

FY 2019

PERFORMANCE BUDGET  
CONGRESSIONAL SUBMISSION



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

## **Introduction**

In FY 2019, the Office of the Solicitor General (OSG) requests a total of \$12,392,000 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 under the Executive Office, which include Administration, Research and Publication, and Case Management.

## **Challenges**

OSG’s overall mission and strategic objectives will essentially remain the same in FY 2019. 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, health care, constitutional, and criminal cases have been at the heart of the Supreme Court’s caseload. For example, with respect to immigration cases, the Supreme Court will decide in its current term whether certain provisions of the Immigration and Nationality Act are unconstitutionally vague; when aliens seeking admission to the United States

who are subject to mandatory detention must be afforded bond hearings; and whether the Executive may temporarily suspend the entry of certain aliens and refugees abroad. 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. In the criminal context, the Court continues to wrestle with issues relating to the scope of constitutional protections in the context of emerging technologies. For instance, the Court is considering in *Carpenter v. United States* the circumstances in which the government may obtain historical “cell-site” records, which show the cellular towers that a mobile phone has connected with while in use. In preparation for this case and others, OSG 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 2019 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.

For FY 2019, OSG is requesting base funding of 48 positions (23 attorneys), 48 FTE and \$12,392,000 to accomplish its goals.

### **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 2016 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**

N/A

## **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</b>
2017 Enacted	48	45	11,885
2018 Continuing Resolution	48	48	11,804
Adjustments to Base and Technical Adjustments	0	0	588
2019 Current Services	48	48	12,392
2019 Program Increases	0	0	0
2019 Program Offsets	0	0	0
2019 Request	48	48	12,392
<b>Total Change 2018-2019</b>			588

#### 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 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>
17	2016	376	2554	570	506	467	53
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

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.

## **2. Performance and Resource Tables**

Performance materials will be provided at a later date.

## **3. Performance, Resources, and Strategies**

Performance materials will be provided at a later date.

## **V. Program Increases by Item:**

N/A

## **VI. Program Offsets by Item:**

N/A

## **VII. EXHIBITS:**