

## Stare Decisis in the Office of the Solicitor General

*Michael R. Dreeben*

**ABSTRACT.** Observers have suggested that the Office of the Solicitor General (OSG) should follow its own form of stare decisis, presumptively adhering to prior positions even if they are thought wrong on the law. The judiciary operates with a presumption of following precedent even when regarded as wrong. But OSG is not a court and its legitimacy does not depend on following precedent. Rather, for constitutional and practical reasons, OSG should presumptively provide the Supreme Court with its best current view of the law, rather than positions that it now believes erroneous. But even with that approach, OSG would do well to recall that the Solicitor General is not a free agent but represents long-term institutional interest of the United States. And because a change of position can jeopardize OSG's credibility with the Court, the Office should proceed very carefully before concluding that its prior position was wrong.

### INTRODUCTION

*“When the facts change, I change my mind. What do you do, sir?”<sup>1</sup>*

*“Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”<sup>2</sup>*

“Respecting *stare decisis* means sticking to some wrong decisions.”<sup>3</sup> The importance of stare decisis to the rule of law justifies this approach, for “[a]dher-

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1. This is generally attributed to John Maynard Keynes, perhaps apocryphally.
  2. This comes from Justice Frankfurter's dissent in *Henslee v. Union Planters National Bank & Trust Co.*, 335 U.S. 595, 600 (1949).
  3. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015).

ence to precedent promotes stability, predictability, and respect for judicial authority.”<sup>4</sup> The Supreme Court accordingly operates with a presumption that it will abide by precedent absent “special justification” that supports overruling it.<sup>5</sup> At a time when stare decisis is triggering significant debate within the Court,<sup>6</sup> it is worth asking about the relevance of the doctrine to another institutional actor with a close relationship to the Court: the Office of the Solicitor General (OSG). This question is especially timely given OSG’s dramatic shifts in position during the Trump Administration—shifts that called into question OSG’s adherence to traditional institutional interests.

Some outside observers have assumed that OSG operates under an internal form of stare decisis.<sup>7</sup> Under such an approach, the Solicitor General presumptively adheres to the positions taken in prior briefs submitted to the Court, absent special justification that goes beyond qualms about correctness. That approach has been confirmed by former Solicitors General. One even described the practice as a form of “*stare decisis*.”<sup>8</sup> And during my time at the Solicitor General’s Office—spanning fourteen Solicitors General and Acting Solicitors General—this was an unspoken way of doing business. If our Office had staked out a legal position in the Court, with rare exceptions that was the position of the United States, full stop. OSG did not ask whether to apply stare decisis to OSG positions—we just did. But is that appropriate? Or do the constitutional, functional, and institutional roles of OSG suggest that a more limited approach to OSG stare decisis is warranted?

Although the judicial system operates with a presumption of retaining precedent even when the Court regards it as wrong, I suggest that the opposite presumption should apply to OSG when it concludes that its prior position is wrong. That is, OSG should operate with a presumption in favor of providing the Supreme Court with its current view of the law, rather than sticking to error.

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4. *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 292 (1991) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986)).
  5. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).
  6. See *infra* notes 10-14 and accompanying text.
  7. E.g., Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 NOTRE DAME L. REV. 1339, 1352-53 (2008) (stating that the Office of Solicitor General (OSG) “practices executive stare decisis so as to preserve the Office’s credibility” but acknowledging that “evidence beyond the anecdotal is essentially absent”).
  8. Former Acting Solicitor General Walter Dellinger observed that “there is a very strong stare decisis weight to be given to positions taken by the United States.” *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 B.Y.U. L. REV. 1, 168. Former Solicitor General Drew Days said much the same, stating, “I went into the office thinking that it was my responsibility to maintain continuity in the law to the greatest extent possible and not take office on the assumption that I could start from scratch and simply ignore what had been done by prior administrations.” *Id.* at 167.

That suggestion comes with two qualifications. First, in arriving at a position, the Solicitor General is not a free agent; rather, OSG represents the interests of the United States. Arriving at a position thus requires balancing both the institutional interests of the United States and a purely legal analysis of the case at hand.<sup>9</sup> And because a change of position can jeopardize OSG's credibility with the Court, the Office should proceed very carefully before concluding that its prior position *was* wrong. OSG's ordinary deliberative processes and professional culture provide a significant safeguard against unfounded reversals. Second, in special circumstances, OSG may opt for adhering to its prior position despite legal misgivings. When it does so, it should candidly inform the Court of countervailing considerations. While no single set of guidelines can govern all contexts, this normative approach is more in line with OSG's interest in promoting the sound development of the law than is the opposite presumption.

This Essay proceeds in three Parts. Part I begins by explaining the heavy cultural influence that stare decisis has on OSG. Like the Court, OSG has practical reasons for standing by its precedent. But as the law, presidential administrations, and occupants of the Solicitor General's office change, so too may the litigating positions of OSG. This Part concludes by posing the critical question: when *should* OSG alter its past litigating positions?

Before addressing that question directly, Part II begins by looking to the recent past to determine when OSG *has* changed positions. Reviewing OSG's filings in the Court under the Obama and Trump Administrations, this Part explains the rarity of shifts in position by OSG, and how the Justices and the press respond to such changes.

Finally, Part III outlines my suggested normative and practical framework to guide decisions around positional changes by OSG. It argues that OSG should presumptively present the position it believes is right because (1) OSG, as part of the executive branch, exercises Article II—and not Article III—power; (2) OSG, unlike the Court, is appropriately responsive to changing approaches of individual office holders—namely, those who occupy the Solicitor General's and Oval offices; (3) OSG's positions are statements of advocacy, and not binding law; and (4) OSG can best help the Court answer difficult questions of law by presenting the best arguments available—not simply those arguments that OSG

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9. See David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROB. 165, 166-67 (1998) (describing “institutional” and “Administration” approaches to the Solicitor General's role). Resolving the tension between these roles implicates some of the most difficult questions the Office faces. See *id.* at 170-77. Nevertheless, the tension must be worked out within the framework of *lawyering for the government*—not by applying policy, political, or quasi-judicial standards. This Essay thus focuses on cases in which the standard tools of *legal analysis*—for example, text, structure, purpose, history, and precedent—point to an answer that differs from the position OSG previously espoused.

has previously made. The Part further argues, however, that positional changes should only be made after a rigorous review process. Only after careful consideration of its client's (i.e., the Government's) interests, its own credibility in the eyes of the Court and the other governmental components it serves, and the long-term impact of its choices, can OSG actually determine that its past position was wrong. And even in circumstances in which OSG makes that determination, the choice to switch should be made with caution, with an eye on institutional considerations.

In many circumstances, OSG best serves governmental interests and those of the Supreme Court by submitting positions that it believes are right, even if they depart from prior submissions. Accordingly, this Essay concludes that when OSG determines—after careful review and listening to competing voices—that its prior position was wrong, it should be prepared to say so.

### I. POSITIONAL CONSISTENCY IN SOLICITOR GENERAL LITIGATING POSITIONS

Judicial stare decisis is in a state of flux in the Supreme Court. The doctrine, which states that the Court will stand by its precedents absent special circumstances, is anything but stable. To the contrary, the Justices have fragmented in their understanding of it. Justice Kagan has emphasized its centrality to the Court's role in case after case.<sup>10</sup> Justice Kavanaugh has attempted to synthesize its basic elements into a new tripartite framework.<sup>11</sup> Justice Gorsuch has found that it did not apply when a prior decision broke from earlier law and rested on

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10. *E.g.*, *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015); *see also* *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2190 (2019) (Kagan, J., dissenting) (“[I]t is hard to overstate the value, in a country like ours, of stability in the law.”); *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, 138 S. Ct. 2448, 2497 (2018) (Kagan, J., dissenting) (“[T]he worst part of today’s opinion is where the majority subverts all known principles of *stare decisis*.”); *Harris v. Quinn*, 573 U.S. 616, 669 (2014) (Kagan, J., dissenting) (noting that stare decisis “is a foundation stone of the rule of law” (internal quotation marks omitted)); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014) (holding that stare decisis is so “necessary to ensure that legal rules develop in a principled and intelligible fashion” that “any departure from the doctrine demands special justification” (internal quotation marks omitted)).
11. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410–15 (2020) (Kavanaugh, J., concurring in part) (articulating three broad considerations that run through stare decisis precedent: is the decision “grievously or egregiously” wrong; does the decision cause “significant negative jurisprudential or real-world consequences”; and would jettisoning the decision “unduly upset reliance interests”).

the aberrant views of a single Justice.<sup>12</sup> The Chief Justice has prominently embraced it, but simultaneously endorsed an escape hatch for precedent that itself departed from precedent.<sup>13</sup> And Justice Thomas has virtually declared war on the doctrine, saying it should yield whenever the Court is sure that a prior decision is wrong.<sup>14</sup> For a doctrine that aims to promote stability, predictability, and societal confidence “that bedrock principles are founded in the law rather than in the proclivities of individuals,”<sup>15</sup> the Court’s inability to agree on the basic operation and scope of stare decisis is striking.

But the Court is not the only institution of government in which standing by precedent is a guiding principle.<sup>16</sup> While the doctrine of stare decisis is purely a principle of judicial restraint, it exerts a direct influence on OSG—the most frequent litigant in the Supreme Court and an office that by tradition and design is highly attuned to the Court’s standards and practices. As the ultimate repeat litigant before the Court, OSG has an enormous interest in maintaining its own credibility in the Court’s eyes. That credibility could be severely undermined by asking the Court to alter its precedent without meeting the Court’s stare decisis standards. And as representative of a client—the Government—that generally benefits from a stable legal framework, OSG has a compelling practical interest in reinforcing the value of precedent and the need for special justification to reverse it. Finally, as the government office that directly and regularly interacts with the Justices in face-to-face dialogue in oral argument—and that often has

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12. *Id.* at 1402 (Gorsuch, J.) (plurality opinion) (holding that prior judgment controlled by “a single Justice writing only for himself” based on “propositions [the Court] has already rejected” does not bind the Court).
  13. *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2133-34 (2020) (Roberts, C.J., concurring in the judgment) (stating that “[t]he legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike . . . [F]or precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly,” but when a precedent “itself departed from the cases that came before it, . . . remaining true to an intrinsically sounder doctrine established in prior cases better serves the values of *stare decisis* than would following the recent departure” (brackets and internal quotation marks omitted)).
  14. *Gamble v. United States*, 139 S. Ct. 1960, 1981, 1989 (2019) (Thomas, J., concurring) (expressing the view that “the Court’s typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law” and urging that the Court “should not invoke *stare decisis* to uphold precedents that are demonstrably erroneous”); *see also* *Allen v. Cooper*, 140 S. Ct. 994, 1008 (2020) (Thomas, J., concurring in part and concurring in the judgment) (arguing that if a decision is “demonstrably erroneous,” the Court would be “obligated to correct the error, regardless of whether other factors support overruling the precedent” (internal quotation marks omitted)).
  15. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1985).
  16. *See* Tushnet, *supra* note 7.

the role of explaining and defending unpopular Court decisions to skeptical and hostile governmental audiences – OSG has an almost personal stake in standing by the Court’s precedent and authority, as a sign of respect and even “loyalty to the Court.”<sup>17</sup>

But what about stability and consistency in OSG’s own litigating positions? Law is not static – it is constantly buffeted by new decisions, understandings, and interpretations. Solicitors General change – certainly, with a change in administration and often in between – and the change in personnel may bring a change in jurisprudential commitments. And OSG may watch as a legal position it has approved is torn to shreds in the lower courts. OSG historically has shown a significant degree of openness to reversing a position that the Government took in the lower courts, even if OSG had previously approved the position. Lower-court litigation serves as a canary in the coal mine. If a position consistently loses in the courts of appeals, in my experience OSG will readily reconsider its approach when the issue reaches the Supreme Court. After all, the stakes are greater since the Court will issue a final, binding decision with nationwide application.<sup>18</sup>

But reversing a government litigating position previously taken in the Supreme Court implicates OSG’s own credibility. Consistency is a virtue – up to a point. But what if OSG concludes that its prior position was mistaken? What then? Before the Solicitor General alters a government litigating position before the Supreme Court, does (or should) OSG apply principles of restraint to itself that parallel those of the Court – accepting some wrong decisions as the price of credibility? Put otherwise, does (or should) OSG apply a version of *stare decisis* to its own positional changes in the Supreme Court?

This Essay is concerned with a subset of positional changes: those that result from the Solicitor General’s conclusion that OSG’s prior position was *legally* wrong.<sup>19</sup> A variety of related questions about changed positions are outside this Essay’s scope. These include OSG’s response to an agency’s own reinterpretation

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17. Archibald Cox, *The Government in the Supreme Court*, 44 CHI. BAR REC. 221, 222 (1963).

18. For example, in *United States v. Walker*, the government saw a longstanding position on limitations of section 2255 relief uniformly rejected in the circuits. 198 F.3d 811, 813-14 (11th Cir. 1999). By the time the issue reached the Supreme Court, the Solicitor General abandoned the position and acquiesced to the universal rule. See Brief for the United States at 3-4, *Johnson v. United States*, 544 U.S. 295 (2005) (No. 03-9685).

19. See *supra* note 9. OSG may reach that conclusion, for example, by determining that it overlooked relevant authority or misapplied precedent. The Office, however, does not approach the task as if writing on a clean slate. Rather, the judicial doctrine of *stare decisis* frames the analysis: OSG generally accepts precedent absent judicially recognized grounds for urging a departure.

of a statute it administers;<sup>20</sup> changes produced by intervening judicial decisions;<sup>21</sup> changes dictated by the Attorney General or President;<sup>22</sup> and changes made against the backdrop of OSG's general practice to defend Acts of Congress against constitutional attack when reasonable arguments are available for that purpose.<sup>23</sup> Positional changes resulting from an agency's action or direction from superiors raise distinct issues from the one under consideration here: what OSG should do when it decides that its own prior legal position was flawed.

As an office that prides itself on rigorous legal analysis and serving the long-term institutional interests of the United States – and whose lawyers are keenly aware of the challenges of defending changed positions in live-fire questioning from the Justices – OSG is not immune from resistance to change. Indeed, it experiences a gravitational pull towards consistency. But no one doubts that a new position should sometimes escape that gravity and result in change. This raises a natural question: when should OSG alter its past positions that it now believes mistaken?

## II. WHEN DOES THE SOLICITOR GENERAL CHANGE POSITION?

Before turning to normative questions, it is worth looking at snapshots of cases in which OSG has changed its position. I will focus on changes that occurred during the last two Administrations.<sup>24</sup> Cases in which OSG's briefs explicitly acknowledged that the Government changed its position provide a starting point for assessing the role that institutional stare decisis should play before the Solicitor General decides to change government litigating positions in the

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20. *E.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154 (2012) (criticizing and rejecting an agency's changed position, which OSG presented).
  21. *E.g.*, *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 576 n.15 (2013) (Ginsburg, J. dissenting) (explaining OSG's change of position in light of an intervening decision); Brief for United States at 32 n.1, *Peugh v. United States*, 569 U.S. 530 (2013) (No. 12-62) (explaining OSG's change on whether the Ex Post Facto Clause applied to advisory guidelines in light of changed sentencing jurisprudence).
  22. *E.g.*, *United States v. Windsor*, 570 U.S. 744, 754 (2013) (showing that the President instructed the Department of Justice to not defend the constitutionality of the Defense of Marriage Act).
  23. *E.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 627-29, 664-67 (1994) (typifying an OSG position-switch based on the Office's "duty to defend" acts of Congress); *see also* Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1084 (2001) (explaining the change in *Turner* from attacking to defending the constitutionality of the must-carry provisions of the cable-television statute).
  24. Because this project examines a specific OSG practice, as opposed to providing an in-depth study of all the times OSG has changed its litigating positions, this Essay only looks at the Trump and Obama Administrations.

Supreme Court.<sup>25</sup> This description is not intended to probe the *reasons* for particular changes of positions. Instead, it provides examples of when OSG *did* change positions as a backdrop for when it *should* do so.

A. *The Obama Administration's Changes in Position*

The Obama Administration swept into office following eight years of Republican rule, and ample areas existed for revision and change. But President Obama's Solicitors General took a highly restrained approach to reversing the positions of their Bush predecessors. During President Obama's first term in office, *no* cases featured overt reversals of positions taken in the Supreme Court, at least as accompanied by explanatory footnotes in OSG briefs. Indeed, one commentator criticized OSG for continuing to press positions developed by the Bush Administration, even while conceding that administrations of both parties had "always . . . used [OSG] to defend and expand government power in general, federal power over state power, and executive power over the powers of the other branches."<sup>26</sup>

A notable example of consistency across administrations was the Government's stance as amicus in *District Attorney's Office for the Third Judicial District v. Osborne*.<sup>27</sup> In that case, the Bush Administration filed an amicus brief arguing that a convicted defendant had no constitutional right to obtain exculpatory evidence from the government in post-conviction review.<sup>28</sup> Shortly before the change in administrations, OSG moved to participate in oral argument. The Court granted that motion, but the oral argument fell to the new Administration. Would it switch sides? The *New York Times* described the case as "pit[ting] the value of finality in criminal cases against the possibility of proving an inmate's innocence long after trials and appeals are concluded."<sup>29</sup> One might have

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25. A complete data set of changed positions is likely impossible to compile. A search for terms that OSG most commonly uses when it acknowledges positional shifts will capture the most prominent cases. For this project, I searched for some specific terms in OSG's filings in merits cases at the Court—at all stages of argument—from October Term 2008 through October Term 2019. These keywords include "reconsider," "reevaluate," "position," "change," and "view." But OSG's use of variant formulations or subtle explanations, or even an omission of an explanatory footnote acknowledging a change, may mean that some positional changes fell through the cracks.

26. Radley Balko, *Leviathan's Lawyers*, REASON (June 2011), <https://reason.com/2011/05/12/leviathans-lawyers> [<https://perma.cc/7S9A-FX3W>].

27. 557 U.S. 52 (2009).

28. Brief for United States as Amicus Curiae, *Dist. Attorney's Office v. Osborne*, 577 U.S. 52 (2009) (No. 08-6).

29. Adam Liptak, *Justices Agree to Consider DNA Case*, N.Y. TIMES (Nov. 3, 2008), <https://www.nytimes.com/2008/11/04/washington/04dna.html> [<https://perma.cc/V3D8-Q6N3>].



thought that the new Administration would prioritize access to physical evidence over finality interests. After all, the burden on the State was minimal and the possibility of DNA exoneration was real. Yet changing positions after the United States filed a brief would have been exceptional and required significant justification. And a switch for the first time at oral argument is almost unheard of. In the end, no switch occurred: the Obama Administration adhered to the position of its predecessor that the State had no post-conviction obligation to provide physical evidence for DNA testing. OSG presented this argument even while acknowledging that the State itself conceded that the evidence could exonerate the defendant.<sup>30</sup> Thus, continuity and the institutional interests of the United States in avoiding new constitutional obligations won out, with the Court ultimately agreeing with the Government's argument.<sup>31</sup>

No changes in position surfaced in OSG's briefs for the next several Supreme Court Terms either. Zero. And then an unusual cluster of changes during President Obama's second term caught the Court's eye. First, in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>32</sup> the Government shifted positions in a controversial case under the Alien Tort Statute.<sup>33</sup> At oral argument, Justice Scalia pounced. Addressing the Solicitor General, Justice Scalia said "that is the new position for the . . . State Department, isn't it? . . . [A]nd for the United States Government? Why should . . . we listen to you rather than the solicitors general who took the opposite position . . . ?"<sup>34</sup> When the Solicitor General explained that the new position sought to balance competing interests — protecting U.S. companies from liability abroad and "ensuring that our Nation's foreign relations commitments to the rule of law and human rights are not eroded"<sup>35</sup> — Justice Scalia retorted that "it was the responsibility of your predecessors as well, and they took a different position. So . . . why should we defer to the views of . . . the current administration?"<sup>36</sup> The Solicitor General's response — "because we think [those views] are persuasive" — did not satisfy the Chief Justice, who also shared Justice Scalia's concerns: "Your successors may adopt a different view," he said, and "whatever

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30. Transcript of Oral Argument at 23, *Osborne*, 577 U.S. 52 (No. 08-6).

31. The Court split 5-4, along usual fault lines. *Osborne*, 577 U.S. at 74-75; see *id.* at 87-107 (Stevens, J., dissenting, joined by Ginsburg and Breyer, JJ., and in part by Souter, J.).

32. 569 U.S. 108 (2013).

33. See Supplemental Brief for the United States as Amicus Curiae at 21 n.11, *Kiobel*, 569 U.S. 108 (No. 10-1491) (reversing the Government's prior position in favor of a categorical rule against extraterritorial application of the Alien Tort Statute and arguing instead against a categorical rule to preserve the possibility of remedies for certain human-rights violations).

34. Transcript of Oral Argument at 43, *Kiobel*, 569 U.S. 108 (No. 10-1491).

35. *Id.* at 44.

36. *Id.*

deference you are entitled to is compromised by the fact that your predecessors took a different position.”<sup>37</sup>

That was not the only rebuke that Term. Two months later, the Chief Justice made waves in the Supreme Court bar by upbraiding an Assistant to the Solicitor General for OSG’s explanation of its change in position in an ERISA case, *U.S. Airways, Inc. v. McCutchen*.<sup>38</sup> In the middle of the Government’s argument as amicus curiae, the Chief Justice interrupted to say:

Counsel, . . . the position that the United States is advancing today is different from the position that the United States previously advanced. . . . You say that, in [the] prior case, the Secretary of Labor took this position. And then you say that, upon further reflection, the Secretary is now of the view—that is not the reason. It wasn’t further reflection.”<sup>39</sup>

Instead, he said, “it would be more candid for your office to tell us when there is a change in position, that it’s not based on further reflection of the Secretary” but that “there has been a change [in the Secretary].”<sup>40</sup> The Chief Justice then added: “We are seeing a lot of that lately,”<sup>41</sup> which he found “a little disingenuous.”<sup>42</sup>

Later in the Term, Justice Ginsburg got into the act. Questioning the Assistant to the Solicitor General arguing a Federal Tort Claims Act case, *Levin v. United States*,<sup>43</sup> Justice Ginsburg noted that his argument was not “always the government’s position”; in fact, in an earlier case, the Government had taken the opposite position now presented by his petitioner.<sup>44</sup> “What occurred to turn on

37. *Id.* at 44-45.

38. 569 U.S. 88 (2013).

39. Transcript of Oral Argument at 32, *McCutchen*, 569 U.S. 88 (No. 11-1295).

40. *Id.*

41. *Id.* The Chief Justice did not explain his allusion to seeing a lot of changes. He may have been referring to *Kiobel*, 569 U.S. 108. Or he may have been thinking of a case from the prior Term, *Christopher v. Smith Kline Beecham*, 567 U.S. 142, 154 (2012), in which the Secretary of Labor changed positions after the Court granted review—resulting in the Court’s refusal to grant deference to the Secretary’s position and rejecting it on the merits.

42. Transcript of Oral Argument at 33, *McCutchen*, 569 U.S. 88 (No. 11-1295). When the Government’s lawyer tried to explain that the law had changed since the brief was filed ten years earlier, the Chief Justice broke in again: “Then tell us the law has changed. Don’t say the Secretary is now of the view.” *Id.* at 33.

43. 568 U.S. 503 (2013).

44. Transcript of Oral Argument at 43, *Levin*, 568 U.S. 503 (No. 11-1351).

the light for the Government?” Justice Ginsburg asked.<sup>45</sup> When the Government’s counsel sought to minimize the importance of OSG having advanced the opposite argument in the prior case, three Justices – Justice Kagan, Justice Scalia, and the Chief Justice – all pointed out that the Court had relied on the Government’s position in the prior case, which it had won.<sup>46</sup>

These critiques have a variety of possible explanations. Some Justices may have disagreed with the new position. Others may have been irked at the explanation for the change. Still others may have taken umbrage that the Government would flip its argument for strategic reasons. At least part of the Court’s reaction, however, seems to reflect an expectation that OSG will take good care in formulating its positions so that it will adhere to its own positional “precedent” or risk undermining its credibility with the Court.

Only in one later brief did the Obama Administration expressly acknowledge that OSG had changed its position at the Supreme Court. In *Puerto Rico v. Sanchez Valle*,<sup>47</sup> the Court was asked to decide whether sequential prosecutions for the same offense by Puerto Rico and the Federal Government were permissible under the Double Jeopardy Clause’s dual-sovereignty doctrine. Two decades ago, the Government’s briefs said yes; but in the *Sanchez Valle* they said no – with the explanation that “[t]hose [prior] briefs do not reflect the considered view of the Executive Branch.”<sup>48</sup> No Justice reacted to the Government’s change in position, and the Court agreed with it by a 7-2 vote.<sup>49</sup>

Thus, for the Obama-era OSG, in the vast array of cases, it was literally true that *plus ça change, plus c’est la même chose*.<sup>50</sup>

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45. *Id.*

46. *Id.* at 43-45. The Court’s decision in *Levin* – rejecting the Government’s new interpretation – devoted three paragraphs to analyzing the government’s *volte-face*, emphasizing that the Court’s earlier decision “was thus informed” by the Government’s prior litigating view, and implicitly rebuking the Government for walking away from it now. 568 U.S. at 516-17.

47. 136 S. Ct. 1863 (2016).

48. Brief for the United States as Amicus Curiae Supporting Respondents at 32 n.6, *Sanchez Valle*, 136 S. Ct. 1863 (No. 15-108).

49. *Sanchez Valle*, 136 S. Ct. at 1870, 1876-77; *cf. id.* at 1877-85 (Breyer, J., joined by Sotomayor, J., dissenting) (disagreeing with the Court’s holding on “conceptual” and “historical” grounds but not commenting on the Government’s change in position).

50. “The more things change, the more they stay the same.” (Attributed to the French writer Jean-Baptiste Alphonse Karr). Positional changes from lower-court positions did occur. These include cases in which OSG reevaluated an issue and altered its position on behalf of an agency, *e.g.*, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1351-53 (2015); Brief for the United States as Amicus Curiae Supporting Petitioner at 16 n.2, *Young* 135 S. Ct. 1338 (No. 12-1226), confessions of error in criminal cases, *e.g.*, *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016); Brief for the United States at 35-38, *Welch*, 136 S. Ct. 1257 (No. 15-6418) (disavowing the Fifth Circuit’s interpretation of *Johnson v. United States*, 576 U.S. 591 (2015)), and the withdrawal of

### B. *The Trump Administration's Changes in Position*

The arrival of the Trump Administration heralded a different story. A shift of party in the White House can catalyze positional changes, given differences in personnel, policy, and legal philosophy. And the Trump Administration's move into OSG's quarters featured all three differences.

In the Trump Administration's first full Term in the Supreme Court, OSG made four major changes in position in high-profile cases: *Epic Systems Corp. v. Lewis*,<sup>51</sup> *Husted v. A. Phillip Randolph Institute*,<sup>52</sup> *Janus v. American Federation of State, County, and Municipal Employees*,<sup>53</sup> and *Lucia v. SEC*.<sup>54</sup> All four involved significant issues. *Epic Systems* held that workplace arbitral agreements that precluded collective litigation overrode statutory labor rights to engage in concerted activities. OSG reversed the position it had taken on behalf of the National Labor Relations Board just months earlier and argued against labor protection.<sup>55</sup> *Husted* held that a federal voting-registration statute did not preclude a State's purge of the voting rolls triggered by a person's failure to vote. OSG's support for that position discarded a fifteen-year-old Department of Justice position.<sup>56</sup>

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its defense of the constitutionality of the Defense of Marriage Act, see *United States v. Windsor*, 570 U.S. 744, 755-63 (2013); Brief for the United States on the Merits Question at 4-6, *Windsor*, 570 U.S. 744 (No. 12-307). Those changes, however, do not reflect OSG's reversal of its own positions based on reconsideration of its legal analysis.

51. 138 S. Ct. 1612 (2018).

52. 138 S. Ct. 1833 (2018).

53. 138 S. Ct. 2448 (2018).

54. 138 S. Ct. 2044 (2018).

55. OSG had petitioned for certiorari on behalf of the National Labor Relations Board, arguing that "[t]he Board, which is charged with enforcing the NLRA, has reasonably concluded that such agreements are unlawful under that Act, because they would deprive employees of their statutory right to engage in 'concerted activities' in pursuit of their 'mutual aid or protection.'" Petition for a Writ of Certiorari at 9, *NLRB v. Murphy Oil USA, Inc.*, 138 S. Ct. 1612 (2018) (No. 16-307) (quoting 29 U.S.C. 157 (2018)). But "[a]fter the change in administration, the Office reconsidered the issue and has reached the opposite conclusion." Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Supporting Respondents in No. 16-307 at 13, *Epic Sys. Corp.*, 138 S. Ct. 1612 (Nos. 16-285, 16-300, and 16-307).

56. Brief for the United States as Amicus Curiae Supporting Petitioner at 13-14, *Husted*, 138 S. Ct. 1833 (No. 16-980) ("In the 15 years since [Help America Vote Act's] enactment, the Department . . . [has] argued that the [National Voter Registration Act of 1993 (NVRA)] forbids [sending Section 20507(d)(2) notices based on nonvoting] in a guidance document first issued in 2010 and in two recent amicus filings, including a brief filed in the court of appeals in this case. After this Court's grant of review and the change in Administrations, the Department reconsidered the question. It has now concluded that the NVRA does not prohibit a State from using nonvoting as the basis for sending a Section 20507(d)(2) notice." (citation and footnote omitted)).

*Janus* overruled a forty-year-old precedent to hold that public-sector-union agency fees violated the First Amendment rights of objecting nonunion members – and the Trump Administration flipped the position the Obama OSG had taken just two years earlier in support of that precedent.<sup>57</sup> And in *Lucia*, OSG reversed the position the Government had taken in lower courts in that very case to argue that the SEC’s method of appointing its Administrative Law Judges was unconstitutional.<sup>58</sup>

These reversals were abrupt and appeared strikingly at odds with institutional norms. This was especially true in *Epic Systems*, which rejected a firmly held position of the National Labor Relations Board, and *Janus*, which asked the Court to overturn over forty years of precedent and thus threatened to destabilize the law. Two of the reversals prompted the *New York Times* to speculate that “[t]he Trump administration may be headed for trouble” by “twice switch[ing] sides in important Supreme Court cases.”<sup>59</sup> But in fact, OSG prevailed in all four cases. And as one commentator astutely observed in describing these events in detail, “[s]urprisingly, the [J]ustices seemed incurious about these reversals and made hardly any fuss when the solicitor general or one of his deputies or assistants appeared in court to defend them.”<sup>60</sup> The Solicitor General’s briefs largely explained the changes as reflecting reconsideration by the new Administration –

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57. Compare Brief for the United States as Amicus Curiae Supporting Respondents at 14, *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11-681) (“Rather than attempting to reconcile their challenge with this Court’s well-settled framework for evaluating claims that particular fees violate the First Amendment, petitioners argue that *Abood* should be either overruled or ‘limited to its facts.’ Neither argument has merit.” (citation omitted)), with Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Janus*, 138 S. Ct. 2448 (No. 16-1466) (“This is the third time in the past five Terms that the Court has granted certiorari to consider overruling *Abood*. In those other cases, the [G]overnment contended that *Abood*’s result is correct and should be reaffirmed. Following the grant of certiorari in this case, the [G]overnment reconsidered the question and reached the opposite conclusion.” (citations omitted)).
58. Technically, OSG did not reverse a position previously taken before the Supreme Court in *Lucia*. But the reversal belongs with the suite of cases discussed here because OSG abandoned a recent position in the very case, and abandoning a constitutional defense is no ordinary confession of error. See Brief for the Respondent at 9-10, *Lucia*, 138 S. Ct. 2044 (No. 17-130), 2017 WL 5899983, at \*9-10 (explaining that while the Government had previously defended the constitutionality of the SEC’s appointment process for Administrative Law Judges (ALJs) on the theory that they were “employees,” “[u]pon further consideration, and in light of the implications for the exercise of executive power under Article II, the government is now of the view that such ALJs are officers”).
59. Adam Liptak, *Trump’s Legal U-Turns May Test Supreme Court’s Patience*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/us/politics/trump-supreme-court.html> [<https://perma.cc/55E3-DG5Y>] (describing reversals in *Epic Systems* and *Husted*).
60. Cristian Farias, *Noel Francisco, Trump’s Tenth Justice*, N.Y. REV. BOOKS (Aug. 9, 2018), <https://www.nybooks.com/daily/2018/08/09/noel-francisco-trumps-tenth-justice> [<https://perma.cc/HL5Z-V2N7>].

nothing more.<sup>61</sup> And apart from a direct challenge from Justice Sotomayor to the Solicitor General in oral argument in *Husted*,<sup>62</sup> the changes went by virtually unremarked.<sup>63</sup>

Why so little comment compared to the Obama-era changes? Perhaps the muted response reflected the Court's acceptance that "of course" a new administration will take new views. Or perhaps some Justices simply agreed with OSG's new positions, while others wanted to engage with those positions on the merits rather than shadow-box with OSG. But a third possibility exists: OSG's change of position on its interpretation of the law, if explained candidly, is simply not worthy of comment to the Court.

### III. WHEN SHOULD THE SOLICITOR GENERAL CHANGE POSITIONS? NORMATIVE AND PRACTICAL CONSIDERATIONS

I now turn to how OSG should approach whether to change a position it had previously taken in the Supreme Court when it concludes that it was previously wrong on the law. My focus is not on agreement or disagreement with the specifics of what OSG determined on the law in the Obama and Trump Administrations. Nor does it turn on a won-lost score card. The Solicitor General must decide whether to change a legal position without knowing how the Court will react; OSG can surmise, but it has no crystal ball. And urging a position may itself affect the outcome. Rather, the question is what general standards the Solicitor General should apply—and, in particular, whether any presumption

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61. See, e.g., Brief for United States as Amicus Curiae at 13, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Nos. 16-285, 16-300, 16-307) ("After the change in administration, the Office reconsidered the issue and has reached the opposite conclusion."); Brief for United States as Amicus Curiae at 14, *Husted*, 138 S. Ct. 1833 (No. 16-980) ("After this Court's grant of review and the change in Administrations, the Department reconsidered the question."); Brief for United States as Amicus Curiae at 11, *Janus*, 138 S. Ct. 2448 (No. 16-1466) ("Following the grant of certiorari in this case, the government reconsidered the question and reached the opposite conclusion."); Brief for Respondent Supporting Petitioner at 14, *Lucia*, 138 S. Ct. 2044 (No. 17-130) ("Upon further consideration, and in light of the implications for the exercise of executive power under Article II, the government is now of the view that . . .").

62. See Transcript of Oral Argument at 28-29, *Husted*, 138 S. Ct. 1833 (No. 16-980). Justice Sotomayor remarked: "General, could you tell me, there's a 24-year history of solicitor[s] general[] of both political parties under . . . Presidents of both political parties who have taken a position contrary to yours . . . Seems quite unusual that your office would change its position so dramatically," and added "how did the solicitor general change its mind?" In responding, the Solicitor General relied on a more recent statutory amendment that he said "clarified what was at the time an ongoing debate between the Department of Justice and the states." *Id.* at 29-30.

63. In *Lucia*, the Court noted that the Government had "switched sides," but only to explain the Court's appointment of an amicus to defend the judgment. *Lucia*, 138 S. Ct. at 2050.

should exist against or in favor of altering the Government’s position when OSG concludes that its prior position is wrong. Several considerations support the conclusion that, unlike judicial stare decisis, which “must give way only to a rationale that goes beyond whether the case was decided correctly,”<sup>64</sup> Solicitors General should refrain from providing their correct view of the law to the Court only in the face of special countervailing circumstances.

That is not necessarily the traditional view. Justice Elena Kagan, who served as Solicitor General under President Obama, and Paul Clement, who served as Solicitor General under President George W. Bush, discussed this issue at an American Law Institute event in May 2018.<sup>65</sup> To a remarkable extent, the two former Solicitors General agreed on when a new Solicitor General should reverse positions previously taken by OSG in the Supreme Court: not very much. Justice Kagan said: “[A]t least for me, the office was very clear that you were supposed to think long and hard, and then you were supposed to think long and hard again, before you changed anything.”<sup>66</sup> Her first reaction to some existing positions was “I don’t think I would want to do it that way,” but OSG “is supposed to be serving . . . the long-term interests of the United States, not any one President,” and “[t]he credibility of the office in great measure depends” on courts having that perception.<sup>67</sup> She concluded that “[a] change in positions is a really big deal that people should hesitate a long time over. Which is not to say that it never happens. . . . But the bar should be high.”<sup>68</sup> Paul Clement largely agreed. He articulated a “presumption that things are not going to change . . . If both administrations are looking out for the long-term interests of the executive branch, they really shouldn’t change that much.”<sup>69</sup>

Perhaps that is so in the aggregate. But a strong argument exists that, if OSG is convinced that that its earlier position on a particular issue is legally wrong, it should apply the *opposite* presumption. That is, OSG should operate with a presumption that it will present its current view of the law to the Supreme Court—even if that represents a change of position.

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64. *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment).

65. Interview by David F. Levi with Justice Elena Kagan and Paul Clement at the ALI Annual Meeting in Washington, D.C. (May 21, 2018), <https://vimeo.com/272791402>.

66. *Id.* at 18:36.

67. *Id.* at 19:06; 19:34.

68. *Id.* at 20:03.

69. *Id.* at 22:21.

A. *OSG Should Operate with a Presumption in Favor of Providing the Court with Its Current View of the Law*

At least four considerations support a presumption in favor of OSG presenting its current, rather than former, position when it is convinced that its prior view was wrong. These reasons focus on the Solicitor General's institutional role as a litigant and the differences between OSG positions and judicial decisions.

First, OSG's function is quite different from that of the courts. The judicial power presupposes adherence to precedent. Quoting Alexander Hamilton, the Chief Justice has observed that “[a]dherence to precedent is necessary to ‘avoid an arbitrary discretion in the courts.’”<sup>70</sup> In that sense, *stare decisis* is an intrinsic feature of the judicial power under Article III. But no analogous principle of *stare decisis* is intrinsic to the exercise of executive power under Article II. When OSG speaks to the Court, it presents the litigating position of the executive branch. Of course, OSG should generally represent the interests of the entire government and people of the United States.<sup>71</sup> As the Supreme Court has observed, OSG is expected to speak with “a voice that reflects . . . the common interests of the Government and therefore of all the people.”<sup>72</sup> But OSG need not follow its own precedent to speak in that voice and perform its executive-branch function. Instead, OSG plays that role as long as it remains the centralized actor in government litigation before the Court and weighs the interests of the public and the executive branch in taking positions before the Court.<sup>73</sup>

Second, *stare decisis* serves an instrumental purpose for the Supreme Court – sustaining public confidence in the integrity of its decisions – that does not have a precise counterpart for the Solicitor General. By adhering to past decisions, the Court reassures the public that the law turns on principle rather than personality.<sup>74</sup> This is essential for the Court because, unlike OSG, whose role is to *advocate* for what the law *should be*, the Court's constitutional role is to say

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70. *June Med. Servs.*, 140 S. Ct. at 2134 (2020) (Roberts, C.J., concurring in the judgment) (quoting THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (J. Cooke ed., 1961)).

71. See *United States v. Providence Journal Co.*, 485 U.S. 693, 700-01 (1988) (holding that the Solicitor General's authority to represent the United States in the Supreme Court in a case “in which the United States is interested,” 28 U.S.C. § 518(a) (2018), covers the interests of all three branches of government).

72. *Id.* at 706.

73. See Joshua I. Schwartz, *Two Perspectives on the Solicitor General's Independence*, 21 LOY. L.A. L. REV. 1119, 1140-41 (1988).

74. See *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment) (arguing that *stare decisis* “contributes to the actual and *perceived* integrity of the judicial process” (emphasis added) (internal quotation marks omitted)).



what the law is.<sup>75</sup> And while stare decisis communicates that judicial decisions are not the product of the “proclivities of individuals”<sup>76</sup> who are temporary occupants of office, the Solicitor General is a political appointee who is always a temporary occupant of office. The Chief Justice has noted that “[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges.”<sup>77</sup> But we *do* have Obama, Trump, Bush, and Clinton Solicitors General. The Solicitor General is appointed in a particular administration and will rarely outlast it. Of course, by tradition and culture, the Solicitor General has a special relationship to the Court and a special obligation to the rule of law.<sup>78</sup> But the chain of command—from President to Attorney General to Solicitor General—reinforces an additional institutional reality of the Solicitor General’s role. The proclivities of individuals, in a sense, come with the job.

Third, the judicial stare decisis interest in preserving the “stability” of the law<sup>79</sup> is absent when speaking from an advocate’s position. Binding law produces reliance interests that stare decisis protects. But OSG’s views are not binding law. It is true that within the executive branch, sound reason exists to consider OSG’s submissions to the Court as stating the position of the United States on issues of constitutional or statutory interpretation. During my time in OSG, I always understood the Solicitor General’s submissions to supersede contrary statements of other Justice Department officials. What OSG said to the Court established precedent that executive agencies and Department of Justice (DOJ)-litigating components should follow, unless supplanted by the President, the Attorney General, or OSG itself.

But that effect within the government flowed from the importance of assuring the Supreme Court that when OSG speaks to it, the Court can rely on its statements as the *Government’s* position—not just that of a particular official. As the Court has stated, “[a]mong the reasons for reserving litigation in this Court to the Attorney General and the Solicitor General, is the concern that the United States usually should speak with one voice before this Court.”<sup>80</sup> And the need for the Government to speak with one voice results in extensive interagency processes to ensure that OSG’s positions reflect all relevant views and are fashioned

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75. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

76. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1985) (stating that stare decisis reassures the public “that bedrock principles are founded in the law, rather than in the proclivities of individuals”).

77. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [https://perma.cc/86HX-BQCB].

78. See Simon E. Sobeloff, *The Law Business of the United States*, 34 OR. L. REV. 145, 148 (1955).

79. *Hilton v. S.C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991) (citing *Vasquez*, 474 U.S. at 265-66).

80. *United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988).

with an eye towards establishing internally binding positions. I participated in numerous meetings at which officials hammered out positions and argued over differing views, and Solicitors General displayed one of the most important attributes of the job: to listen. But the Solicitor General then followed with an equally important role: to decide. Agencies and other DOJ components could appeal to the Attorney General (they rarely did and were even less often successful). But if the Solicitor General's position stood, it represented the position of the United States.

Even still, those positions are not “law” in the sense that they can produce true reliance interests. Justice Jackson's view of the Court that “[w]e are not final because we are infallible, but we are infallible only because we are final,”<sup>81</sup> does not apply to OSG—the Solicitor General is neither infallible nor final. Even if OSG crafts its positions with care, integrity, and dedication to the rule of law, the Supreme Court may (and often does) reject its views.<sup>82</sup>

Finally, when the Court has not resolved an issue—as will be true in the universe of cases under consideration here in which OSG has freedom to revisit its prior view—the Supreme Court is best served by hearing the strongest and best supported arguments from a candid advocate. While the Supreme Court will of course independently evaluate a legal issue, it always benefits from candid advocacy. That duty of candor is amplified for OSG, which has a special relationship to the Court as a coordinate branch of government. Telling the Court what the Government regards as the right answer is an important part of that function, and a candid presentation of its views—even if they depart from a predecessor's (or even the incumbent Solicitor General's own prior views)—further OSG's role as counsel, advisor, and exponent of the rule of law in submissions to the Court.

Those considerations support the notion that OSG should approach its task with a much greater openness to abandoning a prior position than a court would have, if the Solicitor General concludes that the position was legally incorrect. It is likely, in fact, that OSG should employ a presumption that it will furnish the Court with a new and revised position if it believes that its prior position was wrong.

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81. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

82. See, e.g., CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 175-82 (1991) (discussing *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), a case where Solicitor General Charles Fried went through a lengthy and formal process in deciding what he thought was the correct legal position, despite fervent opposition from his political superiors, yet the Court ruled against him).

*B. The Presumption Presupposes a Rigorous Process Within OSG Before Changing Positions, Alongside a Limited Set of Exceptions*

While the presumption described above should operate when OSG is convinced that its prior position was wrong, that presumption can work only if OSG keeps in mind the institutional interests of the government, is meticulous before reaching the conclusion that it *was* wrong, and recognizes limited exceptions.

First, “a Solicitor General is not an ombudsman with a roving commission to do justice as he sees it.”<sup>83</sup> Rather, the Solicitor General is an advocate for the United States—which, all lawyers in OSG understand, is a different function from that of a judge.<sup>84</sup> Institutional interests of the United States thus play a significant role in assessing what position to take. Of course, OSG represents “the long-range interests of the United States, not simply in terms of its fisc, or its success in the particular litigation, but as a government, as a people.”<sup>85</sup> Thus, among the distinctive aspects of the Solicitor General’s role is the willingness to confess error, particularly in criminal cases and in instances where binding legal rules were not observed.<sup>86</sup> The Solicitor General’s advocacy thus takes a broader view of the interests served beyond simply prevailing.<sup>87</sup> But that advocacy is not developed in isolation from the governmental client OSG represents.

Second, reversals of positions—if done too lightly or frequently—can jeopardize OSG’s “reservoir of credibility” with the Court.<sup>88</sup> The Court in countless ways depends on OSG to be an honest legal broker, attentive to the Court’s standards and decisions and devoted to the rule of law. The uniqueness of OSG’s role as the voice of the United States would exist as a matter of institutional relationship regardless of how OSG performed. But in a host of cases, trust is vital to OSG’s success. The perception that OSG’s positions reflected political rather than legal analysis would be highly damaging. This was the essence of former

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83. Erwin N. Griswold, *The Office of the Solicitor General—Representing the Interests of the United States Before the Supreme Court*, 34 MO. L. REV. 527, 527 (1969).

84. *Id.* at 529 (“Any Solicitor General is inevitably aware that he is basically an advocate. Within wide limits it is not for him to decide the cases which are before the Court—that is for the Court.”); David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 LAW & CONTEMP. PROBS. 165, 168–69 (1998) (“No recent Solicitor General has adopted a policy of systematically refusing to take any position he would not vote for as a Justice. . . . The Office sees its principal business as advocacy.”).

85. Griswold, *supra* note 83, at 535.

86. See Cox, *supra* note 17, at 223–25.

87. See Sobeloff, *supra* note 78, at 148 (“My client’s chief business is not to achieve victory but to establish justice.”).

88. Rex E. Lee, *Lawyering for the Government: Politics, Polemics & Principle*, 47 OHIO ST. L.J. 595, 601 (1986).

Solicitor General Rex Lee’s statement that he was “the Solicitor General, not the Pamphleteer General.”<sup>89</sup> If OSG were seen as a political actor, it would impair its ability to provide the Court with necessary information about the way that statutes work, the real-world effects of legal rulings, and the manner that the government operates – which are vital to influencing outcomes.<sup>90</sup> And because the Court is seeking to apply legal principles that endure despite the changing of the guard in the Justice Department, OSG is more likely to have a receptive audience for its submissions if the Court perceives it as engaged in the same rule-of-law mission.

Third, reversals can undermine OSG’s credibility within the government. OSG is a comparatively tiny boat in a tempestuous sea of government actors. In order for OSG to maintain the prestige needed to make binding pronouncements within the government, enjoy the confidence of officials in other agencies, and maintain viable working relationships with other components, it has to be perceived as making sound, principled, and well-considered decisions. Shifts perceived as abrupt, arbitrary, or idiosyncratic – or at odds with the interests of the United States – will undermine that necessary trust and harm OSG’s ability to serve as an authoritative voice in dialogue with client agencies and coordinate offices.

Finally, OSG’s mission entails representing the *long-term* institutional interests of the United States and the executive branch. Yet, political figures who occupy significant posts in government may be preoccupied by short-term policy goals. The mixing bowl of legal analysis may make it easy to confuse the two – and to allow short-run gain to drive advocacy for a particular legal position. Other actors in government can press a changed position on the Solicitor General with great force, persistence, and sometimes beguiling persuasiveness. OSG’s tradition of independence insulates it to some extent against the importuning of other officials. So, when those officials argue for casting a prior position overboard, Solicitors General must rely on their own legal judgment before agreeing to change course.

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89. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 107 (1987); Lee, *supra* note 88, at 600; *see also* Michael W. McConnell, *The Rule of Law and the Role of the Solicitor General*, 21 *LOY. L.A. L. REV.* 1105, 1116 (1988) (“No Solicitor General should make an argument to the Court that he is persuaded is not valid, merely because the argument is popular, or because the President wants it to be made.”).

90. *See* Strauss, *supra* note 84, at 172 (“[OSG] is . . . one of the Court’s few sources of information about the effects of legal rules and decisions in the world.”). Given the increased quantity and quality of amicus briefs, including from Supreme Court specialists who prize their own credibility, and the Court’s access to independent internet research, that statement may be less true today. But the Court can still count on OSG to strive to provide an accurate picture of real-world effects.

Here is where process matters. Many legal questions are just hard. Good arguments exist on both sides. When that is true, it can be difficult to be sure that one's view is correct. A sense of modesty before reaching a firm conclusion that one's predecessors were wrong is a useful antidote to the instinctive reflex that one's own take is right. At a minimum, this consideration suggests that procedural regularity is vital before altering positions.

OSG's culture fosters this deliberativeness. During my time in OSG, almost all decisions were made only after separate components submitted tiers of memoranda. It is typical for OSG to solicit and receive memoranda from one or more executive branch agencies; the trial-level lawyers in the Justice Department; and the appellate staffs of the interested litigating component. Along the way, phone calls, emails, and meetings help ensure due process within the government and provide OSG with answers to questions needed for the Solicitor General's decision. Then, within OSG, all of this material is reviewed by the generalist Assistants to the Solicitor General, who write their own memoranda. And the subject-matter specialist Deputy Solicitors General then add theirs. All of the Assistants and all but one of the Deputies are career officials, often with years of experience in presenting the Government's position to the Supreme Court. That process draws on institutional memory, exposes strengths and weaknesses in competing arguments, and reveals solid legal points versus superficially attractive, but ultimately unconvincing, alternatives. It represents an essential and effective safeguard against hasty or incompletely analyzed reversals. If that process yields a clear legal conclusion that a prior position was wrong, the Solicitor General can have some confidence in the integrity of that decision. In contrast, where the analysis is in equipoise, a default to the status quo may be wiser.<sup>91</sup>

And that brings me to the exception to the presumption. Because a change in position is not cost-free, the Solicitor General may choose to adhere to the views expressed in a prior brief despite doubts about their soundness. The factors that may inform that approach are varied and will necessarily depend on specific circumstances. They may concern a lack of consensus within the government on whether to change course; reliance interests of other components or officials (such as criminal convictions won on the basis of a prior interpretation); a view that the harm to OSG's credibility from a change in position outweighs its context-specific benefits; and a conclusion that concerns about the validity of

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91. The deliberative process within OSG has been consistent for decades. See Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 WASH. U. L.Q. 337, 345 (1981) (“[T]he ‘interest of the United States’ is best understood in functional terms – as the end-product of a dynamic process of decision-making involving many participants. That process operates within the framework of a body of procedures and standards that have the sanction of long tradition in the Solicitor General’s Office.”). For a thorough description of the structure, staffing, process, and culture of OSG, see Schwartz, *supra* note 73, at 1129-32.

a position can be addressed through candid presentation of the competing considerations – recognizing that the Court, rather than OSG, will resolve the issue. But it may better serve both the interests of OSG and the Supreme Court if OSG presumptively submits positions that it believes are right.

## CONCLUSION

In contrast to judicial stare decisis – which promotes stability in the law, limits arbitrary decisionmaking, and enhances legitimacy – stare decisis as applied to positions taken by OSG should operate with a different set of standards and guidelines. While a rigorous process should precede any determination that the legal position OSG has taken is wrong, once the Solicitor General has arrived at that conclusion, the presumption should be in favor of making the change and presenting it to the Court. Of course, any positional reversal should be acknowledged in the filing. And the Solicitor General must weigh considerations that cut against a change, including harming OSG’s institutional credibility, intruding upon another agency’s equity in running its programs, reliance interests, and alternative litigation approaches to provide the Supreme Court with full information. But any assumption that judicial stare decisis should naturally have a counterpart in stare decisis within OSG is difficult to support. When OSG has determined – after careful review and listening to competing voices – that its prior position was wrong, it should be prepared to say so.

*Michael R. Dreeben is a Distinguished Lecturer at Georgetown University Law Center and a Lecturer at Law at Harvard Law School. He previously served as a Deputy Solicitor General in the U.S. Department of Justice. I gratefully acknowledge my research assistants, Jasdeep Kaur and Jordan Hughes, for their painstaking work and thoughtful reflections on this project, and to Marty Lederman, Annie Owens, and Abbe Dembowitz for their invaluable comments on prior drafts. The views expressed are mine and do not purport to represent the views of any other person or institution. Thanks also to the Yale Law Journal Forum editors, especially Ayoub Ouederni, for their excellent work.*