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Confession of Error by Administrative Agencies

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I. Introduction

This Note examines the unusual practice in which an administrative agency "confesses error" in a legal challenge to an agency action. In

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particular, it emphasizes the political ramifications of agency confessions of error,[1] highlights the lack of a judicial standard for reviewing such confessions,[2] and ultimately recommends an analytical framework that courts should use in deciding whether to accept agency confessions of error.[3]

In general, a confession of error occurs when a government attorney[4] admits to a court that the government has committed a legal mistake.[5] A government attorney, such as a prosecutor or the Solicitor General, confesses error in order to "ensure the proper and fair administration of justice."[6] For example, if a prosecutor learns that the state has improperly convicted a criminal defendant, he may confess error on appeal and ask the appellate court to vacate the conviction.[7] In addition, a handful of times each term, the Solicitor General confesses error before the Supreme Court, arguing that the government should not have prevailed in the court below and asking the justices to reverse the judgment.[8]

Although prosecutors and Solicitors General are the government attorneys who most commonly confess error, other executive branch officials also have occasion to use the practice. An administrative agency, for instance, will sometimes confess error in litigation that challenges an agency action such as a rulemaking.[9] Agency confessions of error can serve legitimate purposes, such as ending litigation that is no longer contested and conserving agency and judicial resources; however, they may also serve illegitimate purposes, such as when an agency uses a confession

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1. *See infra* Part II (exploring the political ramifications of a confession of error recently made by the Department of Interior).

2. *See infra* Part III (arguing that federal courts have not articulated a clear standard for determining when to accept confessions of error made by administrative agencies).

3. *See infra* Part IV (proposing a comprehensive standard for courts to use when deciding whether to accept an agency's confession of error).

4. *See* David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General,* 82 GEO. L.J. 2079, 2117 (1994) ("Confession of error is a practice unique to Government attorneys . . . .").

5. *See id.* at 2092–95 (describing various legal mistakes that may give rise to a confession of error).

6. *Id.* at 2117.

7. *See infra* Part III.C (reviewing prosecutorial confession of error).

8. *See* PETER N. UBERTACCIO III, LEARNED IN THE LAW AND POLITICS: THE OFFICE OF THE SOLICITOR GENERAL AND EXECUTIVE POWER 170–71 (2005) (reviewing the Solicitor General's practice of confessing error).

9. *See infra* Part II (providing a detailed discussion of how the Department of Interior attempted to confess error in litigation challenging an administrative rulemaking).

of error as a strategic device to achieve a political goal.[10] This Note examines that distinction and explores how the risk of an improperly motivated confession of error is especially acute in times of political transition, such as during a change in presidential administrations.

Part II begins by introducing litigation concerning the Stream Buffer Zone Rule (SBZ Rule),[11] which is an environmental regulation that protects streams from the effects of coal mining.[12] This litigation arguably provides an example of how an administrative agency can use confession of error as a strategic tactic to achieve political goals—in this case, to circumvent the procedural requirements of the Administrative Procedure Act.[13] This Note will use the controversy surrounding the SBZ Rule litigation as a vehicle to explore the broader issue of agency confession of error and its attendant political implications.

Because confessions of error can be subject to both legitimate uses and illegitimate uses, the courts should have a clear, consistent, and coherent standard of review for deciding whether to accept agency confessions of error.[14] Unfortunately, no such standard has emerged.[15] Part III of this Note highlights and analyzes this shortcoming by reviewing how courts have addressed agency confessions of error and by examining how the legal scholarship has addressed confessions of error by other government attorneys—namely Solicitors General and prosecutors. Part III illustrates the current deficiencies of the confession of error jurisprudence. But it also

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10. *See infra* Part V (critically examining a recent confession of error made by the Department of Interior to determine whether it served a legitimate purpose or an illegitimate purpose).

11. *See* Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams, 73 Fed. Reg. 75,814 (Dec. 12, 2008) (identifying the circumstances under which coal mining may be conducted near streams).

12. *See, e.g.*, News Release, U.S. Office of Surface Mining, *Office of Surface Mining to Issue New Rule Tightening Restrictions on Excess Spoil, Coal Mine Waste, and Mining Activities in or Near Streams* (Dec. 3, 2008), *available at* http://www.osmre.gov/resources/newsroom/News/Archive/2008/120308.pdf [hereinafter *OSM News Release*] (describing the SBZ rule as placing "restrictions on how coal mine operators can dispose of coal mine waste and the excess spoil created by the mining operation").

13. *See* Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.) (mandating that administrative agencies comply with certain procedural requirements before undertaking different types of agency actions).

14. *See infra* Part III (arguing that a comprehensive standard for reviewing agency confessions of error is needed).

15. *See infra* Part III (noting that no consistent standard has emerged for reviewing confessions of error).

suggests that in combination the existing jurisprudence and scholarship can form the beginnings of a workable standard of judicial review.

Part IV of this Note develops a recommendation for such a standard by synthesizing the research from Part III and drawing on the existing jurisprudence and scholarship. It aims to provide a clear standard of review for agency confessions of error, which will enable courts to separate the legitimate uses of the practice from improper ones.

Part V of this Note returns to the SBZ Rule litigation to examine how a court would have evaluated the government's attempt to confess error if it had used the analytical framework recommended in Part IV. Because the district court in the SBZ Rule litigation has issued an opinion on the confession of error question, Part V also compares and contrasts this Note's conclusions with those of the district court.[16] The Note argues that the district court reached the right result—that the attempt to confess error in the SBZ Rule litigation was improper—but it also argues that the court failed to consider several important factors in its analysis.[17] This analysis demonstrates how courts should review agency confessions of error, and it underscores the value of having a consistent framework for other courts to use in the future.

Finally, Part VI of this Note concludes the analysis with some final thoughts on the political implications of agency confessions of error.

II. A Case Study: The Stream Buffer Zone Rule Litigation

This Part provides more detailed background information on the SBZ Rule and associated litigation. It also introduces the practice of agency confession of error by exploring how the Department of Interior (Interior) and the Office of Surface Mining Reclamation and Enforcement (OSM) attempted to confess error in litigation concerning revisions to the SBZ Rule.

The SBZ Rule is an environmental rule that restricts coal mining activities in and around streams and governs how coal mine operators can dispose of coal mining waste.[18] The SBZ Rule was adopted pursuant to the

16. Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3, 4 (D.D.C. 2009) (denying motions to vacate and dismiss).

17. *See infra* Part V (applying the proposed standard of review and finding that in light of various interests, the confession of error was improper).

18. *See, e.g., OSM News Release, supra* note 12 (describing the SBZ rule as placing "restrictions on how coal mine operators can dispose of coal mine waste and the excess spoil created by the mining operation").

Surface Mining Control and Reclamation Act (SMCRA),[19] which is the federal law that regulates surface coal mining.[20] By providing environmental protections to streams, the SBZ Rule helps implement SMCRA, which has the purpose of "assur[ing] that surface coal mining operations are so conducted as to protect the environment."[21] SMCRA also establishes OSM as an agency within the Department of Interior,[22] and it confers authority on OSM to promulgate regulations that relate to surface coal mining and the purposes of the Act.[23]

Pursuant to its authority under SMCRA, OSM adopted the first iteration of the SBZ Rule in 1979,[24] after conducting a notice-and-comment rulemaking pursuant to the Administrative Procedure Act.[25] In 1983, OSM conducted another informal rulemaking in order to revise the original SBZ Rule.[26] The 1983 version of the SBZ Rule (1983 SBZ Rule) provided that mine operators could not conduct surface mining activities within 100 feet of perennial and intermittent streams, unless they first obtained authorization from the appropriate regulatory authority.[27] This 100-foot buffer zone requirement was designed to protect streams from sedimentation and channel disturbance.[28]

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19. *See* Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1328 (2006) (regulating coal mining operations with the aim of reducing adverse environmental effects).

20. *See id.* § 1202(a) (providing that the purpose of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations").

21. *Id.* § 1202(d).

22. *See id.* § 1211(a) (creating the Office of Surface Mining Reclamation and Enforcement and establishing it within the Department of Interior).

23. *See id.* § 1211(c)(2) (conferring authority on the Secretary of Interior, acting through OSM, to publish and promulgate rules and regulations needed to carry out SMCRA).

24. Surface Coal Mining and Reclamation Operations: Permanent Regulatory Program, 44 Fed. Reg. 14,902 (Mar. 13, 1979).

25. *See* Administrative Procedure Act of 1946, 5 U.S.C. § 553 (2006) (discussing the elements of notice and comment rulemaking).

26. Surface Coal Mining and Reclamation Operations Permanent Regulatory Program; Stream Buffer Zones and Fish, Wildlife, and Related Environmental Values, 48 Fed. Reg. 30,312 (Jun. 30, 1983).

27. *See* 30 C.F.R. § 816.57(a) ("No land within 100 feet of a perennial stream . . . shall be disturbed by surface mining activities, . . . unless the regulatory authority specifically authorizes surface mining activities closer . . . .").

28. *See* Surface Coal Mining and Reclamation Operations Permanent Regulatory Program; Stream Buffer Zones and Fish, Wildlife and Related Environmental Values, 48 Fed. Reg. at 30,312 (describing the environmental benefits afforded by stream buffer zones).

In 2007, near the end of George W. Bush's second presidential term, OSM initiated another notice-and-comment rulemaking in order to revise the SBZ Rule yet again.[29] OSM ostensibly undertook the revisions to reduce confusion surrounding the 1983 SBZ Rule[30] and to increase environmental protection for streams.[31] However, environmental groups believed that the proposed revisions would actually reduce environmental protections for streams.[32] They contended that the revisions would favor coal mining over the environment by making it easier for coal mine operators to obtain exemptions from the stream buffer zone requirement, which would have the effect of increasing destructive mining activities in and around streams.[33] Despite these objections, on December 12, 2008, OSM published a final rule adopting revisions to the SBZ Rule (Revised SBZ Rule).[34] The environmental groups that had objected to the changes promptly filed suit, challenging the Revised SBZ Rule on the basis that OSM and Interior had neglected to follow certain procedural requirements.[35]

After President Bush left office, the incoming administration of President Obama expressed disapproval of the Revised SBZ Rule on policy grounds, apparently sympathizing with the environmental plaintiffs' concerns that the rule reduced important environmental protections for streams.[36] In a press conference, Secretary of Interior Ken Salazar

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29. *See* Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States, 72 Fed. Reg. 48,890 (Aug. 24, 2007) (proposing an amendment to OSM's stream buffer zone regulations to clarify and expand environmental protections for streams).

30. *See id.* at 48,892 (noting that there has been controversy over the proper interpretation of the 1983 SBZ Rule, and stating that a purpose of the revisions is to clarify ambiguities and minimize disputes concerning the application of the SBZ Rule).

31. *See id.* (stating that a purpose of the revisions is to expand environmental protections for streams by making the SBZ Rule applicable to all waters of the United States, instead of just perennial and intermittent streams).

32. *See, e.g.*, Scott Kirkwood, *A Mountain of Controversy*, NAT'L PARKS CONSERVATION ASS'N MAG. (Winter 2009), *available at* http://www.npca.org/magazine/2009/winter/a-mountain-of-controversy.html (evaluating and criticizing the proposed revisions to the 1983 SBZ Rule).

33. *See id.* ("But in April 2007, the Office of Surface Mining (OSM) began reevaluating rule's interpretation, and in December, the agency effectively removed its teeth.").

34. Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams, 73 Fed. Reg. 75,814 (Dec. 12, 2008).

35. *See* Nat'l Parks Conservation Ass'n v. Salazar, No. 09-00115 (D.D.C. filed Feb. 17, 2009) (challenging the Department of Interior's amendment to the Revised SBZ Rule); Coal River Mountain Watch v. Salazar, No. 08-2212 (D.D.C. filed Dec. 22, 2008) (same).

36. *See* Press Release, U.S. Department of Interior, *Salazar Moves to Withdraw 11th*

characterized the Revised SBZ Rule as an eleventh hour rule and asserted that the rule was legally defective.[37] However, Secretary Salazar did not specify the precise nature of the deficiency at that time.[38]

Secretary Salazar's remarks made it clear that the Obama administration desired to undo the Revised SBZ Rule. The normal approach for accomplishing this goal would have been for Interior and OSM to conduct a new notice-and-comment rulemaking pursuant to the Administrative Procedure Act.[39] These agencies had routinely used such informal rulemakings to make revisions to the SBZ Rule in the past.[40] However, instead of initiating a new rulemaking to change the SBZ Rule, Interior took the unusual step of confessing legal error in the litigation against the 2008 rulemaking.[41] Interior specifically acknowledged, as the environmental plaintiffs had alleged, that OSM had failed to meet a legal obligation to consult with the U.S. Fish and Wildlife Service regarding the possible effects of the Revised SBZ Rule on threatened and endangered species.[42] On the basis of this error, Interior moved the court to vacate the Revised SBZ Rule and to remand the matter to the agency.[43] The agency reasoned that the case was moot because there was no longer a dispute on

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Hour Mountaintop Coal Mining Rule (Apr. 27, 2009), http://www.doi.gov/archive/news/09_News_Releases/042709.html (last visited Sept. 24, 2010) (quoting Salazar as stating that "[t]he so-called 'stream buffer zone rule' simply doesn't pass muster with respect to adequately protecting water quality and stream habitat that communities rely on in coal country") (on file with the Washington and Lee Law Review).

37. *See id.* (noting Secretary of Interior Ken Salazar's concerns with the Revised SBZ Rule).

38. *See id.* (failing to specify the Revised SBZ Rule's legal deficiency).

39. *See* Administrative Procedure Act of 1946, 5 U.S.C. § 551 (2006) (defining "rule making" to include the repeal of a rule); *id.* § 553 (mandating notice and comment procedures for informal rulemakings).

40. *See supra* notes 24–31 and accompanying text (describing how previous revisions to the SBZ Rule were accomplished by notice-and-comment rulemaking).

41. *See* Defendant's Motion for Voluntary Remand and Vacatur at 4, Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3 (D.D.C. 2009) (No. 09-00115) [hereinafter *Nat'l Parks Motion*] (arguing that the court should vacate the Revised SBZ Rule and remand to the agency because the Secretary of the Interior had confessed legal error); Federal Defendants' Motion to Dismiss Complaint as Moot at 4, Coal River Mountain Watch v. Salazar, No. 08-2212 (D.D.C. Apr. 28, 2009) [hereinafter *Coal River Motion*] (same).

42. *See Nat'l Parks Motion*, *supra* note 41, at 2 ("The Secretary has determined that OSM erred in failing to initiate consultation with the U.S. Fish and Wildlife Service under the [Endangered Species Act] to evaluate possible effects of the SBZ Rule on threatened and endangered species."); *Coal River Motion*, *supra* note 41, at 2 (same).

43. *Nat'l Parks Motion*, *supra* note 41, at 1; *Coal River Motion*, *supra* note 41, at 1.

the merits.[44] Moreover, it argued that the court could save valuable judicial resources by vacating and remanding the rule.[45]

Interior's proposal to vacate and remand the Revised SBZ Rule would have had the practical effect of reinstating the 1983 SBZ Rule.[46] Thus, Interior aimed to undo the Revised SBZ Rule—without conducting any further administrative proceedings—by using a confession of error.[47] The affected mining interests immediately called into question whether confessing error in this matter was a legitimate exercise of agency power or an improper shortcut used to achieve political goals.[48]

As an intervenor in the case, the National Mining Association (NMA) opposed Interior's motion to vacate and remand the Revised SBZ Rule.[49] NMA argued that granting the motion would give the Secretary of Interior the power to rule on the merits of the litigation.[50] Furthermore, NMA argued that vacating and remanding would violate the Administrative Procedure Act because it would allow Interior to adopt a new rule (i.e. the 1983 SBZ Rule) without observing the required notice-and-comment procedures.[51] Ultimately, the District of Columbia District Court found

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44. *See Nat'l Parks Motion*, *supra* note 41, at 5 (arguing that Interior's request for remand and vacatur eliminates any case or controversy between the parties, and thus obviates the need for judicial resolution of the issues); *Coal River Motion*, *supra* note 41, at 5 (same).

45. *See Nat'l Parks Motion*, *supra* note 41, at 5 ("Moreover, the requested remand with vacatur will conserve judicial resources."); *Coal River Motion*, *supra* note 41, at 5 (same).

46. *See Nat'l Parks Motion*, *supra* note 41, at 2–3 ("Vacatur of the SBZ rule would achieve the result of allowing the prior, valid rule that was in effect on December 11, 2008, to be reinstated."); *Coal River Motion*, *supra* note 41, at 2–3 ("Upon vacatur by this Court, Federal Defendants anticipate that OSM would issue an emergency regulation formally withdrawing the SBZ rule and clarifying that the prior, valid rule is applicable.").

47. *See Nat'l Parks Motion*, *supra* note 41, at 3 ("Upon vacatur by this Court, Federal Defendants anticipate that OSM would issue an emergency regulation formally withdrawing the SBZ rule and clarifying that the prior, valid rule is applicable.").

48. *See* Opposition of Intervenor-Defendant National Mining Association to Defendants' Motion for Voluntary Remand and Vacatur at 6, Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3 (D.D.C. 2009) (No. 09-00115) [hereinafter *NMA Motion*] ("[Vacatur] is not a tool for agencies to erase a prior Administration's final, properly promulgated, currently effective regulations merely to suit a new Administration's views on public policy.").

49. *See id.* at 1 (opposing Interior's motion).

50. *See id.* ("They ask this Court not only to remand the rule but also to vacate it, thereby lending the Court's endorsement to Secretary Salazar's unilateral 'determination' late last month that his agency's rule is 'legally defective' and is 'bad public policy.'").

51. *See id.* at 13–15 (describing how vacating and remanding the Revised SBZ Rule would fail to satisfy Administrative Procedure Act requirements for informal rulemaking).

NMA's arguments more persuasive and it denied Interior's motion to vacate and remand.[52]

The district court's opinion ended Interior's attempt to confess error in the SBZ Rule litigation. But it did not resolve more fundamental issues, such as whether an agency should be allowed to confess error at all, and if so, what standards a court should apply to ensure that the technique is not subject to political abuse. The remaining parts of this Note will explore the mechanics of confessing error,[53] examine the legal and policy arguments concerning agency confession of error,[54] and analyze the district court's opinion on Interior's motion to vacate and remand in light of those arguments.[55]

The SBZ Rule litigation and Interior's attempt to confess error raise two important questions of law and policy. First, should a new presidential administration be able to circumvent the Administrative Procedure Act—and undo the previous administration's eleventh hour rules—by confessing that the agency committed legal errors during the rulemaking process? And second, what standards should a court apply in deciding whether to accept such a confession of error and to ensure that this practice is not subject to political abuse?

Answering these questions is important because the practice of agency confession of error implicates important policy issues. To begin with, the Administrative Procedure Act requires an agency to conduct a new rulemaking to repeal a legally effective rule.[56] If the court accepted Interior's confession of error, the agency would be able to circumvent this requirement and repeal the legally effective Revised SBZ Rule without any administrative process. Second, the practice is highly susceptible of political abuse, particularly when a new president has taken office and his administration is eager to undo the eleventh hour rules adopted by the outgoing administration. Finally, it upsets the settled expectations of the regulated parties and the public by undoing a legally effective rule without any administrative process.

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52. *See* Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3, 4 (D.D.C. 2009) (denying motions to vacate and dismiss).

53. *See infra* Part III (discussing modern use of confessions of error).

54. *See infra* Part IV (discussing the policy objectives underlying the use of confessions of error).

55. *See infra* Part V (applying the proposed standard of review to Secretary of Interior Ken Salazar's confession of error).

56. *See supra* note 39 and accompanying text (describing Administrative Procedure Act requirements for repeal of a legally effective rule).

III. Existing Standards of Judicial Review for Confessions of Error

This Part will review how courts have responded to agency confessions of error and then examine the standards of review that courts have applied to confessions of error made by other departments within the executive branch. This Part begins by examining judicial opinions that address confessions of error by administrative agencies. Next, it reviews the use of confession of error by the Solicitor General in the Supreme Court.[57] And finally, it reviews the confession of error by attorneys general and prosecutors in criminal matters. As part of this review, the Note considers whether the standards of review for Solicitors General and prosecutors could be extended to the agency context.

A. Administrative Agencies

Federal district courts have accepted agency confessions of error and granted motions to remand in various proceedings, but they have not articulated any clear standard for determining when such confessions should be accepted. This Part reviews the factors that courts have considered in deciding whether to accept agency confessions of error. It also highlights the fact that courts have made these decisions on a case-by-case basis, without the benefit of a consistent standard of review.

In some cases, district courts have accepted agency confessions of error and granted motions to remand for the purpose of conserving judicial and litigant resources.[58] Their rationale is that if the agency has agreed that it made a mistake, then forcing the litigation to continue will waste the resources of parties on both sides of the dispute and of the judiciary itself.[59] In this scenario, accepting the agency's confession of error achieves the same result that the litigation ultimately would, but the parties involved and

57. *See, e.g.*, Rosenzweig, *supra* note 4, at 2092 n.105 (reviewing the solicitor general's practice of confessing error and evaluating concerns about the practice and its susceptibility to abuse).

58. *See, e.g.*, Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993) ("We commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete.").

59. *See id.* (emphasizing the importance of considering party and judicial resources when deciding whether to accept a confession of error).

the court do not need to expend any additional resources to realize that result.[60]

In examining an administrative agency's confession of error, federal courts will also evaluate the seriousness of the agency's alleged error and the confession's potential for disruptive consequences.[61] District courts have thus granted agency motions to vacate rules and remand when the vacatur would not lead to "significant disruptive consequences."[62] According to one formulation, when a court sets out to determine what constitutes a significant disruptive consequence, it "cannot rely upon intervenors' abstract policy arguments; rather, there must be some factual basis for determining what the disruptive consequences might be."[63] Vacating a regulation would not result in a significant disruptive consequence, for example, if other overlapping regulations were in place and would perform the same function as the vacated regulation.[64]

District courts also will evaluate the seriousness of the deficiencies in the completed rulemaking in deciding whether to vacate and remand.[65] But even upon finding that a rulemaking suffers from serious deficiencies, the court need not automatically vacate the rule.[66]

Indeed, despite the tendency of the federal courts to accept agency confessions of error, such acceptance is hardly guaranteed. The Supreme Court itself has stated that it is not compelled to accept a confession of error simply because opposing parties have come to an agreement on the issue.[67]

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60. *See id.* (noting that the same result would occur regardless of whether the confession of error is accepted).

61. *See* Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) ("The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" (quoting Int'l Union v. Fed. Mine Safety and Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990))).

62. Bldg. Indus. Legal Def. Found. v. Norton, 231 F. Supp. 2d 100, 105 (D.D.C. 2002).

63. *Id.* at 106.

64. *See id.* at 106–07 (determining that vacating the critical habitat designation for the endangered Arroyo Toad was not a significant disruption because "overlapping regulatory structures" were in place to protect the toad and its riparian and vernal pool habitats).

65. *See Allied-Signal, Inc.*, 988 F.2d at 150–51 (stating that the decision to vacate should depend on the seriousness of the deficiencies).

66. *See id.* at 150 ("An inadequately supported rule, however, need not necessarily be vacated.").

67. *See* Young v. United States, 315 U.S. 257, 258 (1942) (stating that a confession of error does not relieve the Supreme Court from performing its judicial function); *see also* Rosenzweig, *supra* note 4, at 2112 ("Several justices have noted in dicta in confession of error cases that the Court is not compelled to accept the position of opposing parties who

And moreover, several of the justices on the Supreme Court have expressed strong disapproval for the practice of confessing error.[68]

In short, federal courts decide whether to accept an agency's confession of error by making individualized assessments of each case. Depending on the court and the case in question, these assessments put weight on factors such as the seriousness of the alleged error; the potential disruption that would be caused by accepting the confession; the speculativeness of that potential disruption; and the prospect of conserving the resources of the parties and the court.[69] Most significantly, some courts and individual jurists are more receptive to confessions of error than others.[70] In combination, these individual preferences and the lack of a consistent standard of judicial review make it difficult to predict whether a court will accept an agency's confession of error in any particular case.

B. Solicitors General

Among his other duties, the Solicitor General is responsible for reviewing cases that the federal government has lost in the federal district courts and courts of appeal, and for deciding which of those losses to appeal.[71] If the Solicitor General chooses to appeal a case to the Supreme Court, and the Court grants review, then the Solicitor General represents the executive branch before the Supreme Court, drafting the government's briefs and presenting its oral arguments.[72] The Solicitor General is also

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agree on an issue.").

68. *See, e.g.*, REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 120–21 (1992) (discussing Chief Justice Rehnquist's dissent in *Rinaldi v. United States*, 434 U.S. 22 (1977) in which he criticized the majority for accepting the government's confession of error in a criminal case when the asserted error did not affect the defendant's guilt or innocence).

69. *See supra* notes 58–66 and accompanying text (reviewing various factors that courts have emphasized in reviewing confessions of error).

70. *See supra* notes 66–68 and accompanying text (discussing how courts and jurists have varying individual preferences for the practice of confessing error).

71. *See* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987) 6–7 (describing the solicitor general's gatekeeping role in deciding which of the government's cases to appeal); UBERTACCIO, *supra* note 8, at 8–9 (summarizing the solicitor general's roles and duties).

72. *See* CAPLAN, *supra* note 71, at 3 ("The Solicitor General's principal task is to represent the Executive Branch of the government in the Supreme Court, ..."); UBERTACCIO, *supra* note 8, at 8–9 (summarizing the solicitor general's roles and duties).

responsible for representing the federal government as *amicus curiae* in the Supreme Court.[73]

When the Solicitor General reviews a case from a lower court that he believes was wrongly decided in favor of the government, he may admit this mistake to the Supreme Court[74] and ask the Court to reverse the judgment of the lower court despite the government's victory.[75] This practice by the Solicitor General is an example of a confession of error.[76] Confessing error is a time-honored custom in the Solicitor General's office and it reflects the view that "[t]he United States wins its point whenever justice is done its citizens in the courts."[77] The Solicitor General confesses error to ensure that justice is done and to serve as a check on the political ambitions of the Department of Justice, which is more closely accountable to the President.[78] The Solicitor General most often confesses error in criminal cases, [79] where he believes that the criminal defendant below was innocent of the crime or was denied important procedural rights in the course of the prosecution.[80]

As with agency confession of error, a Solicitor General's confession of error is potentially subject to abuse. One commentator has noted that because he is a "strategic political actor, the solicitor general's decisions can affect the development of both judicial and executive policy."[81]

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73. *See* UBERTACCIO, *supra* note 8, at 8 ("[T]hird, the OSG represents the government in amicus curiae briefs, where the government has a substantial interest in a case to which it is not a party.").

74. *See* Rosenzweig, *supra* note 4, at 2080 ("The Solicitor General confesses error when she admits to the Supreme Court that a lower court has committed an error in a case decided in favor of the Government.").

75. *See id.* ("Upon confessing error, the Solicitor General may ask the Court to reverse the judgment or may argue either that the judgment should stand despite the error or that the case does not merit review under the Court's standards for granting certiorari.").

76. *See id.* (describing the circumstances under which the Solicitor General might confess error).

77. *See* CAPLAN, *supra* note 71, at 17 (quoting Solicitor General Frederick Lehmann on the use of confessions or error to achieve justice).

78. *See* UBERTACCIO, *supra* note 8, at 170–72 (reviewing the solicitor general's practice of confessing error).

79. *See* Rosenzweig, *supra* note 4, at 2080–81 ("The vast majority of confessions of error occur in criminal cases."); CAPLAN, *supra* note 71, at 9 ("Most confessions of error involve criminal convictions, ...").

80. *See* CAPLAN, *supra* note 71, at 9 (noting that confessions of error in criminal cases "happen for a range of reasons: a jury was selected unfairly; a judge gave faulty instructions to the jury before asking its members to reach a verdict; there was scant evidence supporting the verdict").

81. SALOKAR, *supra* note 68, at 7.

Because he plays these dual roles, the Solicitor General may occasionally be tempted to confess error for purely tactical reasons—for example, to prevent the Supreme Court from ruling on a case when he fears that the decision may have adverse consequences for the government in future cases.[82] When he does this, the Solicitor General engages in a cost-benefit analysis, deciding that the future benefits to the government that would be obtained by avoiding a final ruling outweigh the costs of sacrificing the government's victory in the case below.[83]

Because the Solicitor General has the potential to abuse the practice of confessing error, the Supreme Court has not always been inclined to accept his confessions.[84] Former Solicitor General Archibald Cox reported that in his very first oral argument before the Supreme Court, he attempted to confess error.[85] General Cox had anticipated a trouble-free appearance before the Court, but the justices did not receive his confession of error well.[86] Instead, they peppered him with skeptical questions about the government's position and later ruled unanimously against him.[87]

One example of a case in which the Solicitor General arguably abused the practice of confessing error for strategic reasons was *Environmental Protection Agency v. Brown*.[88] In *Brown*, the Solicitor General represented to the Supreme Court that the government's position in the lower courts was contrary to the Clean Air Act, and then asked the Court for a vacatur in order to avoid a more sweeping adverse ruling on the merits.[89] As Justice

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82. *See* Rosenzweig, *supra* note 4, at 2096 (noting that a Solicitor General may abuse the practice of confessing error by "sacrific[ing] victory in the immediate case to avoid a ruling on the merits of some issue").

83. *See id.* (describing how the Solicitor General might perform a cost-benefit analysis when deciding whether to confess error).

84. *See* Young v. United States, 315 U.S. 257, 258 (1942) (stating that the Supreme Court will not blindly accept a confession of error in lieu of performing its judicial function).

85. *See* SALOKAR, *supra* note 68, at 65 (recounting an interview with Solicitor General Cox and quoting him as saying, "I went up . . . with a prepared statement as to why we were confessing error and hardly opened my mouth than all nine justices jumped down my throat").

86. *See id.* (noting that General Cox believed the Court would readily accept the confession of error).

87. *See id.* (discussing the Justices' critical attitude towards the government's confession of error).

88. *See* Envtl. Prot. Agency v. Brown, 431 U.S. 99, 104 (1977) (vacating the circuit court judgments below and remanding for consideration of mootness after the Solicitor General admitted that the environmental regulations in dispute were invalid).

89. *See id.* at 103 (describing the Solicitor General's argument to the Court); *see also* Rosenzweig, *supra* note 4, at 2099 (arguing that the case "involved an unusual, yet effective, strategic confession by which the Solicitor General persuaded the Court that the case was

Stevens noted in dissent, "By vacating the judgments below, the Court hands the federal parties a partial victory as a reward for an apparent concession that their position is not supported by the statute."[90]

Courts and commentators have split on what standards should be applied in determining whether to permit the Solicitor General to confess error at the Supreme Court. One commentator has proposed a reasonableness standard for reviewing Solicitor General confessions of error.[91] On this view, the Solicitor General should put his personal opinion aside and defend against a constitutional challenge if there is a reasonable ground for doing so.[92]

David Rosenzweig has suggested a set of standards for reviewing confessions of error by Solicitors General.[93] He begins by dividing confession of error cases into several discrete categories, and then proposes a standard for reviewing cases in each category.[94] In his view, the first category involves cases where the Solicitor General confesses a "straightforward" error of fact, law, or procedure.[95] He argues that in these cases, if there is no indication of strategic motivation, then the Court should accept the confession and reverse.[96] This standard of review could potentially be extended to the administrative agency context. Under this standard, when an agency makes a good faith confession of error on a straightforward issue of law, fact, or procedure, the court should accept the confession and vacate and remand to the agency's discretion.

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moot, thus avoiding a significant statutory or constitutional ruling against the Government").

90. *Brown*, 431 U.S. at 104 (Stevens, J., dissenting).

91. *See* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 733 (2005) ("The demanding standard for confessions of error, for example, calls on the [Solicitor General] to defend against a constitutional challenge where there is a reasonable ground for doing so, even if, in his own best view, the federal action was unconstitutional.").

92. *See id.* ("[R]ather than expressing his own independent judgment and declining to pursue a case . . . , the [Solicitor General] . . . makes it a priority to funnel disputes to the Court for decision, and to avoid making decisions that would pretermit Court consideration.").

93. *See* Rosenzweig, *supra* note 4, at 2092–101 (identifying three categories of confession of error cases and recommending a judicial standard of review for each).

94. *See id.* (identifying three categories of confession of error cases and recommending a judicial standard of review for each).

95. *See id.* at 2106 (describing the first category of confession of error cases as those "involv[ing] a clear, reversible error of law, fact, or procedure").

96. *See id.* ("Where a confession involves a clear, reversible error of law, fact, or procedure, the Solicitor General renders a service to the Court by drawing the error to its attention; in such cases, the Court should in almost all instances summarily reverse.").

According to Rosenzweig, a second category of cases involves confessions of error on matters that fall squarely within the government's discretion.[97] This scenario typically arises in the context of prosecutorial discretion policies.[98] On Rosenzweig's view, if the Solicitor General confesses error as to the application of a prosecutorial discretion policy, the Court should conduct at least a minimal review of the record to ascertain that the Solicitor General does not have a strategic motivation.[99] The rationale for this standard is that if the Solicitor General knows that his confession of error will be subject to some review—rather than mechanically accepted—then he will be unlikely to attempt an abuse of the practice.[100] As with the standard of review for the first category of cases, this standard could potentially be extended to the administrative agency context. Under this standard, when the agency confesses error on a matter of policy within its discretion, the court should undertake at least a minimal review to determine the risk of abuse and to assess whether the agency might have a strategic motivation. If the court finds no risk of abuse of strategic motivation, then it should accept the confession of error.

A third category of cases—which includes the most problematic ones—are those where the Solicitor General has clearly engaged in a strategic confession of error.[101] According to Rosenzweig, to discourage such purely strategic confessions of error, the Court should adopt the practice of "refusing to accept any confessions of error at all, denying a larger portion of the Government's certiorari petitions, or more frequently ruling against the Solicitor General's positions in cases decided on the merits."[102] Unlike the recommended standard for the first two categories of cases, this standard is difficult to extend to the agency context because it does not provide a true standard. Instead, it proposes to impose a

97. *See id.* at 2094–95 (identifying a second category of cases as those that involve prosecutorial discretion policies).

98. *See id.* (discussing the use of confessions of error "to effectuate the purposes of [a discretionary Justice Department] policy").

99. *See id.* at 2110 ("While the Court should not automatically deny certiorari in [discretionary prosecution policy] cases, it should undertake at least a minimal independent review of the record in order to deter executive temptation to abuse [discretionary prosecution policy] confessions of error for strategic purposes.").

100. *See id.* at 2109 ("[I]f the Solicitor General knows that the Court will not mechanically accept all confessions, the temptation for the Solicitor General to abuse this type of confession of error will greatly decrease.").

101. *See id.* at 2095–101 (identifying a third category of cases as those that involve strategic confessions of error).

102. *Id.* at 2113–14.

disciplinary action that would not be applicable in the agency context. Moreover, unlike administrative agencies, Solicitors General have a special relationship with the Court because over time they have prepared consistent, high quality, politically neutral arguments on which the Court has come to rely.[103] Because an administrative agency is unlikely to have the special, long-term relationship with the trial court that the Solicitor General has with the Supreme Court, these remedial measures are less likely to be effective in any event.

In summary, the legal scholarship has proposed standards for reviewing confessions of error by the Solicitor General, and these proposed standards could be extended to uncontroversial confessions of error by administrative agencies.[104] However, the scholarship does not provide a standard of review that extends perfectly to the more controversial agency confessions of error—such as Interior's confession of error in the SBZ Rule litigation—that are the focus of this Note.[105]

C. Prosecutors

For the same reasons that Solicitors General occasionally confess error in criminal cases, prosecutors occasionally do the same. According to Professors Green and Yaroshefsky, "[p]rosecutors have a tradition, not uniformly honored, of 'confessing' or correcting error when they learn that discovery material was wrongly withheld or other procedural violations occurred."[106] The practice is not "uniformly honored" because, as with the Solicitor General, the decision to confess error is left entirely to the prosecutor's discretion.[107]

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103. *See id.* at 2083–87 (describing the close relationship between the Office of the Solicitor General and the Supreme Court); SALOKAR, *supra* note 68, at 119 (same); UBERTACCIO, *supra* note 8, at 170–72 (same).

104. *See supra* notes 95–100 and accompanying text (arguing that Rosenzweig's proposed standards of review for the first and second categories of cases could extend to the administrative agency context).

105. *See supra* notes 101–03 and accompanying text (arguing that Rosenzweig's proposed standard of review for the third category of cases does not extend to the administrative agency context).

106. Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 475 (2009).

107. *See* Long v. Satz, 181 F.3d 1275, 1279 (11th Cir. 1999) (per curiam) (agreeing with the district court that "'[t]he task of evaluating the credibility of the alleged exculpatory information, and of determining its bearing on the trial and the prosecutor's decision whether to confess error and agree to have the verdict set aside, no doubt requires the exercise of

Indeed, there are many similarities between confessions of error by the Solicitor General and confessions of error by prosecutors. Like the Solicitor General, prosecutors confess error in criminal cases because of their unique professional obligation to seek justice.[108] On this view, the public trust reposed in prosecutors compels them to confess error when a miscarriage of justice otherwise might result.[109] If a prosecutor wins a conviction against a defendant who he later learns to be innocent, he should sacrifice the government's victory in the case in order to do justice and vindicate the public trust vested in his office.[110]

The salient question is what standard of review should a court employ in assessing a prosecutor's confession of error? As it turns out, courts readily accept prosecutorial confessions of error for the same reason that prosecutors make them—to avoid miscarriages of justice, which would taint the criminal justice system and reduce public confidence in verdicts.[111] However, the Supreme Court has advised that the government's confession of error does not relieve the judiciary from its responsibility to perform its judicial function.[112] In other words, the court should undertake some review of the government's confession of error before deciding to accept it.[113] But again, the federal courts have not established any clear standard for reviewing a prosecutor's confession of error.

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prosecutorial discretion'").

108. *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?* 26 FORDHAM URB. L.J. 607, 615 (1999) (considering the relationship between confession of error and the role of prosecutors in the justice system).

109. *See* Young v. United States, 315 U.S. 257, 258 (1942) ("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. . . . [S]uch a confession does not relieve this Court of the performance of the judicial function.").

110. *See id.* (discussing a prosecutor's duty to the public interest).

111. *See* Green, *supra* note 108, at 615 (discussing the judicial system's responsibility to provide justice).

112. *See supra* notes 67–68 and accompanying text (discussing Supreme Court opinions in which justices have suggested that the Court should not automatically accept confessions of error).

113. *See Young*, 315 U.S. at 258 ("But such a confession does not relieve this Court of the performance of the judicial function.").

IV. Recommended Standard of Judicial Review for Confessions of Error by Administrative Agencies

The need for a single coherent standard of judicial review for agency confessions of error is manifest. As this Note has shown, courts have grappled with the issue of when to accept problematic confessions of error, but they have not forged a consensus as to what standard of review should apply.[114] To date the courts have tended to ferret out problematic confessions of error on a case-by-case basis by looking for indications of political abuse or other improper motivations.[115] The problem with this approach is that it is inconsistent and unpredictable. In turn, this unpredictability prevents administrative agencies from determining in advance whether confessing error is an appropriate strategy, and it prevents regulated parties from assessing the likelihood of an agency's success in confessing error. To rectify this shortcoming in the confession of error jurisprudence, this Note recommends a comprehensive standard that courts should apply when assessing agency confessions of error. This standard will draw on the existing case law,[116] supplementing it with ideas from the legal scholarship on confessions of error in other contexts.[117]

A. Policy Considerations

At the outset, it is important to acknowledge that agency confessions of error can serve legitimate purposes.[118] The practice of confessing error did not evolve by accident: It exists because it has valid applications.

To begin with, forcing an agency to litigate and defend an admittedly defective rule will waste the limited resources of both the agency and the judiciary.[119] Accepting a confession of error can help a court manage its

114. *See supra* notes 58–66, 69 and accompanying text (reviewing a variety of different standards and factors that courts have applied in reviewing agency confessions of error).

115. *See, e.g.*, *supra* notes 48–52 and accompanying text (describing how the district court in the SBZ Rule litigation looked for specific indications of political abuse in making its decision to refuse Interior's confession of error).

116. *See supra* Part III.A (analyzing the case law on judicial standards of review for agency confessions of error).

117. *See supra* Parts III.B and III.C (analyzing the legal scholarship on confessions of error by solicitors general and prosecutors).

118. *See, e.g.*, Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993) (accepting a confession of error to save the courts' and the parties' resources).

119. *See id.* (emphasizing the importance of considering judicial resources when deciding whether to accept a confession of error).

docket and ensure the proper and fair administration of justice.[120] Moreover, accepting a confession of error reduces the harm to the regulated party that would stem from the delay and uncertainty inherent in further litigation.[121] For example, in the SBZ Rule litigation, the regulated mining companies will remain unaware during the pendency of the litigation of what version of the SBZ Rule they will ultimately be required to follow. As a result, they are likely to suffer very real business costs.

Second, there are logistical problems inherent in forcing an agency to defend a rule with which it disagrees. For example, in the SBZ Rule litigation, the district court refused to accept Interior's confession of error.[122] Interior will now proceed to defend the SBZ Rule on the merits, notwithstanding the fact that the agency has publicly gone on record arguing that the rule is not only bad public policy, but also that it is legally defective.[123] The agency is strongly prejudiced against the rule, yet the court has required the agency to defend it. It is clear that the agency has a conflict of interest.

In the SBZ Rule litigation, the mining interests are represented by NMA—a powerful political association that the court has allowed to intervene in the litigation.[124] As an intervenor, NMA will be able to defend the Revised SBZ Rule in the litigation on its own terms. Thus, despite Interior's conflict of interest, the mining companies can ensure that their interests will be adequately represented in court. But what about the hypothetical case where the regulated party does not have the resources to mount its own defense or is otherwise unable to intervene? In that case there is a very real possibility that the litigation against the rule will be entirely one-sided, and therefore not particularly useful in resolving the controversy.

Third, in a related point, justiciability problems emerge when the court forces an agency to defend a rule with which the agency disagrees.[125]

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120. *See* Rosenzweig, *supra* note 4, at 2117 ("When employed in proper circumstances, confessions of error can serve important ends, including assisting the Court in managing its docket and ensuring the proper and fair administration of justice.").

121. *See id.* (emphasizing the importance of considering party resources when deciding whether to accept a confession of error).

122. *See supra* note 52 and accompanying text (noting the district court's order that rejected Interior's attempt to confess error in the SBZ Rule litigation).

123. *See supra* notes 36–37, 41–43 and accompanying text (detailing Interior's public criticisms of the rule and its confession of legal error in the SBZ Rule litigation).

124. *See supra* note 49 and accompanying text (describing NMA's role as an intervening party in the SBZ Rule litigation).

125. *See* Rosenzweig, *supra* note 4, at 2113 ("In the rare instance in which the

These problems arise because the United States Constitution limits the jurisdiction of the federal courts to deciding active cases and controversies.[126] If the defendant agency agrees with the plaintiff that the rule is legally defective and it confesses error in the rulemaking, then there is no longer a case or controversy.[127] Instead, the case is rendered moot. Of course, if the litigation involves an intervening party, or if the court has appointed substitute counsel,[128] a controversy may persist. But when there is no intervenor, for all practical purposes the case or controversy has disappeared—and the claim is no longer justiciable.

For all these legitimate concerns about problems that arise when courts reject agency confessions of error, there also exist formidable policy considerations that weigh in favor of rejecting confessions of error. First, if a court accepts an agency's confession of error in rulemaking litigation and vacates a final rule—as Interior sought to do in the SBZ Rule litigation—then the court effectively allows the agency to undertake a new rulemaking without any administrative process and without any public involvement.[129] Put another way, it gives the agency unilateral discretion to adopt a new final rule.[130] This process subverts public involvement in developing the regulation, which is antithetical to the purposes of the Administrative Procedure Act.[131]

Second, accepting an agency confession of error upsets the settled expectations of the regulated party by instituting a new and different rule without any opportunity for that party to participate. For example, in the SBZ Rule litigation, accepting Interior's confession of error and vacating the Revised SBZ Rule would have severely prejudiced NMA and the mining interests it represents.[132] Those regulated parties participated

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Government refuses to defend a judgment, the Court might face justiciability problems.").

126. *See* U.S. CONST. art. III, § 2, cl. 1 (restricting the federal judicial power to cases and controversies).

127. *See* Rosenzweig, *supra* note 4, at 2113 (describing how an agency's confession of error may create justiciability problems).

128. *See id.* (noting that if "the Court is determined to decide the case on the merits, it can appoint counsel to argue on behalf of the Government").

129. *See supra* notes 48–52 and accompanying text (raising policy concerns about Interior's attempt to confess error in the SBZ Rule litigation).

130. *See supra* note 51 and accompanying text (describing how vacating and remanding would permit Interior to adopt a new rule).

131. *See* Administrative Procedure Act of 1946, 5 U.S.C. §§ 552–53 (2006) (imposing requirements on administrative agencies to make information available to the public and providing for public participation in the rulemaking process).

132. *See NMA Motion*, *supra* note 48, at 2–3 (describing how NMA's members

extensively in the Revised SBZ Rule rulemaking and had a legitimate interest in seeing the agency follow through with the final SBZ Rule it adopted.[133] To allow the agency to repeal the legally effective rule by administrative decree and replace it with a new rule would prejudice the regulated parties and, once again, run contrary to the purposes of the Administrative Procedure Act.[134]

Finally, agency confessions of error, like the Solicitor General's confessions of error,[135] carry a high risk of political abuse. Again, the SBZ Rule litigation provides a relevant example. The Revised SBZ Rule was a so-called eleventh hour rule—a rule that was adopted at the very end of an outgoing presidential administration precisely because it was too politically controversial to have been adopted earlier.[136] When new administrations take office they may be eager to undo the eleventh hour rules of the prior administration—particularly those rules that concern areas on which the two administrations have policy differences.[137] In the case of the Revised SBZ Rule this is exactly what happened. President Bush's Interior promulgated a controversial rule that arguably weakened environmental protections for streams in order to benefit the coal mining industry.[138] When the more environmentally friendly Obama administration took power, Interior switched its position and decided that the rule was bad public policy for that very reason.[139] However, instead of conducting a new rulemaking as required by the Administrative Procedure Act, the Obama

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participated in deliberations with government officials during the six-year rulemaking that produced the Revised SBZ Rule, and noting that NMA's members have a stake in the outcome of the litigation).

133. *See id.* (same).

134. *See supra* notes 129–31 and accompanying text (detailing the purposes of the Administrative Procedure Act and arguing that they would be subverted by vacating and remanding to the agency).

135. *See* Rosenzweig, *supra* note 4, at 2079–80 (describing a political controversy that ensued when President Clinton's Solicitor General successfully confessed error in a child pornography case that the previous administration had prosecuted).

136. *See supra* notes 36–37 (discussing Secretary of Interior Salazar's characterization of the Revised SBZ Rule as an eleventh hour rule).

137. *See, e.g., supra* note 36 and accompanying text (discussing the Obama administration's disapproval of the Revised SBZ Rule adopted in the last few months of the Bush administration).

138. *See supra* notes 30–33 and accompanying text (explaining the underlying political motivations for the Bush administration's revisions to the SBZ Rule and the objections made by environmental groups).

139. *See supra* note 36 and accompanying text (discussing the shift in Interior's position on the Revised SBZ Rule under the Obama administration).

administration attempted to vacate the completed rulemaking by confessing error in the pending litigation.[140] This type of maneuvering illustrates how the executive branch can use a confession of error as a strategic tactic.

Because confession of error carries such a high risk of abuse during political transitions, it is critical that courts have a consistent standard of review for evaluating agency confessions of error. Drawing on Rosenzweig's classification scheme, as described above,[141] this Part recommends standards of judicial review for different types of agency confessions of error.

B. Type I Cases—Straightforward Errors

To separate legitimate uses of confession of error from improper ones, the court should first assess the possibility that the confession is being used for strategic purposes. If the confession is based on a straightforward error of law, fact, or procedure—*and* it does not entail a risk of political abuse or is not susceptible of abuse—then the court should accept that confession of error with minimal additional review.[142] But if the court does discern a risk of abuse or strategic motivation, then further review is warranted.

C. Type II Cases—Matters of Agency Discretion

Similarly, if the contested point is purely a matter of agency discretion, the court should undertake a minimal review to ensure that the agency does not have strategic or political motivations.[143] If that review does not turn up any cause for concern, then the court should accept the agency's confession of error. But if the court can find a risk of strategic or political motivation, then again it should conduct further review.

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140. *See supra* notes 41–45 and accompanying text (discussing Interior's confession of error in the Revised SBZ Rule litigation).

141. *See supra* notes 93–103 and accompanying text (describing Rosenzweig's classification scheme for confessions of error by the Solicitor General).

142. *See supra* notes 95–96 and accompanying text (reviewing a proposed standard of judicial review for confessions of error by the Solicitor General).

143. *See supra* notes 97–100 and accompanying text (reviewing a proposed standard of judicial review for confessions of error by the Solicitor General).

D. Type III Cases—Strategic Confessions

The more problematic—and more common—scenario is where the agency's confession of error does raise the specter of political abuse. This will be the case anytime the confession of error is seriously contested, anytime the court could discern a possible improper motivation for the confession, and anytime the confession threatens the rights of an interested third party.[144] This is certainly the scenario that arose in the SBZ Rule litigation.[145] In such cases, the court must take great care to ensure that the confession of error is appropriate and will serve the interests of justice.

Specifically, the court should accomplish this by analyzing several factors and balancing the interests favoring the confession of error against those opposing the confession of error. This should not prove overly difficult for the judiciary, as courts frequently employ such balancing tests—which take into account the relative strengths of the parties' interests—in other areas of the law.[146]

First, the court should evaluate the government's interest in confessing error, including its interest in conserving resources, and it should contrast that with the countervailing risk of political abuse. Second, the court should look to the regulated party's interest in resisting the confession of error, including whether there is a possibility of "significant disruptive consequences."[147] Third, the court should evaluate the general public's interest in the outcome of the case and the potential harm to the public from losing its opportunity to participate in the proceedings. Fourth, the court should evaluate the judiciary's interest, which will focus on the extent to which accepting the confession of error will conserve judicial resources.

None of these interests should be dispositive. Rather the court should balance the interests of the parties favoring a confession of error against those resisting a confession of error. In deciding whether the interests of justice would be served by allowing the confession of error, the court should pay close attention to the risk of political manipulation as analyzed

144. *See* Rosenzweig, *supra* note 4, at 2095–101 (discussing strategic confessions of error).

145. *See supra* notes 48–52 and accompanying text (describing how Interior's attempt to confess error in the SBZ Rule litigation raised policy concerns and suggested the possibility of political abuse).

146. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 347–48 (1976) (announcing a balancing test which weighs an individual's interest against the government's interest and the public's interest).

147. *See supra* notes 61–64 and accompanying text (reviewing the significant disruptive consequences test and exploring its policy rationale).

in the first step. Any hint of political abuse should militate strongly against accepting the confession of error.

V. The Recommended Standard Applied: Revisiting the Stream Buffer Zone Rule Litigation

This Part of the Note applies the analytical framework recommended in Part IV to the proposed confession of error in the SBZ Rule litigation. It also examines and critiques the district court's analysis in that case, where the court ultimately refused to accept the confession of error. This Part argues that the district court reached the correct conclusion, but that it omitted an evaluation of several important factors. This Part provides a more complete evaluation of the confession of error, first deciding how to classify the confession of error (i.e. deciding what type of case it is), and then applying the recommended standard of review.

As noted above, Interior's confession of error in the SBZ Rule litigation is one of the more challenging Type III cases because it presents the risk of political abuse and has been contested by an intervening party.[148] Because it is a Category III case, the court should review the confession of error by evaluating the respective interests of the agency (Interior), the regulated parties (the mining companies and NMA), the public, and the judiciary. The court should then balance the interests weighing in favor of the confession of error with those weighing against it to determine whether to accept the confession of error.

A. Agency's Interest

The first step in the proposed analytical framework is to evaluate the government's interest in confessing error.[149] This involves two components: (1) evaluating whether the government has a legitimate interest in confessing error, and (2) evaluating the countervailing risk that the government has an improper political motivation and is using the confession of error as a strategic tactic.

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148. *See supra* note 145 and accompanying text (arguing that the SBZ Rule litigation is an example of a Type III case).

149. *See supra* Part IV.D (proposing an analytical framework for evaluating agency confessions of error in which the court should first balance the government's legitimate interests in confessing error against the countervailing risk that the government is engaging in political subterfuge).

An agency will almost always have a legitimate interest in conserving its limited resources by stopping litigation when it believes that its action is legally indefensible in court. The SBZ Rule litigation is no exception. In its pleadings Interior alleged that the SBZ Rule was legally defective because OSM had failed to initiate a consultation with the Fish and Wildlife Service[150] as required by Section 7 of the Endangered Species Act.[151] If the agency's contention is accepted as true, then the rule was legally defective, and forcing the agency to defend the rule from the environmental groups' challenge would waste the agency's time and legal resources on a moot controversy.

Despite the agency's valid interest in conserving its resources, however, the SBZ Rule confession of error carries a countervailing risk of political abuse. To begin with, it is clear that the Obama administration disliked the 2008 SBZ Rule as a matter of environmental policy.[152] Secretary of Interior Salazar publicly went on record—in both a press conference and a news release—to attack the substance and legality of the Revised SBZ Rule.[153] This suggests that Interior had a political motivation for confessing error, and it raises the prospect that the Obama administration intended to confess error as a strategic tactic to undo an eleventh hour rule with which it disagreed as a matter of policy. Because of the risk that the Obama administration had a political motivation for confessing error, and because accepting Interior's confession of error would permit Interior to avoid the lengthy Administrative Procedure Act rulemaking procedures necessary to repeal the rule, the agency's legitimate interest in conserving its resources is not determinative. Instead, the interests of the other affected groups must be considered and balanced against Interior's interests in determining whether to accept its confession of error.

Under the recommended analytical framework, the district court in the SBZ Rule litigation did not properly evaluate the government's interest for two reasons. First, the district court failed to recognize Interior's legitimate

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150. *See supra* notes 41–43 and accompanying text (describing the supposed grounds for Interior's confession of error).

151. *See* Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536 (2006) (requiring federal agencies to consult with the Fish and Wildlife Service to ensure that their actions do not jeopardize listed species or their critical habitats).

152. *See supra* notes 36–37 and accompanying text (describing how Secretary of Interior Salazar criticized the Revised SBZ Rule for reducing important environmental protections for streams).

153. *See supra* notes 36–37 and accompanying text (discussing the content of Secretary of Interior Salazar's press conference and news release).

interest in conserving its resources by ending the litigation.[154] Second, the district court failed to evaluate the risk that Interior was using the confession of error as a strategic tactic to accomplish political goals.[155] Instead, the court devoted most of its analysis to distinguishing the cases that Interior offered to support its attempt to confess error.[156] The district court may have been right to distinguish Interior's precedent on the facts, but as this Note has argued, the courts should develop a consistent standard for reviewing confessions of error rather than making determinations on a case-by-case basis.

B. Regulated Party's Interest

The second step in the proposed analytical framework is to evaluate the regulated party's interest in the outcome of the agency's attempt to confess error.[157] In particular, this analysis should focus on what the regulated party has at stake in the outcome of the litigation and the extent to which the regulated party participated in the agency action being challenged.[158]

In the SBZ Rule litigation, the regulated parties are the individual coal mining companies, which are collectively represented by NMA.[159] These mining interests have much at stake in the outcome of the litigation, and they have legitimate reasons for resisting Interior's attempt to confess error. First, the mining companies played a significant role in the Revised SBZ Rulemaking by collaborating with Interior and by taking advantage of the opportunities for public involvement.[160] They further demonstrated their

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154. *See generally* Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3 (D.D.C. 2009) (omitting any discussion of the Interior's interest in confessing error to conserve resources).

155. *See generally id.* (omitting any discussion of the risk that Interior was using the confession of error as a political tactic).

156. *See id.* at 4 ("The cases cited by the Federal defendants provide scant support for their position that remand and vacatur is appropriate here because the circumstances addressed in those cases are materially different from those extant here.").

157. *See supra* Part IV.D (proposing an analytical framework for evaluating agency confessions of error in which the court should evaluate the regulated party's interest in the confession of error).

158. *See supra* Part IV.D (discussing the interests at stake when analyzing a confession of error).

159. *See supra* notes 132–33 and accompanying text (describing the coal mining companies' participation in the Revised SBZ Rulemaking and noting their interest in the outcome of the litigation).

160. *See supra* notes 132–33 and accompanying text (describing the extent of the NMA's role in the rulemaking).

interest in the SBZ Rule by intervening in the litigation.[161] Second, the mining companies have an economic interest in the SBZ Rule because it dictates how they will be able to operate their businesses.[162] It is true that no permits have been issued pursuant to the Revised SBZ Rule,[163] so the mining companies do not have any *vested* interest in the revisions. Nonetheless, they do have a real economic interest in the outcome of the challenge because they expended considerable time participating in the Revised SBZ Rulemaking, they had a reasonable expectation that they would eventually operate pursuant to the Revised SBZ Rule, and they made business planning choices that reflected this expectation.[164] To allow Interior to confess error and vacate the final rule without any administrative process whatsoever would undermine these interests, be materially unfair to the mining companies, and result in significant disruptive consequences.

The district court in the SBZ Rule litigation only considered the mining companies' interests in a general sense. The court agreed that accepting the confession of error would allow Interior to circumvent Administrative Procedure Act requirements.[165] But the court did not specifically evaluate the extent to which the mining companies participated in the Revised SBZ Rulemaking, nor did it consider the economic interests that the mining companies had at stake in the litigation.[166] Under the recommended analytical framework, a court should have considered both of these factors.

C. Public's Interest

The third step in the proposed analytical framework is to evaluate the public's interest in the outcome of the agency's attempt to confess error.[167]

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161. *See supra* notes 132–33 and accompanying text (citing the NMA as an intervenor in the Revised SBZ Rule litigation).

162. *See supra* notes 132–33 and accompanying text (noting that the NMA has a stake in the Revised SBZ Rule litigation).

163. *See NMA Motion*, *supra* note 48, at 5 (noting that no state has implemented the Revised SBZ Rule).

164. *See id.* at 2–3 (describing the NMA's interest in the Revised SBZ Rule litigation).

165. *See* Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) ("NMA has the better argument that granting the Federal defendants' motion would wrongfully permit the Federal defendants to bypass established statutory procedures for repealing an agency rule.").

166. *See id.* (omitting any discussion of these factors).

167. *See supra* Part IV.D (proposing an analytical framework for evaluating agency confessions of error in which the court should evaluate the public's interest in the confession of error).

This evaluation should concentrate on all relevant factors, but in particular it should focus on the risk that accepting or rejecting a confession of error will deny the public a substantive right.

With respect to the SBZ Rule litigation, the public has a strong interest in how Interior and OSM decide to regulate coal mining.[168] It is true that public opinion is split on the policy issues, but regardless of what form the SBZ Rule ultimately takes, the public has a legitimate interest in being allowed to participate in the rulemaking process pursuant to the Administrative Procedure Act.[169] The general public availed itself of that opportunity during the Revised SBZ Rulemaking,[170] and to vacate that final rule and substitute a new rule without any administrative process would undermine the public's interest in participating, as guaranteed by statute. The public's position on the relative merits of the two proposed rules may be inconclusive, but in either case the public has a strong, legitimate interest in being able to participate in the rulemaking. Accepting the confession of error would deny them this opportunity.

The district court in the SBZ Rule litigation did not properly evaluate the public's interest under the recommended analytical framework. In fact, it did not consider the public's interest in the confession of error at all.[171]

D. Judiciary's Interest

The fourth step in the proposed analytical framework is to evaluate the judiciary's interest in the outcome of the agency's attempt to confess error.[172] This evaluation should principally focus on how accepting or rejecting the confession of error will affect judicial resources.[173]

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168. *See NMA Motion*, *supra* note 48, at 2–4 (detailing the public's extensive involvement in developing the Revised SBZ Rule).

169. *See supra* note 131 and accompanying text (describing the public's right to participate in agency rulemakings pursuant the Administrative Procedure Act).

170. *See supra* note 168 and accompanying text (discussing the public's involvement in the Revised SBZ rulemaking).

171. *See* Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3, 5 (D.D.C. 2009) (omitting any discussion of the public's interest in the confession of error).

172. *See supra* Part IV.D (proposing an analytical framework for evaluating agency confessions of error in which the court should evaluate the judiciary's interest in the confession of error).

173. *See id.* (listing judicial resources as a primary factor in the analysis of confessions of error).

In the SBZ Rule litigation, allowing Interior to confess error would save judicial resources by ending the instant litigation. However, allowing confession of error might not save judicial resources in the long term because the SBZ Rule is extremely controversial, and the parties who feel aggrieved by the final rule are likely to institute additional legal proceedings.

Moreover, accepting the confession of error might contribute to a general trend of increased litigation in the future. For instance, allowing this type of confession of error might encourage third parties—such as environmentalists, industry groups, and labor unions—to liberally challenge eleventh hour rules at times of presidential transition, with the hope that the incoming administration would undo those rules by confessing error. A proliferation of these lawsuits would strain judicial resources, and as discussed throughout this Note, would raise grave concerns about the political manipulation of agency confessions of error.

The district court in the SBZ Rule litigation did not properly evaluate the judiciary's interest under the recommended analytical framework. As with the public's interest, the court failed to consider the judiciary's interest in its analysis.[174]

E. Balancing the Interests

The final step in the proposed analysis—after evaluating the respective interests of all the affected parties—is to balance the interests against each other to determine whether accepting the confession of error would be in the best interests of justice.[175] If on balance accepting the confession of error would create an undue burden, result in a material unfairness, or create significant disruptive consequences, then the court should refuse to accept the confession of error.[176]

In the SBZ Rule litigation, the government had a legitimate interest in confessing error to conserve its limited resources, but this was counterbalanced by the risk that it had an illegitimate political motivation for confessing error and that it was using the confession as a strategic tactic

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174. *See Nat'l Parks Conservation Ass'n*, 660 F. Supp. 2d at 3 (omitting any discussion of the judiciary's interest in confessing error to conserve resources).

175. *See supra* Part IV.D (proposing an analytical framework for balancing the interests of the relevant parties to determine whether to accept or refuse the confession of error).

176. *See supra* Part IV.D (listing various factors that should be considered when evaluating confessions of error).

to avoid an onerous procedural requirement. In turn, the mining companies had a strong interest in resisting the confession of error because of their participation in the rulemaking process and because of their economic concerns. The public's specific view on the merits of the confession of error are unknown, but in a general sense the public has a strong interest in being allowed to participate in the rulemaking process, as guaranteed by the Administrative Procedure Act. Accepting the confession of error would have subverted this interest. Finally, the judiciary's interest in either accepting or resisting the confession of error was inconclusive in the SBZ Rule litigation. Accepting the confession of error might have saved judicial resources by ending the instant litigation, but it also might have created more litigation in the future, which would have required expenditure of additional judicial resources. In the final analysis, the government's interest in confessing error was strongly outweighed by the countervailing risk of political abuse, the regulated party's interest in resisting the confession of error, and the public's interest in participating in the rulemaking process. Thus, the district court was correct to repudiate Interior's attempt to confess error, but as this Note has argued, the district court reached this conclusion without evaluating all the relevant factors.

VI. Conclusion

In the administrative agency context, confession of error is a poorly studied phenomenon that carries significant political implications. These political implications are particularly acute when an agency reorganizes its leadership or changes its position on an issue of public policy. A presidential transition provides the classic example of such a scenario.

As the SBZ Rule litigation demonstrated, an agency may use confession of error as a strategic device to undo final regulations issued by the previous presidential administration while avoiding lengthy Administrative Procedure Act requirements. Because of this risk of strategic manipulation, it is important that courts have a framework for evaluating agency confessions of error so that they can determine whether such confessions are appropriate. To this point, however, the federal courts have failed to articulate any clear standards for reviewing agency confessions of error, and in fact, with few exceptions, they have not undertaken a close examination of the practice at all.

To remedy this problem, this Note recommends an analytical framework that federal courts should use to review agency confessions of

error. This framework will allow federal courts to separate legitimate uses of the practice from illegitimate ones. Moreover, it ensures that the courts will consider the interests of all relevant parties when they balance the arguments weighing for and against accepting a confession of error. It is my hope that this framework will prove useful in the future—not only in times of presidential transition, but also in the myriad other scenarios in which an agency may be eager to advance a political agenda by confessing error.