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US Solicitor General Scored Well Overall Last Term, but Lost Most of the Biggest Cases

The government won 58% of cases where it was a party, but suffered key losses on abortion and gun control.

By Marcia Coyle | July 28, 2022



Elizabeth Prelogar testifies before the Senate Judiciary Committee during her confirmation hearing to be U.S. solicitor general, on Sep. 14, 2021. Image via Committee Video

At the end of their first full term, the Biden administration's top lawyers before the U.S. Supreme Court defied a decades-long, declining win rate, but still lost six of the eight biggest cases.

The Office of the U.S. Solicitor General, led by Biden appointee Elizabeth Prelogar, appeared in 52 of the term's 63 argued cases. Two of the 52 were dismissed as improvidently granted (DIGs) and one ended in a 4-4 split. Of the remaining 49, the office had an overall win rate of 67%. Breaking down the cases into where the government was a party, the win rate was 58%, and where it was an amicus, 76%.

One term, of course, is just a snapshot. A fuller picture awaits the end of at least the first term of the Biden administration. Still, a few insights can be gleaned from the office's participation in what has been described as a "momentous" Supreme Court term.

In a 2018 law review article

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The win rate for the Solicitor General's Office peaked during the Reagan administration when the office prevailed 80% of the time, the scholars found. After the Reagan years, the win rate steadily declined under the following presidents: George H.W. Bush, 70%; Bill Clinton, 63%; George W. Bush, 61%; and Barack Obama, 52%.

Even with a more closely aligned ideological court, the Trump Solicitor General's Office had a difficult time. In a 2019 article (<https://news.bloomberglaw.com/us-law-week/trumps-top-scotus-lawyers-post-winning-term-but-barely>), Posner told the interviewer that the office's record in the 2018-19 term when the government was a party was close to the Obama administration's overall record—a little over half. The Biden administration last term was comfortably above that record, at 58%.

Of the eight biggest cases of the term, the six that the office lost, either as a party or an amicus party, are abortion (*Dobbs v. Jackson Women's Health Center*); concealed carry rights (*New York State Rifle & Pistol Association v. Bruen*); climate change (*West Virginia v. EPA*); employer vaccine mandate (*NFIB v. Department of Labor*); public funding of religious schools (*Carson v. Makin*); and prayer at a public school event (*Kennedy v. Bremerton School District*).

The victories, though few, were important to the government. The office prevailed in fighting a lower court order that the Biden administration enforce the Trump administration's "Remain in Mexico" immigration policy (*Biden v. Texas*). And it successfully defended the administration's rule requiring Medicare and Medicaid funded facilities to vaccinate their staffs—unless exempt for medical or religious reasons—against COVID-19 (*Biden v. Missouri*).

Besides the biggest cases, the office also prevailed as a party in two state secrets cases, two immigration cases and three criminal cases, among other areas of the law.

"It's hard to look at one term and say anything definitively because the cases can often be idiosyncratic," said Andrew Pincus, former assistant to the solicitor general and Mayer Brown partner. "It is interesting that the cases people would label the biggest, [the office] did the least well in."

The Solicitor General's Office also does not decide which cases the justices will review, added veteran high court advocate Alan Morrison of George Washington University Law School. "In many cases, they're defending a law Congress enacted so they're further locked in. Or, it may be a position the government has had for years. You have to take all of that into consideration."

In examining the office's declining success rates since the Reagan years, Epstein and Posner rejected theories that the decline was caused by presidents becoming more aggressive and violating legal norms as well as by justices ideologically predisposed to rule against the office.

Instead, they said, there was evidence suggesting that the court has become more powerful and self-confident in recent decades, and perhaps most significant, the growth of a specialized Supreme Court bar is providing pushback to the government's lawyers.

Pincus agreed with the bar explanation, saying, "Really it's about quality of representation. I was there from '84 to '88 and, by and large, the lawyers on the other side were not experienced Supreme Court advocates."

Last term, 27 of the 118 advocates argued two or more cases, according to SCOTUSblog statistics. Seven of the 27 were from law firms: Clement & Murphy partner Paul Clement; David Frederick, partner at Kellogg, Hansen, Todd, Figel & Frederick; Kannon Shanmugam, partner at Paul, Weiss, Rifkind, Wharton & Garrison; Michael Kimberly, partner at McDermott Will & Emery; Haynes and Boone partner Daniel Geyser; O'Melveny & Myers partner Michael Dreeben; and Latham & Watkins partner Roman Martinez. The other lawyers were from the Solicitor General's Office and one—Judd Stone II—is Texas' solicitor general.

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