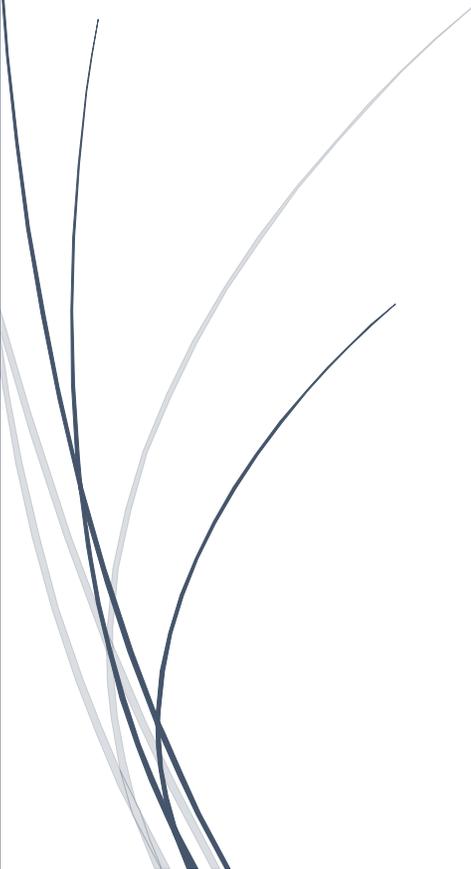


Office of the Solicitor  
General

# FY 2018 PERFORMANCE BUDGET

Congressional Submission



DEPARTMENT OF JUSTICE

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# **I. Overview for the Office of the Solicitor General**

## **Introduction**

In FY 2018, the Office of the Solicitor General (OSG) requests a total of \$11,916,000 that funds 48 positions, including 23 attorney positions, and 48 FTE to meet its mission.

## **Mission/Background**

The mission of OSG is to conduct all litigation on behalf of the United States and its agencies in the Supreme Court of the United States, to approve decisions to appeal and seek further review in cases involving the United States in the lower federal courts, and to supervise the handling of litigation in the federal appellate courts.

The original Statutory Authorization Act of June 22, 1870, states: “There shall be in the Department of Justice an officer learned in the law, to assist the Attorney General in the performance of his duties to be called the Solicitor General.” As stated in 28 CFR 0.20, the general functions of the Office are as follows: (1) conducting or assigning and supervising all Supreme Court cases, including appeals, petitions for and in opposition to *certiorari*, briefs and arguments; (2) determining whether, and to what extent, appeals will be taken by the government to all appellate courts (including petitions for rehearing *en banc* and petitions to such courts for the issuance of extraordinary writs); (3) determining whether a brief amicus curiae will be filed by the government, or whether the government will intervene, in any appellate court, or in any trial court in which the constitutionality of an Act of Congress is challenged; and (4) assisting the Attorney General and the Deputy Attorney General in the development of broad Department program policy.

OSG is headed by the Solicitor General, who is appointed by the President and confirmed by the Senate. Within the attorney staff, there are 23 attorney positions. The attorneys prepare oral arguments, Supreme Court briefs, and other related legal materials. The 25 support staffers are organized into three sections which include Administration, Case Management as well as Research and Publication.

## **Challenges**

OSG’s overall mission and strategic objectives will essentially remain the same in FY 2017 and FY 2018. However, OSG faces a set of new expectations and additional responsibilities in response to the evolving case load in the U.S. Supreme Court and the federal courts of appeals.

The Solicitor General’s docket, which mirrors the docket of the Supreme Court and the federal courts of appeals, covers a range of issues that are critical to our Nation’s viability and economy. Many of the cases require careful attention and coordination within the government, as well as a difficult assessment of how to apply existing statutory schemes.

In recent years, healthcare and immigration cases have been at the heart of the Supreme Court’s caseload. These cases require a substantial devotion of energy in order to understand the intricate statutory framework and to assimilate the wide range of views both inside and outside government as to the proper balance of interests in these cases.

Criminal cases likewise make up a large portion of the Court's caseload. Criminal defendants regularly challenge the reach of the substantive provisions of criminal law enacted by Congress. And the Court continues to wrestle in criminal cases with issues relating to the scope of constitutional protections in the context of emerging technologies. For example, in recent years, OSG argued *United States v. Jones*, which challenged the warrantless installation and use of a GPS tracking device on a respondent's vehicle to monitor its movements on public streets. OSG also argued *United States v. Wurie* and *Riley v. California*, which involved the government's authority to search cell phones incident to arrest. In preparation for these cases and others, and to ensure OSG is well-positioned, government attorneys spend substantial time and resources to understand the workings and limits of the new technologies.

The Solicitor General likewise defends the implementation of an expanding set of government programs and congressional enactments. Although the precise docket in FY 2018 is impossible to predict, experience suggests that OSG will continue to be involved in cases defining an array of federal statutes, including the Securities Act and the Securities Exchange Act, the Fair Labor Standards Act, the Labor Management Relations Act, the Clean Air Act, the Truth in Lending Act, and the Immigration and Nationality Act. In preparation for these cases, OSG attorneys engage in extensive coordination and consultation with the agencies that Congress has directed to implement these statutes.

Finally, OSG regularly handles important foreign affairs cases, including cases under the Alien Tort Statute and the Torture Victims Protection Act, as well as important constitutional cases. These cases can affect the structure of government and the relationship between the Branches, and they can have important consequences for the conduct of foreign affairs.

For FY 2018, OSG is requesting base funding of 48 positions (23 attorneys), 48 FTE and \$11,916,000 to accomplish its goals.

Following is a brief summary of the Department's Strategic Goals and Objectives in which OSG plays a role.

### **Full Program Costs**

OSG has only one program—Federal Appellate Activity. Its program costs consist almost entirely of fixed costs, such as salaries and benefit, GSA rent, reimbursable agreements with other DOJ components, and printing.

## **Performance Challenges**

**External Challenges.** In the vast majority of cases filed in the Supreme Court in which the United States is a party, a petition is filed by an adverse party and the United States responds in some way, either by filing a brief or, after reviewing the cases, waiving its right to do so. Additionally, the Supreme Court formally requests the Solicitor General to express the views of the United States on whether the Court should grant *certiorari* in a case in which the United States is not a party. The number of cases in which the Solicitor General petitions the Supreme Court for review, acquiesces in a petition for a writ of certiorari filed by an adverse party, or participates as an *intervenor* or as *amicus curiae* is governed exclusively by the Solicitor General's determination that it is in the best interest of the United States to take such action. Further, such activity may vary widely from year to year, which limits the Office's ability to plan its workload.

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The Office of the Solicitor General does not initiate any programs, but it is required to handle all appropriate Supreme Court cases and requests for appeal, amicus, or intervention authorization.

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**Internal Challenges.** Prior Fiscal Year performance measures indicate a gradual increase in the number of cases the Solicitor General either participated in and/or responded. The arrival of cases related to the challenges discussed above further predicts an ever increasing caseload.

## **Environmental Accountability**

OSG has incorporated green purchasing and recycling into its core business processes and continues to look for new and creative ways to integrate environmental accountability into its day-to-day decision making and long-term planning processes.

## **II. Summary of Program Changes**

N/A

## **III. Appropriations Language and Analysis of Appropriations Language**

N/A

## IV. Program Activity Justification

### A. Federal Appellate Activity

<i>Federal Appellate Activity</i>	<b>Perm. Pos.</b>	<b>FTE</b>	<b>Amount</b>
2016 Enacted	55	45	11,885
2017 Continuing Resolution	55	56	11,862
Adjustments to Base and Technical Adjustments	-7	-8	54
2018 Current Services	48	48	11,916
2018 Program Increases	0	0	0
2018 Program Offsets	0	0	0
2018 Request	48	48	11,916
<b>Total Change 2017-2018</b>	<b>-7</b>	<b>-8</b>	<b>54</b>

#### 1. Program Description

The major function of the Solicitor General’s Office is to supervise the handling of government litigation in the Supreme Court of the United States and in Federal appellate courts, to determine whether an amicus curiae brief will be filed by the government, and to approve intervention by the United States to defend the constitutionality of Acts of Congress.

The original Statutory Authorization Act of June 22, 1870, states: “There shall be in the Department of Justice an officer learned in the law, to assist the Attorney General in the performance of his duties to be called the Solicitor General.” As stated in 28 CFR 0.20, the general functions of the Office are as follows: (1) conducting or assigning and supervising all Supreme Court cases, including appeals, petitions for and in opposition to *certiorari*, briefs and arguments; (2) determining whether, and to what extent, appeals will be taken by the government to all appellate courts (including petitions for rehearing *en banc* and petitions to such courts for the issuance of extraordinary writs); (3) determining whether a brief amicus curiae will be filed by the government, or whether the government will intervene, in any appellate court, or in any trial court in which the constitutionality of an Act of Congress is challenged; and (4) assisting the Attorney General and the Deputy Attorney General in the development of broad Department program policy.

This Office does not initiate any programs, have control of the Supreme Court litigation it is required to conduct, or determine the number of appeal and amicus authorizations it handles. Amicus filings often involve important constitutional or Federal statutory questions that will fundamentally affect the administration and enforcement of major Federal programs. Examples in recent Terms include cases presenting significant issues of criminal procedure (affecting the government’s ability to succeed in prosecutions), as well as important issues under the civil rights laws (such as the Voting Rights Act and the Americans with Disabilities Act), the environmental laws (such as the Clean Water Act), and many others.

The following table provides a fiscal year snapshot of matters pending at the beginning of the Term of the Supreme Court, additional matters received, completed appellate determinations, certiorari determinations, miscellaneous recommendations, and oral arguments before the Supreme Court.

<i>FY</i>	<i>Supreme Court Term</i>	<i>Matters Pending</i>	<i>Addl. Matters Received</i>	<i>Appellate Determinations</i>	<i>Certiorari Determinations</i>	<i>Miscellaneous Recommendations</i>	<i>Oral Arguments</i>
16	2015	403	2,437	417	610	561	57
15	2014	370	2,943	479	679	545	56
14	2013	389	3,684	528	663	541	60
13	2012	984	3,668	563	714	525	66

The figures on determinations and recommendations provided in this document do not directly correspond with the figures provided on the Office’s Workload Measurement Tables. Our Workload Measurement Tables track our workload by case; these figures track our workload by determination. Often, the Office of the Solicitor General will receive a request for authorization that includes more than one potential outcome: for example, the Solicitor General may receive a request for authorization for rehearing en banc, or, in the alternative, for a petition for a writ of certiorari. In that case, the Solicitor General may make two determinations; (1) no rehearing and (2) no certiorari. Our Workload Measurement Tables reflect that as a single request; here, we have provided a separate accounting for each determination. Additionally, the figures provided in this document under “miscellaneous requests” include requests for authorization of settlement, for stays, and for mandamus, while the figures on the Performance Measurement Tables do not include such requests.

The figure for oral argument participation reflects the number of oral arguments the Office presented to the Supreme Court as a party, *amicus curiae*, or *intervener*; it does not reflect the total number of underlying cases for each of those arguments.

## 2. Performance and Resource

PERFORMANCE AND RESOURCES TABLE											
RESOURCES		Target		Actual		Target		Changes		Requested (Total)	
		FY 2016		FY 2016		FY 2017		Current Services Adjustments and FY 2018 Program Changes		FY 2018 Request	
Total Costs and FTE (reimbursable FTE are included, but reimbursable costs are bracketed and not included in the total)		FTE	\$000	FTE	\$000	FTE	\$000	FTE	\$000	FTE	\$000
		56	11,885	45	11,704	56	11,862	-8	54	48	11,916
TYPE/ STRATEGIC OBJECTIVE	PERFORMANCE	FY 2016		FY 2016		FY 2017		Current Services Adjustments and FY 2018 Program Changes		FY 2018 Request	
Program Activity		FTE	\$000	FTE	\$000	FTE	\$000	FTE	\$000	FTE	\$000
		56	11,885	45	11,704	56	11,862	-8	54	48	11,916
Performance Measure: Output	Cases in which the Solicitor General Participated	3300		3223		3300				3300	
Performance Measure: Efficiency	Requests to which the Solicitor General Responded	1400		1419		1400				1400	
Performance Measure: Outcome											

**A. Definitions of Terms or Explanations for Indicators:**

**Footnote 1:** Because the work of the Office is primarily governed by the Supreme Court’s schedule, the Office tracks its workload by the Supreme Court Term. Fiscal years roughly correspond to Supreme Court Terms, which run from July of the Term year through June of the next year. Reference to fiscal years in this document will reflect information for the applicable Supreme Court Term. Accordingly, FY 2014 corresponds with the 2013 Supreme Court Term, FY 2013 corresponds with the 2012 Supreme Court Term, and so on. The Office of the Solicitor General handles Supreme Court matters on an ongoing basis. As a result, some matters will overlap from one fiscal year to the next, and they are included in the data for the term in which they most appropriately fit.

**Footnote 2:** Includes requests for authorizations as well as recommendations against appeal, intervention, or participation amicus curiae. This category does not include miscellaneous requests, such as requests for authorization of settlement, for stays, for mandamus, etc.

**B. Data Validation and Verification.**

The Office of the Solicitor General handles all aspects of the law—not just civil matters. The Office uses the Automated Docket System (ADS) to track the matters handled by its attorneys. Data is keyed by the Case Management staff. For Supreme Court matters, all data is verified by the Supervisor or her Assistant, and checked against Supreme Court Records. The Case Management System Supervisor executes daily statistical reports to ensure accurate tracking of both Supreme Court matters and requests for authorization to appeal, intervene, or participate as amicus curiae. Additionally, once a week the Case Management System Supervisor distributes statistical reports on all Office matters to each attorney in the Office. The attorneys then review the reports to ensure accurate tracking of the matters for which they are responsible.

**Issues Affecting OSG’s Program Performance.**

The Office of the Solicitor General does not initiate any programs or have control over the number of Supreme Court cases it is required to handle or the number of requests for appeal, amicus, or intervention authorizations it receives. In the vast majority of cases filed in the Supreme Court in which the United States is a party, a petition is filed by an adverse party and the United States is obliged to respond. Additionally, the Office does not control the number of cases in which the Supreme Court formally requests the Solicitor General to express the views of the United States. The number of cases in which the Solicitor General petitions the Supreme Court for review, acquiesces in a petition for a writ of certiorari filed by an adverse party, or participates as an intervenor or as amicus curiae is governed exclusively by the Solicitor General’s determination that it is in the best interests of the United States to do so. Thus, the Solicitor General participates in 100% of the cases in which the United States is required to participate, as well as 100% of the cases in which the Solicitor General has determined that the interests of the United States require participation.

**PERFORMANCE MEASURE TABLE**

Performance Report and Performance Plan Targets		FY 2012	FY 2013	FY 2014	FY 2015	FY 2016		FY 2017	FY 2018
		Actual	Actual	Actual	Actual	Target	Actual	Target	Target
<b>Performance Measure</b>	Cases in which the Solicitor General Participated	3566	3246	3341	3500	3300	3223	3300	3300
<b>Performance Measure</b>	Requests to which the Solicitor General Responded	2567	1487	1495	2000	1400	1419	1400	1400
<b>Performance Measure</b>									
<b>Efficiency Measure</b>									
<b>OUTCOME Measure</b>									

N/A = Data unavailable

## 2. Performance, Resources, and Strategies

### a. **Performance Plan and Report for Outcomes**

Because the work of the Office is primarily governed by the Supreme Court's schedule, the Office tracks its workload by Supreme Court Term. Fiscal years roughly correspond to Supreme Court Terms, which run from July of the Term year through June of the next year.

The first performance measure reflects "cases in which the Solicitor General participated". During the 2015 (FY 2016) Supreme Court Term, the Solicitor General participated in cases and it is anticipated OSG will meet its target of cases in the 2016 (FY 2017) Term.

The second performance measure reflects "Requests for determinations regarding appeal, *certiorari*, or other matters to which the Solicitor General responded". During the 2015 (FY 2016) Supreme Court Term, the office responded to requests. It is anticipated OSG will meet its target of cases within the allotted reporting period.

The Office of the Solicitor General does not initiate any programs, have control over the number of Supreme Court cases it is required to handle, or determine the number of requests for appeal, amicus, or intervention authorizations it receives. In the vast majority of cases filed in the Supreme Court in which the United States is a party, a petition is filed by an adverse party and the United States is obliged to respond in some way, either by filing a brief or (after review of the case) waiving the right to do so. Additionally, the Office does not control the number of cases in which the Supreme Court formally requests the Solicitor General to express the views of the United States. Thus, performance measures may vary widely from year to year which increases the likelihood that OSG's actual measures will also vary widely from projected goals. The number of cases in which the Solicitor General petitions the Supreme Court for review, acquiesces in a petition for a writ of *certiorari* filed by an adverse party, or participates as an intervenor or as amicus curiae is governed exclusively by the Solicitor General's determination that it is in the best interests of the United States to take such action.

### b. **Strategies to Accomplish Outcomes**

To fulfill the Office of the Solicitor General's critical mission of representing the interests of the United States in the Supreme Court, the Office will devote all resources necessary to prevail in the Supreme Court. For FY 2018, OSG is requesting base funding of 48 positions, 48 FTE, and \$11,916,000 to accomplish its goals.

OSG has experienced a steady increase in Court related activities and has been called upon to assume responsibilities requiring a skilled workforce in furtherance of its mission. OSG attorneys have briefed and argued particularly difficult and technical civil and civil rights cases in the 2016-2017 term. Major cases included *Samsung Electronics Co. v. Apple* (patent law); *National Labor Relations Board v. SW General* (Federal Vacancies Reform Act); *Beckles v. United States* (Federal Sentencing Guidelines); *Jennings v. Rodriguez* (immigration detention); *Bethune-Hill v. Virginia State Board of Elections* (redistricting); *Ashcroft v. Abbasi* (*Bivens* liability); *Lee v. Tam* (Lanham Act); *Hernandez v. Mesa* (4th Amendment/cross-border shooting).

In the 2015-2016 term, major cases included *Fisher v. University of Texas* (affirmative action); *Federal Energy Regulatory Commission v. Electric Power Supply Association* (Federal Power Act); *Dollar General Corporation v. Mississippi Band of Choctaw Indians* (tribal jurisdiction);

*Evenwel v. Abbott* (one person, one vote); and *RJR Nabisco v. The European Community* (Racketeer Influenced and Corrupt Organization Act (“RICO”)). Major criminal cases such as *McDonnell v. United States*, *United States v. Bryant*, and *Birchfield v. North Dakota*, have necessitated funding to continue to meet the challenges of our mission.

In the 2014-2015 term, major cases included *Zivotofsky v. Kerry* (executive authority to recognize foreign sovereigns); *Equal employment Opportunity Commisison v. Abercrombie & Fitch Stores* (Civil Rights Act); *Utility Air Regulatory Group v. Environmental Protection Agency* (Clean Air Act); *Johnson v. United States* (Armed Career Criminal Act).

c. **Priority Goals**

OSG’s general goals for FY 2018 are as follows:

- Representing the interests of the United States in the Supreme Court.
- Devote all resources necessary to prevail in the Supreme Court.

**V. Program Increases by Item:**

N/A

**VI. Program Offsets by Item:**

N/A

## **IV. EXHIBITS**