

IN A JUSTICE DEPARTMENT SHUTDOWN, FUNDED AGENCIES CAN STILL LITIGATE

KEITH BRADLEY*

A large portion of the federal government was shut down from December 22, 2018 through January 26, 2019, due to a lapse in appropriations for many departments and agencies.¹ Although the shutdown has ended, it could recur. The recent shutdown was the longest, but it was certainly not the first; and policy disputes may well lead to further appropriations lapses in the future. Now is a good time to draw valuable lessons from the recent painful experience.

Among the many consequences of the shutdown, litigation by the Department of Justice (DOJ) stalled because the Justice Department was among the departments without an appropriation. Many Justice Department attorneys were furloughed. However, the Solicitor General continued to draft and file briefs at the Supreme Court, even though litigators in lower courts generally attempted to delay litigation. Under DOJ's shutdown plans, litigators were directed to request stays or postponements in all active civil cases. If a court refused a postponement, the Justice Department would "comply with the court's order, which would constitute express legal authorization for the activity to continue," but would use only minimal staff necessary to comply.² Courts responded in various ways to these requests. One panel of the D.C. Circuit refused to postpone oral argument, over a dissent by Senior Judge

* Keith Bradley is a partner at Squire Patton Boggs, where he provides clients regulatory counseling and advocates on administrative and regulatory matters. He was previously senior advisor to the general counsel at the U.S. Department of Energy and counsel at the Consumer Financial Protection Bureau.

1. As a few examples, the Departments of Justice, Interior (except for the Bureau of Reclamation), and Homeland Security lost funding, as did the Environmental Protection Agency, the Securities and Exchange Commission, and the Federal Communications Commission. By contrast, the Departments of Defense, Energy, Health & Human Services, Labor, and Veterans Affairs had already received appropriations for the full 2019 fiscal year. Consolidated Appropriations Act of 2019, Pub. L. No. 115-244 (2019); Further Additional Continuing Appropriations Act of 2019, Pub. L. No. 115-245 (2019).

2. *Fiscal Year 2019 Contingency Plan*, U.S. DEP'T OF JUSTICE 1, 3 (Jan. 10, 2019), <https://www.justice.gov/jmd/page/file/1015676/download>.

Randolph.³ Other panels granted postponements. The Southern District of West Virginia issued a general order staying cases in which the federal government was a party, but a particular judge in that court issued his own order exempting his cases from the stay.⁴

For civil litigants with cases against the Government, these delays can be costly. These cases involve, for example, appeals from the imposition of fines; disputes over the validity of regulations; land condemnation cases; complaints of employment discrimination; and efforts to obtain benefits such as Social Security payments or Medicare reimbursement. The uncertainty of knowing whether or when a person will be subject to a given imposition, or conversely, will be able to receive a benefit or payment being claimed, can significantly impair a person's activities.

The delays resulting from the shutdown could last much longer than the shutdown itself. For example, a case removed from an appellate court's calendar might not get rescheduled for argument until months later. Delaying a case in trial court because of a minor, non-dispositive motion can set summary-judgment briefing back by months as well. It is also important to remember that litigants spent time and money preparing for court dates in January 2019, and the Government's stalling of litigation wasted those resources. Imagine, for example, an SEC enforcement appeal with a pro se party, who bought a plane ticket and made other arrangements to come to Washington, D.C. for a court date only for it to get postponed.

These costs force us to think seriously about whether federal agencies should be allowed to temporarily disappear from cases. The circumstances of this shutdown reveal that the answer is not simple.

If a private party's lawyer stopped participating in a case because the client refused to pay, there would be consequences. A court would not likely display much leniency to the client. The court would surely recognize that delay is unfair to the opposing party, which was ready to make progress in the litigation. And, if the client was delinquent for a substantial length of time, the court could enter a default judgment against it.

Following the analogy through, a defendant agency ought to be held responsible if the defense fails because litigation counsel was not paid. In ordinary times, the analogy would fail at this step because agencies are not usually financially responsible for litigation defense. The Justice Department handles a defense, funded by its own appropriations. Ordinarily an agency does not pay for its own defense because various statutes limit agencies other than the Justice Department from using appropriations to pay for litigation

3. *Kornitzky Grp., LLC v. Elwell*, 912 F.3d 637, 638 (D.C. Cir. 2019).

4. General Order Holding Civil Matters in Abeyance, No. 2:18-mc-00196 (S.D.W.V. Dec. 26, 2018); Civil Cases Exempt from the General Order, No. 2:18-mc-00196 (S.D.W.V. Jan. 2, 2019).

counsel.⁵ In a shutdown with no appropriations, the analogy would also fail for cases with federal agencies as defendants, because the Government, as sovereign, can disallow most types of lawsuits against it.⁶ A refusal to appropriate funds is an unorthodox way to do that. But arguably, it would be improper to enter judgment against the Government when—notwithstanding statutes like the Administrative Procedure Act⁷ that formally waive sovereign immunity—federal law bars the Government from participating in the case.

However, in this shutdown, many agencies actually had annual appropriations already. These agencies, including several full Executive departments such as the Department of Energy and the Department of Health and Human Services, continued to operate normally throughout the shutdown—except where the shutdown of other agencies affected their operations. The shutdown of the Justice Department, I argue, should not have had such an effect. If an agency or its officials is engaged in civil litigation that would affect a program with an appropriation, existing law should allow the agency to fund the litigation. The agency could use an Economy Act agreement to pay the Justice Department attorneys working on its case.⁸

Although the Justice Department plays a powerful role in civil litigation brought against the Government—with controlling authority over litigating positions and strategies⁹—it may sometimes seem like the defendant, but it is not. The Justice Department consistently refers to agency defendants as “client agenc[ies],”¹⁰ and expects a “client agency” to support litigation by performing a range of tasks such as factual development that are comparable to what a private defendant must do.¹¹ If a court issues an order, the order

5. See OFF. OF THE GENERAL COUNSEL, GOV'T ACCOUNTABILITY OFFL., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1, 3-110, <https://www.gao.gov/legal/appropriations-law-decisions/red-book> (last visited Mar. 7, 2019) (citing 5 U.S.C. § 3106) [hereinafter GAO RED BOOK].

6. *Patchak v. Zinke*, 138 S. Ct. 897, 912–13 (2018) (Ginsburg, J., concurring) (“Just as it is Congress’ prerogative to consent to suit, so too is it within Congress’ authority to withdraw consent once given.”).

7. See generally 5 U.S.C. § 702 (2012) (waiving sovereign immunity).

8. See Economy Act, 31 U.S.C. § 1535 (2012) (describing how one agency can perform services for another and receive payment from the receiving agency’s appropriations; the Economy Act would be an appropriate mechanism for an agency to ensure that its DOJ litigation counsel remain available.).

9. See Justice Manual 4-1.100, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/jm/jm-4-1000-assignment-responsibilities#4-1.100> (last visited Mar. 7, 2019); *id.* 4-1.410 (citing E.O. 6,166, § 5 (June 10, 1933)).

10. See, e.g., Justice Manual 4-1.214.

11. *Id.* 4-1.430.

will be directed to the agency being mandated or prohibited.¹² If a court enters a money judgment, the defendant agency bears the first responsibility to satisfy the judgment, with DOJ's Judgment Fund serving only as a back-stop.¹³

Accordingly, defending against litigation, in these circumstances, ought to be a permissible use of agency appropriations. In general, appropriations can be used for expenses that "make a direct contribution to carrying out . . . an authorized agency function"; "must not be prohibited by law"; and "must not be otherwise provided for" in other appropriations.¹⁴ When a lawsuit seeks to alter how an agency carries out a program pursuant to an appropriation, or carries out its general functions, ordinary reasoning suggests that preventing those outcomes would be the sort of "direct contribution" that can warrant the use of appropriated funds. The Government Accountability Office (GAO) has repeatedly opined that, in certain circumstances, agency appropriations are available to pay attorneys to defend lawsuits against officials.¹⁵ If those defenses "make a direct contribution" to furthering appropriated activities, the same conclusion should hold for any other litigation that threatens to impede an agency's programs or operations.

Ordinarily, the bar to agencies' funding their own litigation is the collection of statutes that reserve defense to the Justice Department. Under 28 U.S.C. § 516, "the conduct of litigation in which the United States, an agency, or an officer thereof is a party . . . is reserved to the officers of the Department of Justice[.]"¹⁶ Additionally, under 5 U.S.C. § 3106, an agency "may not employ an attorney or counsel for the conduct of litigation in which . . . an agency . . . is a party."¹⁷ However, GAO decisions "recognize the availability of agency appropriations, where otherwise proper and necessary, for uses consistent with the litigative policies established for the United States by the Attorney General."¹⁸

GAO has also allowed agencies, "in certain situations, to use their appropriations to provide litigative services with respect to their own employees and operations."¹⁹ A 1975 case involving the Small Business Administration

12. *Cf., e.g.*, Justice Civil Resource Manual 37, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/jm/civil-resource-manual-37-indispensable-party> (last visited Mar. 8, 2019) ("indispensable party").

13. *See* Justice Manual 4-10.110, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/jm/jm-4-10000-judgments-against-government> (last visited Mar. 8, 2019).

14. GAO RED BOOK, *supra* note 5, at 3-16-17.

15. *Id.* at 3-116-3-117 (discussing cases).

16. 28 U.S.C. § 516 (2012).

17. 5 U.S.C. § 3106 (2012).

18. 73 Comp. Gen. 90 (Feb. 25, 1994).

19. *Id.*

(SBA) is particularly relevant. A former SBA employee was sued over actions he had taken in his official capacity, and the U.S. Attorney in his district undertook the defense. However, for various reasons, the U.S. Attorney decided to withdraw from the representation, even though the Justice Department continued to believe that federal representation for the former employee was appropriate.²⁰ The former employee had to retain his own counsel, and the SBA wanted to reimburse him. GAO concluded that the limitations on agencies paying for legal defense “would not be a bar to reimbursement,” because DOJ representation in the defense was appropriate but “unavailable” due to the withdrawal of the U.S. Attorney.²¹ Similarly, DOJ attorneys were effectively unavailable to defend civil litigation against agencies during the shutdown, because the lack of appropriations barred the Justice Department from accepting their service for which it would be obligated to pay. By analogy to the SBA case, these agencies ought, therefore, to have been permitted to pay for their own defenses.

In the SBA case, the agency paid for private litigation counsel for its former employee. For an agency to retain private counsel during a temporary shutdown would be impractical, and would also arguably be inconsistent with another limitation on agency legal work—that government representation must be “consistent with the litigative policies” of the Justice Department.²² But an agency would not have had to hire private counsel to continue its litigation. It could simply have used its appropriated funds to pay the DOJ lawyers already working on its case. The Economy Act, under which an agency can request and pay for work performed by another agency, permits such an arrangement.²³ The expenses incurred for the work—in this situation, the salaries for the attorneys defending the agency—are paid out of the appropriation of the agency requesting the work.²⁴ While it is improper to use an Economy Act transaction to augment the appropriations of the agency performing the work, GAO has previously concluded that shifting of litigation costs does not augment DOJ appropriations.²⁵

20. 1975 U.S. Comp. Gen. LEXIS 43, at *10 (Oct. 29, 1975).

21. *Id.* at 11.

22. GAO RED BOOK, *supra* note 5, at 3-120.

23. Economy Act, 31 U.S.C. § 1535 (2012) (“Agency Agreements”).

24. *Id.* § 1535(d). Economy Act transactions involve certain complexities, such as whether the ordering agency pays in advance or by reimbursing the performing agency. Thus, it is conceivable some technicality might end up blocking the arrangements suggested here. Still, it would be incumbent on a defendant agency to make the effort and demonstrate to a court why it cannot support its defense.

25. 73 Comp. Gen. 90 (Feb. 25, 1994) (“The limitations on the use of agency appropriations to provide litigative services . . . were intended to reinforce Justice’s control of the conduct of litigation involving the United States . . . not to bar agencies from using their appropriations to assist in the defense of litigation.”).

Thus, in this unusual partial shutdown in which the Justice Department lacks an appropriation, an agency that has an appropriation for a particular program or component should be able to continue litigation involving that program or component. This conclusion has broader implications. The current Administration used a number of creative measures to extend the availability of services during the shutdown.²⁶ Yet, so far as I am aware, no agency used its own funds to continue its civil litigation. Paying for litigation counsel has long been one of the supposed red lines in fiscal law.²⁷ If, as I argue, that boundary is not so impenetrable as many assumed, there may be room for agencies to do much more to mitigate the impact of future shutdowns.

26. See, e.g., P. Daniel Smith, *Statement on Protecting National Parks*, NAT'L PARK SERV. (Jan. 6, 2019), <https://www.nps.gov/orgs/1207/updatelapse.htm> (explaining novel use of user fees to maintain services during the shutdown); Letter from Jeff Ruch, Exec. Dir. of Public Employees for Env'tl Responsibility, to Comptroller Gen. (Jan. 22, 2019) (describing the Interior Department's activities during the shutdown).

27. GAO RED BOOK, *supra* note 5, at 3-110.