

One Minute Memo®



For Civil Litigants, Confusion About the Effect of the Federal Government Shutdown

By Rebecca Woods, Esther McDonald, and Connor Bateman

On Monday, as the partial government shutdown entered its third week, the Administrative Office of the U.S. Courts (“AOC”) [announced](#) its intention to continue paid operations through January 18, extending its [previous estimate](#) by one week. To sustain operations, courts will utilize fee balances and other funds that are not dependent on a new appropriation. Courts have also been directed to delay certain “non-mission critical expenses,” such as travel and new hires, in order to further defray costs. Should the current budget crisis continue beyond January 18, however, courts will operate under the terms of the Anti-Deficiency Act, which allows the courts to conduct “essential” work during the lapse in appropriations.

The question for civil litigants is what “essential” means for their matters. (For those involved in litigation with the federal government, there is likely a significant impact because many Department of Justice employees are furloughed. A number of courts, for instance, have [stayed civil cases](#) involving the U.S. Government that do not jeopardize life or property, citing the furlough of Justice Department attorneys.) There is guidance from an AOC memorandum issued just before the 16-day shutdown in 2013 as to what “essential” work means, but a reader would be forgiven for being confused. On the one hand, the [memorandum](#) advises that under the Anti-Deficiency Act, “essential work” is “interpreted very narrowly” and that “a limited number of employees would be called upon to perform essential work, while all others would be furloughed.”

On the other hand, the lodestar for “essential work” for judicial purposes is “[a]ctivities necessary to support the exercise of the Article III judicial power,” and the potential activities allowed under that statement are broad: In defining “essential work,” the AOC’s *Guide to Judiciary Policy* states that: judges may “employ staff, such as law clerks and secretaries, and utilize court reporters, who are not part of the judge’s staff, which in the court’s opinion are essential to the resolution of cases”; “[c]onferences, hearings, jury trials, non-jury trials, and appellate arguments [would] continue to be conducted, and new cases [would] be accepted”; “[n]ew cases, including both civil and criminal, will be accepted and processed in the normal manner”; and “the proper and timely processing of all filings, motions, orders, emergency applications, and other litigation documents” will be permissible. Finally, the guide provides that “routine judicial activities performed by magistrate judges, from the conduct of preliminary hearings to the exercise of delegated trial authority, will continue” during the shutdown. Following these directives, in the 2013 shutdown, [dozens](#) of courts issued orders declaring virtually **all** employees essential to the exercise of Article III powers.

Adding to the confusion about just what aspects of civil litigation would be affected by the shutdown, the AOC advised that they “do not provide specific guidance as to exactly which functions should be considered essential because [that] is the prerogative of each court” We thus expect a patchwork of evolving approaches that will affect civil litigants,

which will be driven both by practical and human factors. On the practical side, the judiciary's landlord, the General Services Administration, is affected by the shutdown and basic building needs may preclude judicial employees from working even if they were otherwise deemed essential.

The human element is considerably more variable. Everyone but judges who is deemed essential will work without pay. So far, courts appear intent on continuing near-normal operations. James Hatten, the District Court Executive for the Northern District of Georgia, [stated](#) that the court would "remain open, . . . continue to accept cases[,] and continue to have court proceedings and trials[.]" Hatten also expected clerks, security personnel, court reporters, and support staff to continue working, although they could not be paid until the shutdown is resolved. Judge Patricia A. Gaughan of the U.S. District Court for the Northern District of Ohio made a similar [prediction](#), stating that some employees would likely be asked to report to work without pay until the shutdown ends. Echoing the sentiments expressed by judges during the 2013 shutdown, Judge Gaughan noted that "[a]ll employees, just by virtue of them being employed by the federal court, may be deemed essential . . ."

But history is no teacher for how courts will handle this shutdown if it is not resolved today. The longest prior shutdown was 21 days (December 1995 to January 1996), and January 11, 2019 is the 21st day of the present shutdown. With many cases on dockets stayed because they involve furloughed government lawyers, some civil litigants could see more movement on their cases. As the shutdown extends and unpaid employee morale continues to [sink](#), however, we may see emerging delays on civil cases because the courts may need to prioritize criminal cases and certain federal employees may resign, creating staffing problems.

So what to do next?

Civil litigants who have not yet filed cases and who are nearing an expiration of a statute of limitation (or other time bar) may want to consider getting tolling agreements in place or filing lawsuits soon in the unlikely, but possibly dire, event that new cases stop being processed. Civil litigants in a hurry for a resolution may want to inquire whether the other party(ies) would consent to shifting the venue to private arbitration.

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