political environment by utilizing a dichotomous indicator of confessions filed in a case originally prosecuted by a different administration. As we explain in the main text of the manuscript, identifying information for cases in the 1980s and early 1990s was difficult, so our analysis begins with the 1992 term. Eliminating 13 terms' of data is not ideal, so the results we present here are suggestive. But, as the results in Models 2, 4, and 6 show, the justices do not respond any differently to confessions of error if they address decisions made by the past administration; they only respond to the error type, not its context. Given the AICs indicate the models perform as well without the variable (Models 1, 3, and 5) as they do with it, we use the simpler model in the main text of the paper.

In Table A3, we utilize alternative measures for the political environment. One potential measure is to control for a new presidential administration's first Supreme Court term, which is when the difference between the past and current administrations should look most obvious (Pacelle 2003). As Models 1, 3, and 5 in Table A3 show, this dichotomous indicator is never a significant predictor of judicial behavior. Alternatively, we also control for whether or not the justices file a dissent in response to the Court's decision to grant review in a case, vacate the lower court's ruling, and remand the case for additional review in light of the Solicitor General's confession. We use this measure because the justices' universal complaint in these dissents is that the Solicitor General is using a confession of error for political purposes (Rosenzweig 1994). Looking at Models 2, 4, and 6 of Table A3, this dichotomous indicator is also never a significant predictor of judicial behavior.

Table A2: Logistic Regression Results, Justice Votes in Favor of Solicitor General, 1992 to 2014

	(1) Merits	(2) Merits	(3) CVSG	(4) CVSG	(5) Voluntary Amicus	(6) Voluntary Amicus
Policy Change Confession	-0.099 (0.107)	-0.151 (0.137)	-0.749*** (0.268)	-0.378 (0.305)	-0.276* (0.142)	-0.066 (0.166)
Admission of Mistake	0.123 (0.108)	0.166 (0.112)	-0.080 (0.255)	0.265 (0.307)	0.262* (0.150)	0.318** (0.151)
Other Type of Confession	0.332 (0.210)	0.137 (0.209)			-0.843*** (0.264)	-0.790*** (0.266)
Confession Filed in Previous Session	0.139** (0.068)	0.127* (0.068)	0.365** (0.175)	0.350** (0.176)	-0.044 (0.096)	-0.112 (0.097)
Solicitor General Politicization	0.776*** (0.142)		0.890** (0.359)		0.466** (0.184)	
Correcting Past Administration		0.032 (0.134)		-1.076** (0.466)		-0.512*** (0.190)
Confession in Criminal Procedure Case	-0.090 (0.118)	-0.151 (0.121)	0.369 (0.281)	0.940** (0.371)	0.081 (0.148)	0.285* (0.173)
Total Past Confessions Filed by SG	0.000 (0.007)	0.001 (0.007)	-0.014 (0.022)	-0.018 (0.023)	0.007 (0.011)	0.008 (0.011)
Solicitor General-Justice Ideological Distance	-0.395*** (0.053)	-0.392*** (0.053)	-0.778*** (0.145)	-0.759*** (0.144)	-0.631*** (0.075)	-0.628*** (0.075)
Outlier Signal	0.406*** (0.069)	0.394*** (0.069)	-0.005 (0.190)	-0.011 (0.190)	0.574*** (0.098)	0.580*** (0.098)
Solicitor General is Petitioner	0.930*** (0.049)	0.947*** (0.049)	0.418*** (0.147)	0.416*** (0.148)	0.812*** (0.069)	0.818*** (0.069)
Constitutional Case	-0.098 (0.060)	-0.084 (0.060)	0.106 (0.316)	0.100 (0.314)	-0.195** (0.079)	-0.206*** (0.079)
Law Declared Unconstitutional	-0.781*** (0.108)	-0.827*** (0.108)	-0.794 (0.644)	-0.717 (0.658)	-0.356** (0.147)	-0.354** (0.147)
Civil Rights Case	0.003 (0.068)	-0.007 (0.068)	0.384** (0.186)	0.309* (0.181)	-0.357*** (0.086)	-0.353*** (0.086)
Case Salience	-0.061*** (0.011)	-0.063*** (0.011)	-0.103*** (0.033)	-0.096*** (0.033)	-0.049*** (0.016)	-0.047*** (0.016)
Constant	-0.012 (0.093)	0.398*** (0.054)	0.905*** (0.243)	1.372*** (0.183)	0.659*** (0.127)	0.903*** (0.085)
Observations	7969	7969	1363	1363	4362	4362
AIC	9940	9970	1476	1477	5149	5148
Log Likelihood	-4955	-4970	-724	-724	-2559	-2559

\* p < 0.1, \*\* p < 0.05, \*\*\* p < 0.01

Table A3: Logistic Regression Results, Justice Votes in Favor of Solicitor General, Alternative Politicization Measures

	(1) Merits	(2) Merits	(3) CVSG	(4) CVSG	(5) Voluntary Amicus	(6) Voluntary Amicus
Policy Change Confession	-0.120 (0.079)	-0.106 (0.080)	-0.823*** (0.201)	-0.807*** (0.205)	-0.300*** (0.114)	-0.312*** (0.115)
Admission of Mistake	0.031 (0.069)	0.045 (0.070)	0.002 (0.193)	0.023 (0.193)	0.113 (0.104)	0.093 (0.105)
Other Type of Confession	0.092 (0.141)	0.116 (0.143)			-0.444** (0.186)	-0.467** (0.188)
Confession Filed in Previous Session	0.088* (0.049)	0.089* (0.049)	0.249* (0.139)	0.232* (0.137)	-0.070 (0.074)	-0.067 (0.074)
First Term of New Administration	0.007 (0.048)		-0.069 (0.125)		-0.034 (0.075)	
Dissent on GVR Decision		-0.090 (0.097)		-0.139 (0.298)		0.131 (0.162)
Confession in Criminal Procedure Case	-0.092 (0.083)	-0.090 (0.083)	0.511** (0.210)	0.515** (0.211)	0.090 (0.116)	0.083 (0.115)
Total Past Confessions Filed by SG	0.010 (0.006)	0.010 (0.006)	-0.007 (0.019)	-0.006 (0.019)	0.028*** (0.010)	0.029*** (0.009)
Solicitor General-Justice Ideological Distance	-0.459*** (0.035)	-0.459*** (0.035)	-0.457*** (0.104)	-0.460*** (0.104)	-0.769*** (0.052)	-0.769*** (0.052)
Outlier Signal	0.188*** (0.053)	0.187*** (0.053)	-0.303** (0.150)	-0.310** (0.150)	0.372*** (0.078)	0.374*** (0.079)
Solicitor General is Petitioner	0.727*** (0.037)	0.728*** (0.037)	0.438*** (0.112)	0.447*** (0.110)	0.605*** (0.055)	0.607*** (0.055)
Constitutional Case	-0.032 (0.045)	-0.031 (0.045)	-0.051 (0.193)	-0.057 (0.193)	-0.055 (0.061)	-0.056 (0.061)
Law Declared Unconstitutional	-0.860*** (0.093)	-0.862*** (0.093)	-0.259 (0.296)	-0.250 (0.296)	-0.424*** (0.119)	-0.418*** (0.119)
Civil Rights Case	-0.050 (0.051)	-0.051 (0.051)	0.119 (0.134)	0.109 (0.133)	-0.222*** (0.069)	-0.220*** (0.069)
Case Salience	-0.049*** (0.008)	-0.049*** (0.008)	-0.160*** (0.024)	-0.160*** (0.024)	-0.094*** (0.012)	-0.095*** (0.012)
Constant	0.518*** (0.044)	0.520*** (0.043)	1.330*** (0.145)	1.312*** (0.137)	1.057*** (0.070)	1.049*** (0.069)
Observations	13655	13655	2073	2073	6935	6935
AIC	17166	17166	2321	2321	8264	8264
Log Likelihood	-8568	-8568	-1147	-1147	-4117	-4117

\* p < 0.1, \*\* p < 0.05, \*\*\* p < 0.01

Our data is structured such that votes are nested within cases, which are nested within both Solicitors General and justices. Given the nature of the data, we would ideally use a multilevel modeling technique with intercepts that vary by Solicitor General and justice to deal with heterogeneity within the data (see Table A1), but data limitations eliminate that option. Consequently, following Wohlfarth (2009) and Black et al. (2020), we utilize pooled logistic regression modeling with standard errors that are clustered by justice in the main text of the manuscript (see Table 1 in the main text). As we show in Table A4 and Table A5, these results are robust to several different model specifications that address potential heterogeneity, including adding fixed effects for each presidential administration (as suggested by Black et al. 2020, see Table A4) and clustering the standard errors by term (as suggested by Enns and Wohlfarth 2013, see Table A5).



Table A4: Logistic Regression Results, Justice Votes in Favor of Solicitor General, Fixed Effects by Administration

	Merits	CVSG	Voluntary Amicus
Policy Change Confession	-0.137* (0.080)	-0.888*** (0.207)	-0.314*** (0.116)
Admission of Mistake	-0.038 (0.071)	-0.095 (0.204)	0.054 (0.109)
Other Type of Confession	0.040 (0.144)		-0.524*** (0.192)
Confession Filed in Previous Session	0.078 (0.050)	0.210 (0.138)	-0.096 (0.075)
Solicitor General Politicization	-0.269** (0.131)	-0.261 (0.366)	-0.111 (0.171)
Confession in Criminal Procedure Case	0.016 (0.085)	0.530** (0.212)	0.169 (0.120)
Total Past Confessions Filed by SG	0.014** (0.007)	0.015 (0.021)	0.022** (0.010)
Solicitor General-Justice Ideological Distance	-0.475*** (0.036)	-0.507*** (0.106)	-0.781*** (0.053)
Outlier Signal	0.195*** (0.053)	-0.340** (0.151)	0.366*** (0.079)
Solicitor General is Petitioner	0.693*** (0.038)	0.404*** (0.111)	0.636*** (0.056)
Constitutional Case	-0.044 (0.045)	-0.028 (0.196)	-0.061 (0.062)
Law Declared Unconstitutional	-0.853*** (0.094)	-0.245 (0.302)	-0.431*** (0.119)
Civil Rights Case	-0.075 (0.051)	0.112 (0.137)	-0.239*** (0.070)
Case Salience	-0.050*** (0.008)	-0.183*** (0.026)	-0.087*** (0.013)
Constant	0.639*** (0.125)	1.531*** (0.272)	1.140*** (0.139)
Observations	13.655	2.073	6.935
<i>AIC</i>	17.112	2.310	8.245
Log Likelihood	-8.540	-1.140	-4.106

Standard errors in parentheses  
 Includes fixed effects for presidential admin (not included)  
 \*  $p < 0.10$ , \*\*  $p < 0.05$ , \*\*\*  $p < 0.01$

Table A5: Logistic Regression Results, Justice Votes in Favor of Solicitor General, Standard Errors Clustered by Term

	Merits	CVSG	Voluntary Amicus
Policy Change Confession	-0.118 (0.079)	-0.851*** (0.203)	-0.295*** (0.114)
Admission of Mistake	0.021 (0.069)	0.028 (0.193)	0.103 (0.104)
Other Type of Confession	0.106 (0.141)		-0.440** (0.186)
Confession Filed in Previous Session	0.086* (0.049)	0.238* (0.137)	-0.069 (0.074)
Solicitor General Politicization	0.152 (0.104)	0.215 (0.273)	0.063 (0.138)
Confession in Criminal Procedure Case	-0.079 (0.083)	0.513** (0.210)	0.091 (0.116)
Total Past Confessions Filed by SG	0.009 (0.006)	-0.005 (0.019)	0.029*** (0.009)
Solicitor General-Justice Ideological Distance	-0.459*** (0.035)	-0.461*** (0.104)	-0.770*** (0.052)
Outlier Signal	0.191*** (0.053)	-0.313** (0.150)	0.370*** (0.078)
Solicitor General is Petitioner	0.724*** (0.037)	0.448*** (0.109)	0.604*** (0.055)
Constitutional Case	-0.035 (0.045)	-0.051 (0.193)	-0.053 (0.061)
Law Declared Unconstitutional	-0.848*** (0.093)	-0.253 (0.297)	-0.424*** (0.119)
Civil Rights Case	-0.049 (0.051)	0.124 (0.134)	-0.221*** (0.069)
Case Salience	-0.049*** (0.008)	-0.161*** (0.025)	-0.095*** (0.012)
Constant	0.434*** (0.072)	1.194*** (0.194)	1.020*** (0.101)
Observations	13655	2073	6935
<i>AIC</i>	17164	2321	8264
Log Likelihood	-8567	-1147	-4117

Standard errors in parentheses  
 Includes fixed effects for presidential admin (not included)  
 \*  $p < 0.10$ , \*\*  $p < 0.05$ , \*\*\*  $p < 0.01$

## References

- Black, Ryan C., Ryan J. Owens, Justin Wedeking and Patrick C. Wohlfarth. 2020. *The Conscientious Justice: How Supreme Court Justices' Personalities Influence the Law, the High Court, and the Constitution*. Cambridge University Press.
- Enns, Peter K. and Patrick C. Wohlfarth. 2013. "The Swing Justice." *Journal of Politics* 75(4):1089–1107.
- Pacelle, Richard. 2003. *Between Law and Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation*. Texas A and M University Press.
- Rosenzweig, David M. 1994. "Confession of Error in the Supreme Court by the Solicitor General." *Georgetown Law Journal* 82:2079–2117.
- Wohlfarth, Patrick C. 2009. "The Tenth Justice? Consequences of Politicization in the Solicitor General's Office." *Journal of Politics* 71(1):224–237.