

The recent shutdown of the federal government was the longest ever. The recovery may be slow, and there may still be another shutdown coming soon, since Congress only enacted a continuing resolution through February 28<sup>1</sup>. The shutdown has had severe consequences across the nation<sup>2</sup>, of course. Against those broad harms, the fact that many civil cases against the Government has been delayed may be a minor effect. But for some cases and clients, these delays can be quite important. In this essay I discuss how counsel can try to minimize the effects of shutdown-induced delay, or take advantage of it.

During the shutdown, the policy of the Department of Justice was that criminal prosecutions could continue, because prosecutions are “an activity essential to the safety of human life and the protection of property<sup>3</sup>.” But civil litigation was to be “curtailed or postponed” except where doing so would compromise the safety of life or the protection of property. To that end, DOJ attorneys were directed to ask courts for stays or postponements in all active cases. Courts had a range of reactions to those requests. The Southern District of West Virginia might encapsulate all of them. In response to the Government’s petition for a general order staying its cases, that court stayed all civil litigation with the Government as a party of with the Justice Department as counsel, for 14 days which it renewed as the shutdown continued<sup>4</sup>. Judge Goodwin, however, viewing the shutdown as “a dispute internal to one party, the Federal Government,” refused to give the Government any “special influence or accommodation...unavailable to other litigants<sup>5</sup>.” When the shutdown ended, the Government asked the court for a general extension, allowing it an additional 21 days to respond to most times of filings<sup>6</sup>. The court dissolved its stay but refused to grant a general extension<sup>7</sup>.

The ambivalence of this court is likely to be present in federal courts across the country. The courts themselves were constrained by the shutdown—they pared back staff to conserve their funds for as long as possible—and are likely to have some sympathy for the Department of Justice. In addition, the principle of sovereign immunity probably lies under decisions to grant the Government stays or postponements. Congress can legislate that the Government cannot—for the most part—be sued, and a refusal to fund litigators to participate in cases has essentially the same effect, on a temporary basis. At the same time, Judge Goodwin’s reaction is also quite understandable. If a private litigant’s lawyers asked for a stay because the client refused to pay them, most courts would probably not grant that request.

Now that the Government is running again—for the time being—counsel in cases against the Government have to manage the consequences. In some cases a court might simply have postponed oral argument by a month. In others, taking a case off the trial calendar might mean waiting for months for the next available date.

Sequencing of events is also important, especially for cases that involve discovery or substantial motion practice.

The first thing counsel need to think about is whether delay is a positive or a negative development for their cases. If your client is trying to overturn a rule that you claim is causing permanent environmental damage, even a one-month delay in oral argument may be consequential. On the other hand, if you are defending a civil enforcement case, you might prefer an even longer delay. In both cases, counsel will want to argue that the Government shouldn’t get a special privilege of delaying its cases. But they will use that argument to different effect. In the first case, the argument would be that no delay is acceptable; in the second, counsel might ask for a delay of his or her own, and point out that the request is no more than what the Government got.

The second consideration is what type of case is at issue. Courts writing about the shutdown have tended not to distinguish between different kinds of government litigation, but to make the best arguments counsel will want to make those distinctions. The argument above, that if Congress can withdraw a waiver of sovereign immunity a court can give effect to a shutdown that temporarily blocks a lawsuit, applies only to affirmative litigation with a government defendant. In cases where the Government is a plaintiff, such as civil enforcement actions, counsel may want to point out that Judge Goodwin’s observation is particularly apt.

Another consideration, and perhaps the most important, is which agency in the Government is the litigant. The Government is not a monolithic litigation party; the parties in interest are particular agencies and officials<sup>8</sup>. That fact is particularly important for this shutdown because it was only partial. Many agencies had their fiscal-year 2019 appropriations already, and those agencies have operated throughout the shutdown. Among others, the funded agencies include the Departments of Defense, of Education, of Health and Human Services, of Labor, and of Veterans Affairs; as well as the Bureau of Reclamation, the Army Corps of Engineers, the National Labor Relations Board, and the Nuclear Regulatory Commission<sup>9</sup>. A number of other agencies, such as the prudential financial regulators, have no-year appropriations and also operated throughout the shutdown.

An agency that had an appropriation could have funded DOJ attorneys to litigate its cases<sup>10</sup>. Agencies may have overlooked that possibility because ordinarily the Justice Department appropriation pays for litigation counsel and agencies are not allowed to hire their own litigators. But past decisions by the Government Accountability Office indicate that when DOJ representation is unavailable—which was certainly the case during the shutdown—paying for litigation defense can be a proper use of appropriated funds. And by using an Economy Act agreement to finance DOJ counsel during the shutdown, an agency would not have been violated the prohibition on hiring non-DOJ litigation counsel.

Counsel litigating against one of the agencies that had appropriated funds may want to make this argument as they ask courts to deny extensions, prohibit late responses where deadlines were missed, etc. The deadlines at issue applied to the party to the litigation, namely the agency involved, not to its DOJ counsel. And in a case like that, the agency had, thanks to its appropriation, the ability to meet those deadlines. Meanwhile, the notion of sovereign immunity discussed above should not come into play, because existing law allowed the defendant agency to participate fully in the lawsuit. If an agency was able to litigate and meet its deadlines, a failure to do so is not readily excusable, and there is much less justification for any further extensions or postponements. The Administration used a number of creative measures to extend the availability of services during the shutdown<sup>11</sup>, and Economy Act agreements to finance DOJ litigation counsel could easily have been among them.

Judge Goodwin said the Government should get no special accommodations. Although many courts have already shown they do not accept that as a general premise, you have many options for arguing that your government opponent should get no special accommodations in your particular case.

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## Endnotes

- 1 H.J. Res. 28.
- 2 See generally Cong. Budget Office, “The Effects of the Partial Government Shutdown Ending in January 2019” (Jan. 2019), at <https://www.cbo.gov/publication/54937>.
- 3 U.S. Dep’t of Justice, Fiscal Year 2019 Contingency Plan, p. 3 (Jan. 10, 2019).
- 4 No. 2:18-mc-00196, General Order Holding Civil Matters in Abeyance (S.D.W.V. Dec. 26, 2018).
- 5 No. 2:18-mc-00196, Civil Cases Exempt from the General Order (S.D.W.V. Jan. 2, 2019).
- 6 No. 2:18-mc-00196, Report that Appropriations Have Been Restored (S.D.W.V. Jan. 29, 2019).
- 7 No. 2:18-mc-00196, Order (S.D.W.V. Jan. 29, 2019).
- 8 Cite Regulatory Review piece when it publishes.
- 9 Pub. L. 115-244; Pub. L. 115-245.
- 10 Cite Regulatory Review piece when it publishes.
- 11 See, e.g., P. Daniel Smith, Deputy Dir., Nat’l Park Serv., “Statement on Protecting National Parks” (Jan. 6, 2019) (explaining novel use of user fees to maintain services during the shutdown), at <https://www.nps.gov/orgs/1207/updatelapse.htm>; Ltr. from Jeff Ruch, Exec. Dir. of Public Employees for Env’tl Responsibility, to Comptroller General (Jan. 22, 2019) (describing Interior Department’s activities during the shutdown).