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When the Solicitor General Confesses Error

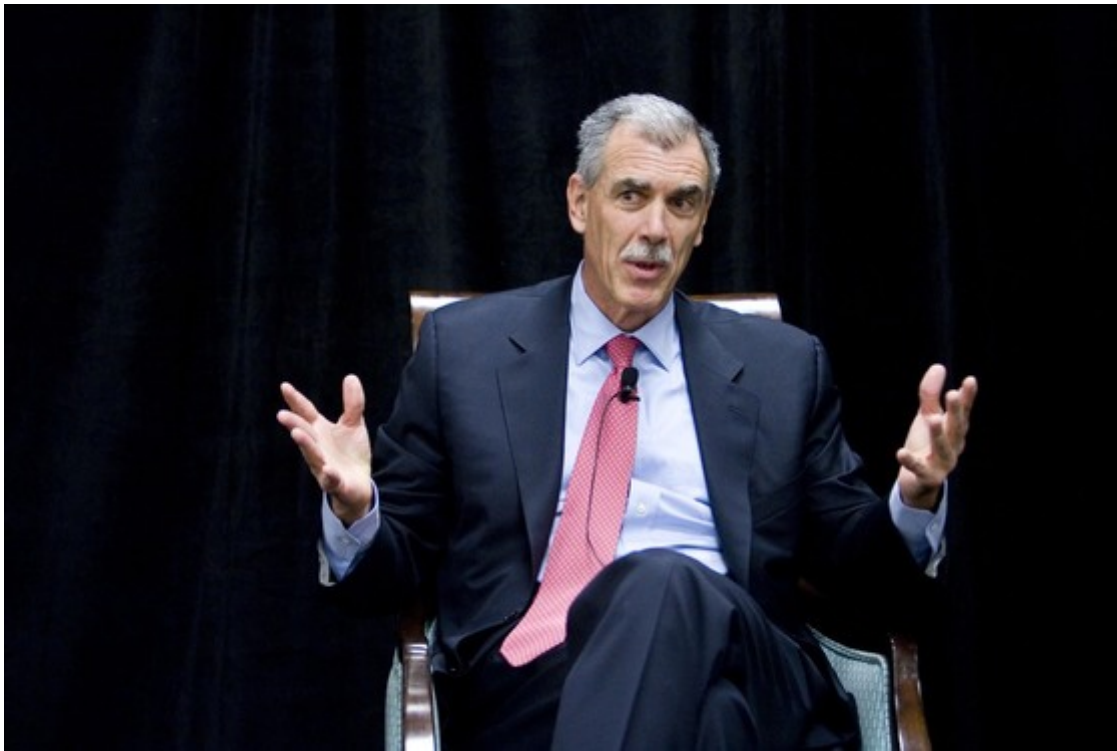


Photo: Diego M. Radzinski Solicitor General Donald Verrilli, Jr.

The U.S. Supreme Court took note of a rare occurrence on Monday: a confession of error by the solicitor general.

Such confessions take place only a couple of times a term, when the solicitor general disavows a position taken at earlier stages of a case and tells the justices that he or she should have lost instead of winning.

The court did just that on Monday when **it remanded the case** (http://www.supremecourt.gov/orders/courtorders/120715zor_6j37.pdf) Gary France v. United States “in light of the confession of error by the Solicitor General,” according to its order. The case is a dispute over whether the federal government can garnish an individual’s entire disability benefits to satisfy a restitution order.

France, a dentist, was ordered to pay Chicago \$800,000 in restitution in connection with a fraudulent billing scheme for dental services for city employees. By the time the order was handed down, France had closed his practice and was collecting disability income from a private insurance policy after being injured in a car accident.

After a series of other events including divorce and bankruptcy, the federal government in 2014 moved to garnish all of France’s disability payments so as to recoup the money required by the restitution order.

But France claimed his disability payments were exempt from being completely garnished because of the Consumer Credit Protection Act, which allows consumers to keep some day-to-day income even as they pay off debts, so they are not forced into bankruptcy. The federal government disagreed, convincing the trial court and the U.S. Court of Appeals for the Seventh Circuit that garnishment was proper. France **filed an appeal** (<http://www.scotusblog.com/wp-content/uploads/2015/11/France-Petition-for-Cert-for-printing.pdf>) with the U.S. Supreme Court.

The case drew interest from the Disability Rights Legal Center, which **filed a brief supporting France** (http://www.scotusblog.com/wp-content/uploads/2015/11/DRLC-Amicus-Brief_080615.2.pdf). “Many individuals with disabilities rely on private disability insurance benefits to maintain their quality of life,” the brief stated. Allowing the government to garnish all such benefits would be devastating for the disabled, the brief argued.

The confession of error came when Solicitor General Donald Verrilli Jr. **filed a brief responding to France’s certiorari petition** (http://www.justice.gov/sites/default/files/osg/briefs/2015/11/10/15-24_france_v_united_states_2015-11-04_final_430.pdf) on Nov. 6.

“Although the government took a different position in the courts below, it has reconsidered the issue based on consultations with the Department of Labor,” Verrilli wrote. Instead of pushing to garnish all France’s disability benefits, the government now regards those payments as earnings that are protected from excess garnishment. Under the consumer protection law, a maximum of 25 percent of a debtor’s weekly earnings can be garnished

further consideration.”

Mayer Brown’s Michael Kimberly, who represented France before the high court, said that while the appeal was under way, France’s disability payments have gone into an escrow account administered by the federal district court.

“My client is happy, and we are happy,” Kimberly said on Monday after learning that the Supreme Court had remanded the case.

Oddly enough, solicitors general take some pride in confessing error, because it shows the public that their goal is justice, not just victory.

“It has been an enduring and endearing practice,” Katyal, now a partner at Hogan Lovells, said in **a 2012 speech at Fordham Law School**

(<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4916&context=flr>). “I think it stems from the solicitor general’s obligation to the court, which is much broader than the immediate case at hand. It is really, truly, an interest in doing justice.”

But as cleansing as confessions of error may be for the solicitor general, they can be hard for prosecutors to swallow after they zealously advanced an argument that is now defunct, Katyal said. Lower court judges grumble, too.

According to Katyal the late Learned Hand, a renowned judge on the U.S. Court of Appeals for the Second Circuit, once said, “It’s bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some solicitor general.”

Practice Area(s): ● [Appellate \(/practice-areas/appellate\)](/practice-areas/appellate)