



FY 2021 PERFORMANCE BUDGET  
CONGRESSIONAL SUBMISSION

Office of the Solicitor General

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

## **Introduction**

In FY 2021, the Office of the Solicitor General (OSG) requests a total of \$13,585,000 and 49 positions, including 23 attorney positions, and 45 FTE to meet its mission.

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. The attorneys prepare oral arguments, Supreme Court briefs, and other related legal materials. The 26 support staffers assist the attorneys in the performance of those functions. They perform legal research, review briefs, oversee filings, and complete various administrative tasks.

## **Challenges**

OSG’s overall mission and strategic objectives will essentially remain the same in FY 2021. 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, immigration, constitutional, and criminal cases have been at the heart of the Supreme Court’s caseload. For example, with respect to criminal cases, the Supreme Court decided in its current term whether sentencing a juvenile to life without parole violates the Eighth Amendment if state characterizes its sentencing scheme as “discretionary”; whether a defendant must object to a sentence’s substantive reasonableness in district court to properly preserve the claim for appeal; and whether federal statutory restrictions on the use of a federal employment-authorization form (the I-9) preempt state prosecutions for providing false identity

information on documents other than the I-9. These cases require a substantial devotion of energy in order to understand the intricate statutory, constitutional, and historical context and to assimilate the wide range of views both inside and outside government as to the proper balance of interests in these cases.

The Solicitor General likewise defends the implementation of an expanding set of government programs and congressional enactments. Although the precise docket in FY 2021 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 Federal Arbitration Act, the Clean Air Act, the Truth in Lending Act, the Immigration and Nationality Act, the Foreign Sovereign Immunities Act, and the Bankruptcy Code. 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.

### **Full Program Costs**

OSG has only one program—Federal Appellate Activity. Its program costs consist almost entirely of fixed costs, such as salaries and benefits, 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 with the exception of FY 2017 when the Court was absent one Supreme Court Justice. 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**

Item Name	Description				Page
		Pos.	FTE	Dollars (\$000)	
<b>Bristow Fellow</b>	<b>Increase personnel to meet increasing responsibilities</b>	<b>1</b>	<b>1</b>	<b>111</b>	<b>9</b>

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

General Legal Activities language is displayed in the GLA rollup budget submission.

## **IV. Program Activity Justification**

### **A. Federal Appellate Activity**

<i>Federal Appellate Activity</i>	<b>Perm. Pos.</b>	<b>FTE</b>	<b>Amount (\$000)</b>
2019 Enacted	48	44	\$11,828
2020 Enacted	48	44	12,250
Adjustments to Base and Technical Adjustments	0	0	1,224
2021 Current Services	48	44	13,474
2021 Program Increases	1	1	111
2021 Request	49	45	13,585
<b>Total Change 2020-2021</b>			<b>\$1,097</b>

### **1. Program Description**

The major function of the Solicitor General’s Office is to supervise the handling of government litigation in the U.S. Supreme Court 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.

This Office does not initiate programs, control 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 Civil Rights Act of 1964), 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>
19	2018	484	3042	680	662	444	54
18	2017	518	5,612	637	538	493	51
17	2016	376	2,554	570	506	467	53
16	2015	403	2437	417	610	561	57

The determinations and recommendations fields in the chart above do not directly correspond with the Office’s workload measurement tables. The workload measurement tables track the workload by case whereas the figures above track the 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. The workload measurement tables reflect that as a single request. The table above provides a separate accounting for each determination. Additionally, the miscellaneous recommendations field includes requests for authorization of settlement, for stays, and for mandamus, while the figures on the performance measurement tables do not include such requests.

The oral argument field 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.

**PERFORMANCE AND RESOURCES TABLE**

**Decision Unit: Federal Appellate Activity**

<b>RESOURCES</b>			<b>Target</b>		<b>Actual</b>		<b>Projected</b>		<b>Changes</b>		<b>Requested (Total)</b>	
			<b>FY 2019</b>		<b>FY 2019</b>		<b>FY 2020</b>		<b>Current Services Adjustments and FY 2021 Program Changes</b>		<b>FY 2021 Request</b>	
<b>Total Costs and FTE</b> (reimbursable FTE are included, but reimbursable costs are bracketed and not included in the total)			<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>
			48	11,828	44	11,880	44	12,250	1	1,335	45	13,585
<b>TYPE</b>	<b>STRATEGIC OBJECTIVE</b>	<b>PERFORMANCE</b>	<b>FY 2019</b>		<b>FY 2019</b>		<b>FY 2020</b>		<b>Current Services Adjustments and FY 2021 Program Changes</b>		<b>FY 2021 Request</b>	
			<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>	<b>FTE</b>	<b>\$000</b>
<b>Program Activity</b>			48	11,828	44	11,880	44	12,250	1	1,335	45	13,585
<b>Performance Measure: Output</b>		Cases in which the Solicitor General Participated		3300		5284		3300				3300
<b>Performance Measure: Efficiency</b>		Requests to which the Solicitor General Responded		1400		2944		1400				1400

Data Definition, Validation, Verification, and Limitations: **INFORMATION REQUIRED:** Use this section to discuss data terms, data sources, how the information is collected, how the information is verified, and data limitations to include how well the indicator measures performance in this area.

**2. Performance and Resource Tables**

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 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 are keyed by the Case Management staff. For Supreme Court matters, all data are 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 percent 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											
Decision Unit: Federal Appellate Activity Strategic Goal 4/Strategic Objective 4.1- Uphold the rule of law and integrity in the proper administration of justice.											
Strategic Objective	Performance Report and Performance Plan Targets		FY 2015	FY 2016	FY 2017	FY 2018	FY 2019		FY 2020	FY 2021	FY 2022
			Actual	Actual	Actual	Actual	Target	Actual	Target	Target	Target
4.1	<b>Performance Measure</b>	Cases in which the Solicitor General Participated	3775	3223	2548	5284	3300	5306	3300	3300	3300
4.1	<b>Performance Measure</b>	Requests to which the Solcitor General responded	1422	1419	1283	2944	1400	3409	1400	1400	1400
	<b>Performance Measure</b>										
	<b>Performance Measure</b>										
	<b>Performance Measure</b>										

## V. Program Increases by Item:

**Item Name:** **Bristow Fellow**

Budget Decision Unit(s): Federal Appellate Activity

Strategic Goal & Objective: 4.1 Uphold the rule of law and Integrity in the proper administration of justice.

Organizational Program: Office of the Solicitor General

Program Increase: Positions 1 Atty     FTE 1 Dollars \$110,686

### Description of Item

OSG is requesting an enhancement of 1 position (1 Bristow Fellow), 1 FTE and \$110,686 in furtherance of its mission.

### Justification

The heavy workload of the Office requires adequate staffing of attorney and paraprofessionals to move the mission. The Bristow Fellows (Law Clerks) are a critical part of the Office's workforce and have been a reliable and effective resource to the office for decades.

The Bristow Program is a 1-year fellowship program in which four GS-11/12 attorneys support the SG and the office in a full range of matters that include the drafting of briefs in opposition to certiorari, petitions for certiorari and briefs on the merits in Supreme Court cases, recommendations to the Solicitor General regarding authorization of government appeals in the lower courts, and assisting in the preparation of oral arguments in the Supreme Court. OSG usually selects four Bristow Fellows each year; however, given the increased workload of the Office, it is necessary to hire an additional position for this very critical work.

### Impact on Performance

A program increase of 1 position, 1 FTE and \$110,686 to fund an additional Bristow Fellow in support of the Department's Strategic Goal4/Strategic Objective 4.1- Uphold the rule of law and integrity in the proper administration of justice is necessary in ensuring OSG's ability to continue to provide quality work product within set deadlines and limitations.

Base Funding

FY 2019 Enacted				FY 2020 Enacted				FY 2021 Current Services			
Pos	agt/ atty	FTE	\$(000)	Pos	agt/ atty	FTE	\$(000)	Pos	agt/ atty	FTE	\$(000)
48	23	44	11,885	48	23	44	12,250	48	23	44	13,474

Personnel Increase Cost Summary

Type of Position/Series	Full-year Modular Cost per Position (\$000)	1 <sup>st</sup> Year Annualization	Number of Positions Requested	FY 2021 Request (\$000)	2 <sup>nd</sup> Year Annualization	FY 2022 Net Annualization (change from 2021) (\$000)	FY 2023 Net Annualization (change from 2022) (\$000)
Paralegals /Other (0900-0999)	111	-55	1	111	0	0	0
<b>Total Personnel</b>	111	-55	1	111	0	0	0

Non-Personnel Increase Cost Summary

Non-Personnel Item	Unit Cost	Quantity	FY 2020 Request (\$000)	FY 2022 Net Annualization (change from 2021) (\$000)	FY 2023 Net Annualization (change from 2022) (\$000)
<b>Total Non-Personnel</b>	0	0	0	0	0

Total Request for this Item

	Pos	Agt/ Atty	FTE	Personnel (\$000)	Non-Personnel (\$000)	Total (\$000)	FY 2022 Net Annualization (change from 2021) (\$000)	FY 2023 Net Annualization (change from 2022) (\$000)
Current Services	48	23	44	13,474	0	13,474	0	0
Increases	1	0	1	111	0	111	0	0
<b>Grand Total</b>	<b>49</b>	<b>23</b>	<b>45</b>	<b>13,585</b>	<b>0</b>	<b>13,585</b>	<b>0</b>	<b>0</b>

**VI. Program Offsets by Item:**

N/A

**VII. Exhibits**