



FY 2020

# 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 2020, the Office of the Solicitor General (OSG) requests a total of \$12,488,000 that funds 51 positions, including 23 attorney positions, and 51 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 28 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 2020. 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 criminal cases, the Supreme Court decided in its current term whether state and federal authorities can continue to successively prosecute individuals for the same criminal offenses; whether it is constitutional for

Congress to prescribe mandatory terms of reimprisonment for supervised release offenses; and whether Congress may authorize the Attorney General to promulgate regulations delimiting the applicability of statutory requirements backed by criminal penalties. 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. In the civil context, the Court continues to wrestle with issues relating to emerging technologies. For instance, in *Apple v. Pepper*, the Court considered the application of antitrust principles to Apple's marketplace for cell phone apps. In preparation for this case and others, OSG attorneys spent substantial time and resources to understand the workings of both the technology and the relevant market.

The Solicitor General likewise defends the implementation of an expanding set of government programs and congressional enactments. Although the precise docket in FY 2020 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 2020, OSG is requesting base funding of 51 positions (23 attorneys), 51 FTE and \$12,488,000 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.

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.

**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)	
Federal Appellate Activity	Increase personnel to meet increasing responsibilities	3	3	397	

**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>	Perm. Pos.	FTE	Amount
2018 Enacted	48	46	11,885
2019 Continuing Resolution	48	48	11,885
Adjustments to Base and Technical Adjustments	0	0	206
2020 Current Services	48	48	12,091
2020 Program Increases	3	3	397
2020 Program Offsets	0	0	0
2020 Request	51	51	12,488
<b>Total Change 2019-2020</b>			603

## 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>
18	2017	518	2,612	637	538	493	51
17	2016	376	2,554	570	506	467	53
16	2015	403	2,437	417	610	561	57
15	2014	370	3,684	479	679	545	56

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 AND RESOURCES TABLE												
Decision Unit: Federal Appellate Activity												
RESOURCES			Target		Actual		Projected		Changes		Requested (Total)	
			FY 2018		FY 2018		FY 2019		Current Services Adjustments and FY 2020 Program Changes		FY 2020 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
			48	11,885	45	11,705	48	11,885	3	603	51	12,488
TYPE	STRATEGIC OBJECTIVE	PERFORMANCE	FY 2018		FY 2018		FY 2019		Current Services Adjustments and FY 2020 Program Changes		FY 2020 Request	
Program Activity			FTE	\$000	FTE	\$000	FTE	\$000	FTE	\$000	FTE	\$000
			48	11,885	45	11,705	48	11,885	3	603	51	12,488
Performance Measure: Output		Cases in which the Solicitor General Participated		3300		5284		3300				3300
Performance Measure: Efficiency		Requests to which the Solicitor General Responded		1400		2944		1400				1400

**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% 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.



## V. Program Increases by Item:

**Item Name:** Program Increase of 3 FTE /3 positions

**Budget Decision Unit(s):** Federal Appellate Activity

**Strategic Goal & Objective:**

**Organizational Program:** Office of the Solicitor General

**Program Increase:** Positions 3 Atty     FTE 3 Dollars \$396,749

### Description of Item

OSG is requesting an enhancement of 3 Positions, 3 FTE and \$396,749 to accomplish its goals.

### Justification

OSG played a leading role in several complex cases regarding the constitutionality and scope of the bankruptcy scheme Congress established for Puerto Rico in a 2016 statute, PROMESA. Most particularly, OSG handled arguments in both the First Circuit—which involved a challenge to the appointment of the PROMESA Oversight Board—and the Court of Federal Claims—addressing the relationship between PROMESA and the Tucker Act. OSG also continues to be involved in lower court lawsuits involving immigration matters. These are just two of several areas in which the Office is assisting in complex litigation in lower courts. In the most recent term OSG has also shouldered a heavier load in the Supreme Court with at least three cases that generated supplemental briefing and one that was set for re-argument.

OSG attorneys have increasingly been asked to brief and argue particularly important criminal cases in the en banc stage in the appellate courts including matters involving firearms regulation, computer searches, and finance regulations. Given the projection of a steady increase in casework, and the unpredictable challenges highlighted in the matters above, OSG is requesting additional resources in its FY 2020 submission.

### Impact on Performance

A program increase of 3 critical program, 3 FTE and \$396,749 is being requested in support of DOJ Strategic Goal 4, “Promote Rule of Law, Integrity, and Good Government.” We have determined that three new positions will enable the office to meet the demands placed upon it without any decrease in the quality of its work.

Base Funding

FY 2018 Enacted				2019 Continuing Resolution				FY 2020 Current Services			
Pos	agt/atty	FTE	\$(000)	Pos	agt/atty	FTE	\$(000)	Pos	agt/atty	FTE	\$(000)
48	23	48	11,885	48	23	48	11,885	51	23	51	12,488

Personnel Increase Cost Summary -See attached Cost module templates

Type of Position/Series	Full-year Modular Cost per Position (\$000)	1 <sup>st</sup> Year Annualization	Number of Positions Requested	FY 2020 Request (\$000)	2 <sup>nd</sup> Year Annualization	FY 2021 Net Annualization (change from 2020) (\$000)	FY 2022 Net Annualization (change from 2021) (\$000)
Clerical and Office Services (0300-0399)	192	104	1	171	83	91	22
Clerical and Office Services (0300-0399)	148	81	1	124	57	62	47
Paralegals /Other (0900-0999)	128	71	1	102	45	124	147
<b>Total Personnel</b>	468	256	3	397	185	277	216

Non-Personnel Increase/Reduction Cost Summary

[Itemize all non-personnel costs, e.g., include separate rows for operational funding, system development, equipment purchases, etc.]

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

Total Request for this Item

	Pos	Agt/Atty	FTE	Personnel (\$000)	Non-Personnel (\$000)	Total (\$000)	FY 2021 Net Annualization (change from 2020) (\$000)	FY 2022 Net Annualization (change from 2021) (\$000)
Current Services	48		48	6,597	5,494	12,091		
Increases	3		3	397	0	397		
<b>Grand Total</b>	<b>51</b>		<b>51</b>	<b>6,994</b>	<b>5,538</b>	<b>12,488</b>		

**VI. Program Offsets by Item:**

N/A

**VII. EXHIBITS:**