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## Shutdown: How the Trump Shutdown Threatened the Fiscal Constitution

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# SHUTDOWN: HOW THE TRUMP SHUTDOWN THREATENED THE FISCAL CONSTITUTION

Charles Tiefer\*

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## I. INTRODUCTION

In 2019, President Trump's triggering of appropriation lapses brought on a dramatic confrontation between the elected branches. His insistence on five billion dollars in congressional appropriations to build a wall along the

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border with Mexico—later transferred by his fiat from other spending—led to the agencies normally funded by seven appropriation bills instead having appropriation lapses and shutting down.<sup>1</sup> Under the law that has evolved for shutdowns, only “essential” agencies and programs could continue to call their employees into work; whereas, non-essential agencies must furlough their employees.<sup>2</sup> No public employees received pay, whether essential or not.<sup>3</sup>

Despite this, shutdowns are too often overlooked as not important to the separation of powers, presumably because they are seen as non-adjudicated or merely statutory issues, rather than constitutional ones. Until 2019, there were few law review articles on the topic of government shutdowns, and they only looked at big and lengthy shutdowns.<sup>4</sup> Therefore, shutdowns could be seen as just a kind of political mishap. However, appropriation lapses and ensuing shutdowns are a noteworthy part of the Fiscal Constitution.<sup>5</sup> And the 2019 shutdown brought front and center a major legal controversy—an administration that stretched the law governing shutdowns to its brink.

The Anti-Deficiency Act (“ADA”), the statute governing shutdowns, requires a narrow definition of an agency that is so essential it continues to operate during a shutdown.<sup>6</sup> By contrast, the Trump Administration, which initially had voluntarily taken the blame for the shutdown, implemented a broad definition of agencies and programs that continued to operate.<sup>7</sup> Regardless, the burden on government employees remained high because, essential or not, they did not receive pay during the shutdown.<sup>8</sup>

However, by keeping agencies in operation with unpaid employees, the Trump Administration aimed to reduce the public burden so that the public

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<sup>1</sup> *Q&A: Everything You Should Know About Government Shutdowns*, COMM. FOR A RESPONSIBLE FED. BUDGET, <http://www.crfb.org/sites/default/files/QAShutdownsJan2019.pdf> (Jan. 7, 2019); Kellie Mejdric & Jennifer Shutt, *In Appropriations Endgame, All Roads Lead to Border Wall*, ROLL CALL (Nov. 13, 2018, 11:15 AM), <https://www.rollcall.com/2018/11/13/in-appropriations-endgame-all-roads-lead-to-border-wall/>.

<sup>2</sup> See OFF. OF PERS. MGMT., GUIDANCE FOR SHUTDOWN FURLOUGHS 1–6 (Sept. 2015), <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance-for-shutdown-furloughs.pdf>.

<sup>3</sup> *Id.* at 6. The employees are to be paid “at the earliest date possible after the lapse in appropriations end.” 31 U.S.C. § 1341(c)(2).

<sup>4</sup> For an example of such a law review article discussing shutdowns, see Charles Tiefer, *Confronting Chaos: The Fiscal Constitution Faces Federal Shutdowns and (Almost) Debt Defaults*, 43 HOFSTRA L. REV. 511, 513 (2014).

<sup>5</sup> The Fiscal Constitution is “the sum of the constitutional provisions bearing on taxation and expenditure, including both rules defining the fiscal competence of the branches of the federal government and rules allocating taxing and spending powers between the federal government and the states.” Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 272 (1977).

<sup>6</sup> See 31 U.S.C. § 1341–42.

<sup>7</sup> Maegan Vasquez, *Trump’s Ever-Shifting Shutdown Blame Game*, CNN (Jan. 3, 2019, 2:42 PM), <https://www.cnn.com/2019/01/03/politics/government-shutdown-blame-game-donald-trump/index.html>.

<sup>8</sup> See OFF. OF PERS. MGMT., *supra* note 2, at 6.

would not condemn the Administration.<sup>9</sup> This approach involved more than just strained and dubious, but limited, applications of shutdown law—it involved a very different approach to the entirety of shutdown law.

## II: ROADMAP: HOW THIS ARTICLE TREATS SHUTDOWNS<sup>10</sup>

Part III of this Article compares shutdowns with other aspects of the separation of powers. Articles I and II of the Constitution establish numerous contexts in which the Executive and Legislative branches compete for power on issues such as impeachments and executive privileges.<sup>11</sup>

Shutdowns belong with other aspects of separation of powers. Such struggles are a high stakes public clash between the President and Congress. Therefore, shutdowns have a place in the combination of constitutional provisions and key statutes establishing what is called the “Fiscal Constitution.” Shutdown law, and its related struggles, derive from the Appropriations Clause and ADA.<sup>12</sup> In fact, it is normal for separation of powers struggles to involve statutes, intermittent occurrences, and disputed aspects. Shutdowns also involve all of these, and therefore, have a definite place in the taxonomy of checks and balances.

Part IV of this Article provides the history and the mechanics of shutdown law. In quick summary, the Constitution’s “No Spending Without Appropriations” Clause (“Appropriations Clause”) derives from English and colonial backgrounds.<sup>13</sup> Then, Congress implemented the Appropriations Clause by enacting the ADA.<sup>14</sup> The idea of the modern government shutdown dates from opinions by Attorney General Benjamin Civiletti (“Civiletti”).<sup>15</sup>

Since then, shutdown law has been refined in the course of a couple of major impasses. First, in 1995, Speaker Newt Gingrich clashed with President Bill Clinton.<sup>16</sup> Second, in 2013, the Republican House fought with President Barack Obama.<sup>17</sup> That meant there had been over seventeen years

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<sup>9</sup> See Katie Rogers & Alan Rappeport, *White House Redefines Who Is Essential to Get Parts of Government Moving Again*, N.Y. TIMES (Jan. 16, 2019), <https://nyti.ms/2RQz0WI>.

<sup>10</sup> The single most useful resource on government shutdowns are documents compiled by the Congressional Research Service. See, e.g., CLINTON T. BRASS ET AL., CONG. RSCH. SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS (2018), <https://fas.org/sgp/crs/misc/RL34680.pdf>.

<sup>11</sup> See generally U.S. CONST. art. I–II.

<sup>12</sup> See *id.* art. I, § 9, cl. 7; 31 U.S.C. § 1341; see also BRASS ET AL., *supra* note 10, at 4–5.

<sup>13</sup> Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1353–54 (1988).

<sup>14</sup> *Id.* at 1374.

<sup>15</sup> See generally Applicability of the Antideficiency Act Upon a Lapse in an Agency’s Appropriations, 43 Op. Att’y Gen. 224 (1980); Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Att’y Gen. 293 (1981). The 1981 opinion was described thusly: “The 1981 [Attorney General Opinion] answered [the] questions [concerning temporary lapses in appropriations] and became the operational guide for agencies faced with a lapse in appropriations. In form and reasoning the 1981 [Attorney General Opinion] resembles a judicial opinion . . . .” Alan L. Feld, *Shutting Down the Government*, 69 B.U. L. REV. 971, 973 (1989).

<sup>16</sup> Q&A: *Everything You Should Know About Government Shutdowns*, *supra* note 1.

<sup>17</sup> *Id.*

between major funding gaps.<sup>18</sup> Up to this point, it might have been possible to dismiss shutdowns as rare and minor confusions. However, all this prepared the way for the dramatic 2019 shutdown (“the 2019 shutdown”).

Part V of this Article focuses on the 2019 shutdown. This Article discusses how the Trump Administration’s efforts were illegal. It also explores the key distinction between essential and non-essential federal workers. This distinction shapes the shutdown even though, after a shutdown, Congress retroactively pays both groups of employees.<sup>19</sup> The 2019 shutdown was characterized by the Trump Administration’s dramatic efforts to make the shutdown more palatable to the public by keeping many federal workers on the job, despite not being able to pay them. Therefore, Part V looks at particular efforts taken by the Trump Administration that were not for the sake of legality but for the purpose of propitiating President Trump’s supporters.

Finally, Part VI looks at proposed solutions. The complete solution—an automatic continuing resolution—has never won much acceptance and will never overcome congressional antipathy to the supplanting of its appropriation process.<sup>20</sup> Other measures could ameliorate the sharpest immediate pain of a shutdown, namely, bettering the condition of the unpaid federal employees who are helpless pawns during shutdowns.

### III. WHY SHUTDOWNS COUNT

It could be asked whether shutdowns really matter in the world of separation of powers. Yes, they are indubitably high stakes clashes between the President and Congress, loud, and involve a lot of money. However, so are fights over overriding presidential vetoes or defense spending. But these either have no diverse legal issues or are just political issues and are thus legally insubstantial. Maybe shutdowns are not substantial enough to warrant legal attention. So why study shutdowns?

In answering this question, the place to start is that shutdowns are a high stakes public clash between the President and Congress. They catch the whole nation’s attention.<sup>21</sup> They strike agencies and programs with eventual operations in the hundreds of billions of dollars.<sup>22</sup> Additionally, they involve a range of legal issues. Notably, some agencies and programs continue to operate, with asserted legality, as “essential” programs, while some just

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<sup>18</sup> BRASS ET AL., *supra* note 10, at 3.

<sup>19</sup> See OFF. OF PERS. MGMT., *supra* note 2, at 6.

<sup>20</sup> A continuing resolution is legislation that allows agencies to continue operating until regular appropriations can be enacted. *Continuing Resolution/Continuing Appropriations*, U.S. SENATE, [https://www.senate.gov/reference/glossary\\_term/continuing\\_resolution.htm](https://www.senate.gov/reference/glossary_term/continuing_resolution.htm) (last visited Nov. 7, 2020).

<sup>21</sup> BRASS ET AL., *supra* note 10, at 26–29.

<sup>22</sup> *Id.* at 26–35.

shutdown.<sup>23</sup> And President Trump assumed great power over which ones continue to operate.

The fact that shutdowns do not involve purely constitutional considerations does not have significance upon close examination. Shutdowns do bring into play more than the bare and raw constitutional provision of the Appropriations Clause. Indeed, shutdowns derive both from the Appropriations Clause and the statutory language and import of the ADA.<sup>24</sup>

The whole of the Fiscal Constitution derives from this kind of mix of the Appropriations Clause and implementing statutes.<sup>25</sup> In the past, there have been struggles over impoundments—presidential claims of power not to spend appropriations—but this too draws on the Fiscal Constitution, statutory implementation-like appropriation acts, and, once enacted, the Impoundment Control Act.<sup>26</sup> There have also been struggles over appropriation riders and war powers.<sup>27</sup>

Shutdowns do not become legally insubstantial simply because they do not show up much in judicial decisions or because they occur at unpredictable intervals.<sup>28</sup> Whatever the view of law students, professors, and lawyers, they all recognize that judicial decisions only show a part of legal issues. Particularly in the area of separation of powers between Congress and the President, a great deal of the law shows up in non-judicial sources.<sup>29</sup>

For example, war powers show up far more in presidential actions, and congressional reactions, than in judicial decisions. Many questions have been raised about, for example, whether the war with the Islamic State in Iraq

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<sup>23</sup> Deborah Barfield Barry & Michael Collins, *Shutdown Puts Some Programs on Hold, but Most Government Agencies Continue Running*, USA TODAY (Dec. 27, 2018, 3:16 PM), <https://www.usatoday.com/story/news/politics/2018/12/27/shutdown-does-not-shutter-all-government-agencies-donald-trump-congress/2422203002/>.

<sup>24</sup> See U.S. CONST. art. I, § 9, cl. 7; 31 U.S.C. § 1341–42; see also BRASS ET AL., *supra* note 10, at 4–5.

<sup>25</sup> See Charles Tiefer, “Budgetized” Health Entitlements and the Fiscal Constitution in Congress’s 1995–1996 Budget Battle, 33 HARV. J. ON LEGIS. 411, 415–16 (1996).

<sup>26</sup> SEAN M. STIFF, CONG. RSCH. SERV., R46417, CONGRESS’S POWER OVER APPROPRIATIONS: CONSTITUTIONAL AND STATUTORY PROVISIONS 46 (2020), <https://crsreports.congress.gov/product/pdf/R/R46417>; see also CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974, Pub. L. No. 93-344 (1974).

<sup>27</sup> Charles Tiefer, *Can Appropriation Riders Speed Our Exit From Iraq?*, 42 STAN. J. INT’L L. 291, 292–93 (2006).

<sup>28</sup> A recent, and notable, case involving shutdown related litigation was *Martin v. United States*. See generally 117 Fed. Cl. 611 (2014). In this case, the plaintiffs were government workers who were required to work during a shutdown, but they were not paid their regular or overtime wages on their regularly scheduled pay day. *Id.* at 613. The plaintiffs filed suit under the Fair Labor Standards Act, and the court granted summary judgment to the plaintiffs, finding that, in this particular instance, the shutdown and lack of regular pay violated the Fair Labor Standards Act. *Martin v. United States*, 130 Fed. Cl. 578, 584 (2017).

<sup>29</sup> See, e.g., BRASS ET AL., *supra* note 10; STIFF, *supra* note 26; MATTHEW E. GLASSMAN, CONG. RSCH. SERV., R44334, SEPARATION OF POWERS: AN OVERVIEW (2016), <https://fas.org/sgp/crs/misc/R44334.pdf>.

and Syria properly derived from congressional authorizations.<sup>30</sup> Few expect this to be resolved by the courts.<sup>31</sup>

As for unpredictable intervals, presidential impeachments certainly have not shown up on judicial schedules more frequently, or less predictably, than government shutdowns.<sup>32</sup> While the courts get tapped on peripheral questions, namely questions about obtaining witnesses and documents, they do not get to the heart of what is an impeachable offense.<sup>33</sup>

For the 2019 shutdown, the meaningful standard depends on whether there was a major controversy between Congress and the President, of a recurring type, involving real legal issues.

#### IV. THE EVOLUTION OF SHUTDOWN LAW

##### A. *The Constitution and the ADA*

##### 1. The Appropriations Clause Generally

The Appropriations Clause states: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”<sup>34</sup> Although the text, by itself, does not dictate in detail about shutdowns, it has some important foundations for the eventual evolution of government shutdown. First, it is stronger and phrased in a definitive way when compared to other Article I clauses. It does not just speak like the Commerce Clause and suggest Congress may—or may not—enact laws to regulate commerce.<sup>35</sup> Rather, it operates potently and universally. Congress does not have to enact laws of any particular kind to activate the Appropriations Clause. Instead, it operates to bar spending unless and until Congress promulgates such appropriations.<sup>36</sup> And the Clause operates directly on the Treasury Department, and not just in some general way on vague potential subjects of legislation.<sup>37</sup> The Clause is the cornerstone of the Fiscal Constitution.<sup>38</sup>

Second, the key word “appropriations” comes with an established meaning. Appropriations do not just vaguely say “go spend.” They have an

<sup>30</sup> Charles Tiefer & Kathleen Clark, *Congressional and Presidential War Powers as a Dialogue: Analysis of the Syrian and Isis Conflicts*, 49 CORNELL INT’L L.J. 683, 684–86 (2016).

<sup>31</sup> *Id.* at 699.

<sup>32</sup> See generally Charles Tiefer, *The Senate Trial of President Clinton*, 28 HOFSTRA L. REV. 407 (1999); Charles Tiefer, *The Controversial Transition Between Investigating the President and Impeaching Him*, 14 ST. JOHN’S J. LEGAL COMMENT 111 (1999); Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. L. SCHOOL ROUNDTABLE 143 (1998).

<sup>33</sup> See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993); JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., R46013, *IMPEACHMENT AND THE CONSTITUTION* 53 (2019), <https://crsreports.congress.gov/product/pdf/R/R46013>.

<sup>34</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>35</sup> Compare *id.* with *id.* art. I, § 8, cl. 3.

<sup>36</sup> U.S. CONST. art. I, § 9, cl. 7; Stith, *supra* note 13, at 1345.

<sup>37</sup> Stith, *supra* note 13, at 1345.

<sup>38</sup> See generally *id.*; Dam, *supra* note 5.

object, a purpose, and importantly for this Article, a duration. As explained by Alexander Hamilton: “no money can be expended, but for an *object*, to an *extent*, and *out of a fund*, which the laws have prescribed.”<sup>39</sup> In short, when appropriations expire, the money stops, and Congress may well arrange that the pay for employees stops. When the Appropriations Clause speaks of “Appropriations made by Law,” it means appropriations that do not remain available after their duration expires.<sup>40</sup> With exceptions, appropriations last one year.<sup>41</sup> Hence, the spending must stop when that year ends, barring the addition of any congressional extensions, like a month-long continuing resolution. After that, the Appropriations Clause is at least open to the possibility that, in some way, executive operations that draw upon expiring appropriations, shall shutdown when the duration runs out.

## 2. English Background Behind the Appropriations Clause

As previously stated, the formulation of the Appropriations Clause draws on English and colonial precedents. In both places, the English Crown or its colonial governors wanted money for unpopular causes, like unpopular wars.<sup>42</sup> Parliament and the colonial legislatures reacted by imposing a requirement that the legislature had to agree by “appropriations” for such spending to occur.<sup>43</sup> As one law review article sums up this evolution:

Accordingly, from the tumultuous seventeenth-century Civil Wars to the Glorious Revolution of 1688 and the development of the fiscal-military state in the eighteenth century, the English Crown's dependence on parliamentary appropriations provided a central mechanism for degrading royal authority and enforcing legal constraints on executive power. In the colonies, likewise, local legislative control over taxes and appropriations provided an important means of restraining otherwise unaccountable royal governors. Indeed, royal efforts to cut governors loose from local purse strings provided one important impetus for the Revolution.<sup>44</sup>

This is still quite relevant to today. In 2019, President Trump had a goal as to appropriations that was not so different from the goal of the Crown in England and colonial governors. He had a project—a wall at the Mexican border—affecting our relations with a foreign country, which he had proposed

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<sup>39</sup> Explanation (Nov. 11, 1795), *reprinted in* 8 THE WORKS OF ALEXANDER HAMILTON 122, 128 (Henry Cabot Lodge, ed. 1904).

<sup>40</sup> Zachary S. Price, *Funding Restrictions and Separations of Powers*, 71 VAND. L. REV. 357, 366 (2018).

<sup>41</sup> *Id.* at 367.

<sup>42</sup> *Id.* at 366–67.

<sup>43</sup> *See id.*

<sup>44</sup> *Id.* at 367.



and vigorously campaigned for, but which remained unpopular.<sup>45</sup> Congress refused money for the wall.<sup>46</sup> So he vetoed the appropriation bill for a significant part of the government.<sup>47</sup> President Trump was like the English Crown and colonial governors because he wanted a project and the legislature refused appropriations for it. Unfortunately for President Trump, the Appropriations Clause says the legislature holds the trump card in this situation, and President Trump was fighting to overcome this.

### 3. Congress Enacts the ADA

Congress implemented the Appropriations Clause by enacting the ADA.<sup>48</sup> The ADA was not implemented from the outset in terms of shutting down agencies during appropriation lapses.<sup>49</sup> As one law review article explains why Congress enacted it:

The Antideficiency Act is the main source of law that delineates Congress's constitutional power over the spending of money. Section 1341 of the Act states that "[a]n officer or employee of the United States Government. . . may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation" by Congress. The Antideficiency Act also states that Contracting Officers cannot create contractual obligations that exceed the amount of funds that Congress has approved. In the 1800s, the executive branch commonly created contracts without obtaining prior congressional approval for the use of funds from the Treasury. Because the government was obligated to pay for the services it received under those contracts, Congress was later forced to appropriate money to cover the costs of those contracts over which it had had no input or say in creating. The executive branch had therefore found an effective way to get around Congress's constitutional power over appropriations, and agencies were able to force Congress to spend money on projects for which it had not

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<sup>45</sup> Janell Fetterolf, *Border Wall is Trump's Least Popular Policy Internationally*, PEW RSCH. CTR. (July 28, 2017), <https://www.pewresearch.org/fact-tank/2017/07/28/border-wall-is-trumps-least-popular-policy-internationally/>; Gary Langer, *64% Oppose Trump's Move to Build a Wall; On Asylum, Just 30% Support Stricter Rules*, ABC NEWS (Apr. 30, 2019, 7:00 PM), <https://abcnews.go.com/Politics/64-oppose-trumps-move-build-wall-asylum-30/story?id=62702683>.

<sup>46</sup> Susan Cornwell & Richard Cowan, *House Passes Bill Rejecting Trump's Border Wall Emergency*, REUTERS (February 26, 2019, 1:08 AM), <https://www.reuters.com/article/us-usa-trump-congress/house-passes-bill-rejecting-trumps-border-wall-emergency-idUSKCN1QF0FX>.

<sup>47</sup> Jacob Pramuk, *In His First Veto, Trump Rejects Bill That Would Block His Border Emergency*, CNBC (Mar. 15, 2019, 6:21PM), <https://www.cnbc.com/2019/03/15/trump-vetoes-bill-that-would-block-border-wall-national-emergency.html>.

<sup>48</sup> 31 U.S.C. § 1341.

<sup>49</sup> U.S. GEN. ACCT. OFF., PAD-81-31, FUNDING GAPS JEOPARDIZE FEDERAL GOVERNMENT OPERATIONS 37 (1981), <https://www.gao.gov/assets/140/132616.pdf>.

expressly granted legislative approval.<sup>50</sup>

Therefore, ADA laid the foundation for shutdowns to occur, and today the ADA is the “charter” of shutdowns.

### *B. The Civiletti Opinions*

The ADA was not read until the 1970s as applying to lapses between one appropriation and the next. In the early stages of the ADA, and as the General Accounting Office (“GAO”) explained: “most [f]ederal managers continued to operate during periods of funding gaps while minimizing all nonessential operations and obligations, believing that Congress did not intend that agencies close down while the appropriations measures were being passed.”<sup>51</sup> Therefore, lapses did not cause a full-scale shutdown, but what might be called a slowdown.<sup>52</sup> Because agencies minimized non-essential operations, Congress and the President were motivated to resolve appropriations disputes to get agencies fully active.<sup>53</sup> Still, the scale of these slowdowns is not clear because the GAO did not cite anything regarding the Office of Management and Budget’s (“OMB”) government planning, nor did it cite any comprehensive Attorney General opinions that pre-date the Civiletti opinions.<sup>54</sup>

Shutdowns, in their modern understanding, started with opinions by Attorney General Civiletti in 1980 and 1981 (“Civiletti opinions”). In 1980, Congress had deliberately not voted for an appropriation for the Federal Trade Commission (“FTC”) because of how controversial some of the FTC’s initiatives were, and hence, how controversial some of the appropriation riders were that took away the authority of the FTC.<sup>55</sup> The 1980 Civiletti opinion (“first Civiletti opinion”) was so strict about shutting the FTC down that a backlash ensued when there was a lapse in government-wide appropriations, leading to a moderated opinion in 1981 (“second Civiletti opinion”).<sup>56</sup>

The Civiletti opinions may have occurred for a specific reason. Increasing polarization in Congress led to more offerings of controversial

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<sup>50</sup> Darnell Curren, *Government Contracting in the Shadow of the October 2013 Federal Government Shutdown*, 44 PUB. CONT. L.J. 349, 352 (2015).

<sup>51</sup> U.S. GEN. ACCT. OFF, *supra* note 49, at i. The GAO was originally called the General Accounting Office but was subsequently renamed the General Accountability Office in 2004. *See* GAO Human Capital Reform Act of 2004 Pub. L. 108–271, 118 Stat. 811 (2004). Throughout this Article, GAO refers to the organization under both names.

<sup>52</sup> *See* U.S. GEN. ACCT. OFF, *supra* note 49, at 2.

<sup>53</sup> *SEE ID.*

<sup>54</sup> *See generally id.*

<sup>55</sup> *See* Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Att’y Gen. 293, 294–95 (1981).

<sup>56</sup> *See generally* Applicability of the Antideficiency Act Upon a Lapse in an Agency’s Appropriations, 43 Op. Att’y Gen. 224 (1980); Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Att’y Gen. 293 (1981).

policy provisions on appropriations, called “riders.”<sup>57</sup> As a result, appropriation bills might not become enacted not simply because of disputes over how much to spend, but now also over partisan disputes over policy riders. FTC policies elicited a dispute over its funding, leading to the first Civiletti opinion.<sup>58</sup>

Besides generally prescribing shutdowns for appropriation lapses, the main point of the second Civiletti opinion was to describe the exception of allowing some agencies to continue to function.<sup>59</sup> First, Civiletti naturally reasoned that since the ADA allowed spending “authorized by law,” it covered initiatives based on the President’s own constitutional or other authority.<sup>60</sup> But Civiletti ducked on this, stating that “[u]nfortunately, no catalogue is possible of those exercises of presidential power that may properly obligate funds in advance of appropriations.”<sup>61</sup>

Second, and more importantly, the ADA provided that during appropriations lapses, personnel could not be employed “except in cases of emergency involving the safety of human life or the protection of property.”<sup>62</sup> This is the key phrase governing shutdowns. Civiletti noted that this language represented some relaxation compared to the language in amendment proposals from the 1950s.<sup>63</sup> To reach this conclusion, namely that examples of arguable appropriation lapse examples would be widespread, Civiletti bestowed interpretive power on the OMB, stating: “[t]his interpretation is buttressed by the history of interpretation by the Bureau of the Budget and its successor, the Office of Management and Budget . . . .”<sup>64</sup> Civiletti also cited, with approval, some helpful examples of what the OMB had approved as within these exceptions:

Activities for which deficiency apportionments have been granted on this basis include Federal Bureau of Investigation criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§ 601-695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents

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<sup>57</sup> U.S. GEN. ACCT. OFF, *supra* note 49, at 10–11.

<sup>58</sup> Ian Shapira, *Meet the Democrat Who Paved the Way for Government Shutdowns. Yes, a Democrat*, WASH. POST (Jan. 17, 2019, 7:00 AM), <https://www.washingtonpost.com/history/2019/01/17/meet-democrat-who-paved-way-government-shutdowns-yes-democrat/>.

<sup>59</sup> *See generally* Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Att’y Gen. 293 (1981).

<sup>60</sup> *See id.* at 300–01.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 301 (quoting 31 U.S.C. § 665(b) (1950)).

<sup>63</sup> *See id.* at 301–02.

<sup>64</sup> *Id.* at 303.

by the National Transportation Safety Board.<sup>65</sup>

These examples became a kind of established precedent and guided interpretation of shutdown law.

### C. Modern Shutdowns

The Civiletti opinions launched the modern era of shutdowns. After the Civiletti opinions, there were several very short, temporary appropriations lapses.<sup>66</sup> As Attorney General Walter Dellinger (“Dellinger”) said in a 1995 opinion: “[s]ince the issuance of the extensive 1981 Opinion, the prospect of a general appropriations lapse has arisen frequently. In 1981, 1982, 1983, 1984, 1986, 1987, and 1990, lapses of funding ranging from several hours to three days actually did occur.”<sup>67</sup> In addition to these temporary lapses, there were also some threatened lapses where the Executive or Congress came to the brink of, but did not actually trigger, a funding lapse.<sup>68</sup>

Additionally, the OMB and its agencies regularly updated their plans for what to do in a shutdown.<sup>69</sup> These temporary and threatened lapses and the OMB’s planning activities did not radically alter the understanding of what happens in a shutdown. On the contrary, it reinforced the sense that the nature of a shutdown stayed stable and could be trusted by all sides to provide a roadmap to apply to whatever happened in the world of appropriation lapses.

#### 1. Congressional Response to the Civiletti Opinions

In 1990, Congress responded to the second Civiletti opinion by amending the ADA. It did so by enacting 31 U.S.C. § 1342. Notably, Section 1342 defined emergency operations as those “involving the safety of human life or the protection of property” and did not include “ongoing, regular functions of government, the suspension of which would not imminently threaten the safety of human life or the protection of property.”<sup>70</sup>

The legislative history drove home the following: “[t]he conference report also makes conforming changes . . . to make clear that . . . ongoing, regular operations of the Government cannot be sustained in the absence of appropriations . . . .”<sup>71</sup> The legislative history also added that:

These changes guard against what the conferees believe might be an overly broad interpretation of an opinion of the

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<sup>65</sup> *Id.* at 304.

<sup>66</sup> Government Operations in the Event of a Lapse in Appropriations, 1995 O.L.C. LEXIS 57, at \*3 (Aug. 16, 1995).

<sup>67</sup> *Id.* at \*3–4 (emphasis omitted).

<sup>68</sup> *See id.* at \*4.

<sup>69</sup> *See* Applicability of the Antideficiency Act Upon a Lapse in an Agency’s Appropriations, 43 Op. Att’y Gen. 224, 227 (1980).

<sup>70</sup> 31 U.S.C. § 1342.

<sup>71</sup> H.R. REP. NO. 101-964, at 1170 (1990) (Conf. Rep.), as reprinted in 1990 U.S.C.C.A.N. 2374, 2875.

Attorney General issued on January 16, 1981, regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress.<sup>72</sup>

In enacting Section 1342, the key new point was the contrast of emergency functions that would justify essential employees working with “ongoing, regular functions of government.”<sup>73</sup> Congress reinforced the strength of this point by indicating that threats to safety or property had to be imminent.<sup>74</sup> This further contrasts what the Trump Administration did in 2019.<sup>75</sup>

Section 1342, its legislative history, and the reading of these by Dellinger in his 1995 opinion all narrowed what the Executive Branch could do to keep numerous agencies open during a shutdown just to help out, rather than for imminent emergencies.<sup>76</sup> And the legislative history, in Dellinger’s reading, identified bluntly the Fiscal Constitution’s involvement—that the action would “affirm that the constitutional power of the purse resides with Congress.”<sup>77</sup>

## 2. Early Shutdowns Under the Modern View of Shutdowns: 1995 and 2013

The first of the three major shutdowns after the Civiletti opinions occurred in 1995 (“the 1995 shutdown”). This shutdown derived from the election of a new Republican House and Senate, with an ambitious legislative agenda.<sup>78</sup> The Republican House, with Newt Gingrich as Speaker, clashed with the Democratic President, Bill Clinton.<sup>79</sup> Discussed below is the concept that the public “blames” on side, either Congress or the President, for a shutdown.<sup>80</sup> In this instance, the public blamed the Republican House.<sup>81</sup> President Clinton implemented the shutdown by stopping a number of agency functions, typified by the closure of public parks.<sup>82</sup> In the end, the public dislike of the shutdown, and its blaming Gingrich and Republicans, forced

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<sup>72</sup> *Id.*

<sup>73</sup> 31 U.S.C. § 1342.

<sup>74</sup> *Id.*

<sup>75</sup> See *infra* Part V.

<sup>76</sup> See, e.g., 31 U.S.C. § 1342; H.R. REP. NO. 101-964; Government Operations in the Event of a Lapse in Appropriations, 1995 O.L.C. LEXIS 57, at \*3 (Aug. 16, 1995).

<sup>77</sup> H.R. REP. NO. 101-964, at 1170.

<sup>78</sup> See Margaret Sanregret Shockley, “Canonizing” Under Newt Gingrich: The Speaker’s Consolidation of Power in the House of Representatives, 9 STAN. L. & POL’Y REV. 165, 170–73 (1998).

<sup>79</sup> See *id.* at 173.

<sup>80</sup> See *infra* Part V.C.

<sup>81</sup> Sanregret Shockley, *supra* note 78, at 173.

<sup>82</sup> See Bryan Craig, *The 1995–96 Government Shutdown*, UVA MILLER CTR., <https://millercenter.org/1995-96-government-shutdown> (last visited Nov. 20, 2020).

Congress to enact appropriations and end the shutdown.<sup>83</sup>

The second major shutdown occurred in 2013 (“the 2013 shutdown”).<sup>84</sup> This shutdown derived from the election of a Republican House, who wanted to repeal the Affordable Care Act.<sup>85</sup> President Barack Obama opposed the repeal effort.<sup>86</sup> Again, the public overwhelmingly blamed the House.<sup>87</sup> In a rather unpopular move, President Obama implemented the shutdown by stopping a number of agency functions, exemplified by shutting down the start of new clinical trials by the Department of Health and Human Services.<sup>88</sup> In the end, the intense public dislike of the shutdown, and its blame of the House, forced the House to enact appropriations and end the shutdown.<sup>89</sup>

After the 2013 shutdown, it might still have been conceivable to look at shutdowns as though they were rare and *sui generis* events. It could be asserted that the 1995 shutdown had been some kind of strange novelty. Almost two decades passed between the 1995 shutdown and the 2013 shutdown, and so it could have still been imagined that large-scale shutdowns were infrequent, albeit major, like declared wars or Presidential impeachments. And, it might have been thought that the lesson of both shutdowns—namely, that whoever got blamed became the loser—might have inhibited any players from undertaking another subsequent shutdown. However, shutdown law received a fresh and powerful boost from the shutdown in 2019. This was the second shutdown in a decade. Shutdowns were no longer a novelty. The legal questions became prominent, and it seemed now quite valid that the law of shutdowns merited study.

#### D. Mechanics

##### 1. Employee Labels

In the wake of the Civiletti opinions and modern shutdowns, the following discussion will describe the basic mechanics of a shutdown. During a shutdown, federal employees fall into three categories. First, a limited

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<sup>83</sup> See David Scott Louk & David Gamage, *Preventing Government Shutdowns: Designing Default Rules for Budgets*, 86 U. COLO. L. REV. 181, 220 (2015); Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENV'T. L. REV. 457, 508–09 (1997).

<sup>84</sup> See Jed Handelsman Shugerman, *Hardball vs. Beanball: Identifying Fundamentally Antidemocratic Tactics*, 119 COLUM. L. REV. ONLINE 85, 96–97 (2019) (discussing the major government shutdowns in 1995, 2013, and 2019).

<sup>85</sup> See *id.* at 96.

<sup>86</sup> See *id.*

<sup>87</sup> See Louk & Gamage, *supra* note 83, at 223.

<sup>88</sup> See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-86, THREE DEPARTMENTS REPORTED VARYING DEGREES OF IMPACTS ON OPERATIONS, GRANTS, AND CONTRACTS 15 (2014), <https://www.gao.gov/assets/670/666526.pdf>.

<sup>89</sup> See Louk & Gamage, *supra* note 83, at 223.

number of employees continued to work and get paid.<sup>90</sup> These are employees whose employment is “authorized by law.”<sup>91</sup> As provided in 31 U.S.C. § 1342: “An officer or employee of the United States Government or the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that *authorized by law* except for emergencies involving the safety of human life or the protection of property.”<sup>92</sup> That “authorized by law” exception has a limited role. Generally, it applies to “entitlements,” which are funds like Social Security which operate without requiring appropriations.<sup>93</sup> Agencies, like Social Security, that send out entitlement checks are authorized by law to perform their functions.<sup>94</sup> While Social Security and similar entitlements are large in scale, they are a small fraction of all programs, and the vast majority of federal government employees do not work on such entitlements.<sup>95</sup>

Next, there are two categories of employees in appropriated (non-entitlement) programs. The first type of employee in this category are the employees whose work during “emergencies involving the safety of human life or the protection of property.”<sup>96</sup> The classic example, as cited in the second Civiletti opinion, is the federal firefighter.<sup>97</sup> Shutdown parlance labels such employees as “excepted,” meaning they go to work, but do not get paid during the shutdown.<sup>98</sup>

It is noteworthy that precisely since “excepted” employees perform vital services, and because they do not want to work without pay, they have some power to force an end to the shutdown. For example, during the very last days of the 2019 shutdown, a number of air traffic controllers stopped showing up for work and thus paralyzed air transportation.<sup>99</sup> The shutdown was probably headed for an end, even without their “sick-out,” but they delivered the *coup de grace*.<sup>100</sup>

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<sup>90</sup> See BRASS ET AL., *supra* note 10, at 4–7; OFF. OF PERS. MGMT., *supra* note 2, at 1–2.

<sup>91</sup> BRASS ET AL., *supra* note 10, at 5 (quoting 31 U.S.C. § 1341).

<sup>92</sup> 31 U.S.C. § 1342.

<sup>93</sup> BRASS ET AL., *supra* note 10, at 35.

<sup>94</sup> *Id.*

<sup>95</sup> See *id.* at 3.

<sup>96</sup> 31 U.S.C. § 1342.

<sup>97</sup> Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Att’y Gen. 293, 306 (1981).

<sup>98</sup> See OFF. OF PERS. MGMT., *supra* note 2, at 1, 6.

<sup>99</sup> Ellie Kaufman & Rene Marsh, *The Government Shutdown Ended After Only 10 Air Traffic Controllers Stayed Home*, CNN (Feb. 6, 2019, 5:56 PM), <https://www.cnn.com/2019/02/06/politics/ten-air-traffic-controllers-shutdown/index.html>; Joseph A. McCartin, *How Air Traffic Controllers Helped End the Shutdown—and Changed History*, WASH. POST (Jan. 26, 2019, 1:21 PM), <https://www.washingtonpost.com/outlook/2019/01/26/how-air-traffic-controllers-helped-end-shutdown-changed-history/>.

<sup>100</sup> Other airplane incidents show the striking effect of shutdowns, during and afterward. Two aviation disasters in 2018 and 2019 consisted of crashes of Boeing 737 Max planes. *Timeline: Boeing 737 Max Jetliner Crashes and Aftermath*, CHI. TRIB. (Oct. 14, 2019, 7:52 AM), <https://www.chicagotribune.com/business/ct-biz-viz-boeing-737-max-crash-timeline-04022019-story.html>. After the first crash, Boeing planned on a software fix by January 2019. Natalie Kitroeff et al., *Boeing Promised Pilots a 737 Software Fix Last Year, but They’re Still Waiting*, N.Y. TIMES (Mar. 14, 2019), <https://nyti.ms/2CkD2gV>. The 2019

The second category of employees are those not serving imminent safety or property protection.<sup>101</sup> Most employees fall in this category. They are “furloughed,” meaning they are sent home, do not work, and are not paid. 102 Furloughed employees traditionally receive retroactive pay at the end of a shutdown, although technically the threat remains that they do not have a restitutionary claim to be paid, and hence could be denied retroactive pay.<sup>103</sup> Undoubtedly, the combination of no pay, no work, and no restitution claim to pay, takes a harsh emotional toll on these employees.<sup>104</sup>

## 2. Management Structure

Another aspect of the practical mechanics for shutdowns consists of the management structure erected by the OMB. Some decades back, the OMB began giving general guidance to executive agencies in terms of how to plan for shutdowns, as well as guidance for these agencies to use during shutdowns.<sup>105</sup> Eventually, the OMB’s approach to shutdown guidance became so systematic that it now requires agencies to submit regular updates of their shutdown plans for the OMB’s review.<sup>106</sup>

For those analyzing the nitty-gritty classifications of employees at any and all of the agencies affected by a shutdown, these plans provide transparency.<sup>107</sup> For example, shutdown analyses by the Congressional Research Service draw heavily on the OMB plans.<sup>108</sup> Apart from OMB’s analytical assistance, the combination of the OMB planning beforehand and guidance in real time makes it possible to understand how the Trump

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shutdown intervened. The press reported that the second crash was “because Boeing’s disagreements with the Federal Aviation Administration kept delaying the repair—and its discussions with the FAA *stopped altogether during the five-week government shutdown* . . . .” Kathryn Krawczyk, *How the Government Shutdown Reportedly Stopped Boeing from Fixing Its 737 MAX Planes*, THE WEEK (Mar. 13, 2019), <https://theweek.com/speedreads/828982/how-government-shutdown-reportedly-stopped-boeing-from-fixing-737-max-planes> (emphasis added).

<sup>101</sup> See U.S. OFF. OF PERS. MGMT., *supra* note 2, at 2.

<sup>102</sup> See *id.* at 2–6.

<sup>103</sup> BRASS ET AL., *supra* note 10, at 14. But see Niv Elis & Juliegrace Brufke, *The 7 Republicans Who Voted Against Back Pay for Furloughed Workers*, THE HILL (Jan. 11, 2019, 1:36 PM), <https://thehill.com/homenews/house/424942-the-7-republicans-who-voted-against-back-pay-for-furloughed-government-workers>.

<sup>104</sup> See Lisa E. Baranik et al., *What Happens When Employees Are Furloughed? A Resource Loss Perspective*, 46 J. OF CAREER DEV. 381, 389 (2019).

<sup>105</sup> See generally OFF. OF MGMT & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB BULL. No. 80-14, SHUTDOWN OF AGENCY OPERATIONS UPON FAILURE BY THE CONGRESS TO ENACT APPROPRIATIONS (1980), [https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment\\_a-5.pdf](https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-5.pdf).

<sup>106</sup> JARED C. NAGEL & JUSTIN MURRAY, CONG. RSCH. SERV., R41759, PAST GOVERNMENT SHUTDOWNS: KEY RESOURCES 7 (2019) (citing an OMB circular that required for plans “to be submitted to OMB at a minimum every two years starting August 1, 2015”), <https://fas.org/sgp/crs/misc/R41759.pdf>.

<sup>107</sup> To provide for such transparency, many agencies have made their shutdown contingency plans available for public review. See *Agency Contingency Plans*, WHITE HOUSE, <https://www.whitehouse.gov/omb/information-for-agencies/agency-contingency-plans/> (last visited Nov. 3, 2020).

<sup>108</sup> See JUSTIN MURRAY, CONG. RSCH. SERV., R43250, CRS RESOURCES ON THE FY2014 FUNDING GAP, SHUTDOWN, AND STATUS OF APPROPRIATIONS 2 (2014), <https://fas.org/sgp/crs/misc/R43250.pdf> (listing analyses and reports from the Congressional Research Service, many of which source their data from OMB plans).



Administration could implement, across the very broad span of agencies, a new approach to the ADA.

## V: THE WRONGFUL EXECUTIVE STANCE OF OPENING AGENCIES WHEN IT LIKES

### A. 2019 Shutdown Background

Part V of this Article focuses on the 2019 shutdown. This time, a Democratic House faced off with Republican President Trump.<sup>109</sup> The legislative issue was President Trump's demand for a border wall on a grand scale, which, according to President Trump, was the way to keep out migrants from Mexico.<sup>110</sup> Before the shutdown, President Trump took the extraordinary step of expressly announcing he would take the blame for the shutdown, contrary to the virtually unanimous effort of leaders of the past to cast the blame on their opponents.<sup>111</sup> Not surprisingly, the public largely blamed President Trump for the 2019 shutdown.<sup>112</sup> As in previous major shutdowns, the attempts of the initially blamed party to get the public to change its mind about whom to blame came to naught.<sup>113</sup>

Faced with the public blaming them, the Trump Administration was left with seeking to reduce the public's sense of the impact of the shutdown. It had one advantage: the shutdown was partial in that it only applied to seven appropriation bills.<sup>114</sup> The biggest departments, Health and Human Services and Defense, had appropriations and, thus, were not affected by the 2019 shutdown, so the public would not be antagonized about them.<sup>115</sup> Nevertheless, "about 25 percent of the government [was] without funding, including the U.S. Department of Agriculture, the Justice Department and the

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<sup>109</sup> Julie Hirschfeld Davis & Michael Tackett, *Trump and Democrats Dig in After Talks to Reopen Government Go Nowhere*, N.Y. TIMES (Jan. 2, 2019), <https://www.nytimes.com/2019/01/02/us/politics/trump-congress-shutdown.html>.

<sup>110</sup> See *id.*; Glenn Kessler, *President Trump's Error-Filled Holiday Tweets on the Border Wall*, WASH. POST (Jan. 2, 2019, 3:00 AM), <https://www.washingtonpost.com/politics/2019/01/02/president-trumps-error-filled-holiday-tweets-border-wall/>.

<sup>111</sup> Compare Davis & Tackett, *supra* note 109 (noting that President Trump would "proudly own the consequences if that mean a shutdown") with Matea Gold et al., *In Shutdown Blame Game, Democrats and Republicans United: It's the Other Side's Fault*, WASH. POST (Oct. 1, 2013), [https://www.washingtonpost.com/politics/in-shutdown-blame-game-democrats-and-republicans-united-its-the-other-sides-fault/2013/09/30/759b136e-29e6-11e3-97a3-ff2758228523\\_story.html](https://www.washingtonpost.com/politics/in-shutdown-blame-game-democrats-and-republicans-united-its-the-other-sides-fault/2013/09/30/759b136e-29e6-11e3-97a3-ff2758228523_story.html) (describing how, during past shutdowns, politicians usually blamed other people for the shutdown).

<sup>112</sup> William Cummings, *Americans Blame Shutdown on Trump Over Democrats by Wide Margin, Poll Finds*, USA TODAY (Jan. 13, 2019, 3:52 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2019/01/13/shutdown-abc-washington-post-poll/2564178002/>.

<sup>113</sup> See Grace Sparks, *Who Gets Blamed for a Government Shutdown?*, CNN (Jan. 11, 2019, 6:02 AM), <https://www.cnn.com/2019/01/11/politics/shutdown-blame-polling/index.html>.

<sup>114</sup> Nicole Ogrysko, *Partial Government Shutdown Begins After Congress, White House Fail to Reach Spending Deal*, FED. NEWS NETWORK (Dec. 21, 2019, 4:51 PM), <https://federalnewsnetwork.com/government-shutdown/2018/12/agencies-make-last-minute-updates-to-shutdown-contingency-plans/>.

<sup>115</sup> *Id.*

Internal Revenue Service.”<sup>116</sup>

### B. President Trump’s Distorting of the ADA

The issue that this Article is focused on is the nature of the change in meaning that the 2019 shutdown, and President Trump’s actions during the shutdown, gave to the ADA. As this Article has explored, the ADA serves as a cornerstone of the Fiscal Constitution.<sup>117</sup> An occasional, minor misinterpretation of the ADA has limited significance. But what happened in 2019 was an overall major twisting of the ADA away from its text and the history of its applications. This changed—away from legality—the meaning espoused for that cornerstone of the Fiscal Constitution.

During the 2019 shutdown, the Trump Administration faced the elaborate evolution of precedents and plans intended to carry out the ADA’s intent. As described above, the ADA’s intent had been to close down and idle—furlough—a large majority of agencies.<sup>118</sup> As for keeping open “essential” agencies, the ADA intended those agencies to be those that the closure of would create an imminent “emergency,” not just a public inconvenience.<sup>119</sup> This key distinction separates essential and non-essential federal workers. Certain examples reveal the Trump Administration’s strategy, and how it deviates from legal precedents. The following discussion will discuss these examples in detail.

#### 1. The IRS Difference

The OMB had cited “several kinds of ‘economic disruption’” due to “suspension of Internal Revenue Service . . . income verification used by financial institutions to help determine credit-worthiness of prospective borrowers . . . .”<sup>120</sup> In other words, during the 2013 shutdown, the OMB had known that stopping mortgage verifications would produce economic disruption, but had also known this was not an “emergency” threat to “safety.”<sup>121</sup> Despite this precedent, during the 2019 shutdown, the OMB

<sup>116</sup> Ayesha Rascoe, *Attempts to Make Shutdown ‘Painless’ May Stretch Limits of Federal Law*, NPR (Jan. 18, 2019, 5:01 AM), <https://www.npr.org/2019/01/18/685829213/attempts-to-make-shutdown-painless-may-stretch-limits-of-federal-law>.

<sup>117</sup> See generally *supra* Parts I–IV.

<sup>118</sup> See *supra* Part IV.D.

<sup>119</sup> Government Operations in the Event of a Lapse in Appropriations, 1995 O.L.C. LEXIS 57, at \*5, 21 (Aug. 16, 1995).

<sup>120</sup> *Id.* at 30 (quoting OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, IMPACTS AND COSTS OF THE OCTOBER 2013 FEDERAL GOVERNMENT SHUTDOWN 2 (2013), <https://obamawhitehouse.archives.gov/sites/default/files/omb/reports/impacts-and-costs-of-october-2013-federal-government-shutdown-report.pdf>).

<sup>121</sup> See *id.*; 31 U.S.C. § 1342; Lisa Rein & Jeff Stein, ‘Could You Make These Guys Essential?’, *Mortgage Industry Gets Shutdown Relief After Appeal to Senior Treasury Officials*, WASH. POST (Jan. 11, 2019, 5:30 PM), [https://www.washingtonpost.com/politics/could-you-make-these-guys-essential-mortgage-industry-gets-shutdown-relief-after-appeal-to-senior-treasury-officials/2019/01/11/9071e9d8-152c-11e9-90a8-136fa44b80ba\\_story.html](https://www.washingtonpost.com/politics/could-you-make-these-guys-essential-mortgage-industry-gets-shutdown-relief-after-appeal-to-senior-treasury-officials/2019/01/11/9071e9d8-152c-11e9-90a8-136fa44b80ba_story.html).

directed the IRS to bring the mortgage verifiers in to work, as covered by the ADA exception for emergencies.<sup>122</sup> The press reported that “[t]he Trump administration . . . direct[ed] federal employees . . . [to] provide documents for mortgage processing . . . .”<sup>123</sup>

Likewise, the OMB cited that, due to the 2013 shutdown, “[a]lmost \$4 billion in tax refunds were delayed.”<sup>124</sup> But traditionally, the IRS does not bring back the IRS employees who handle refunds.<sup>125</sup> Therefore, it cannot be said that the government needs to make prompt refunds in order to keep functioning. So, although the OMB of course knew that delay of refunds burdened taxpayers, it also knew that tax refunds were not an “emergency” threat to “safety.”<sup>126</sup>

Further, the Taxpayer Advocacy Service headlined a memo section which stated: “The IRS Chief Counsel Interpretation of the ADA in 2013 Recognized Only Risks to Public Health and Protection of Government Property,” and this interpretation “did not apply to a taxpayer’s need for a refund . . . .”<sup>127</sup> It is noteworthy here that the existing application of the ADA did not come from some loose cannon down in the depths of the IRS. It came from the Chief Counsel of the IRS, who surely knew and followed the precedents in making such a tough call.

However, during the 2019 shutdown, the press reported that “[t]he IRS . . . call[ed] 46,000 furloughed employees back to work without pay to help process tax refunds for tax filing season . . . .”<sup>128</sup> Apparently the OMB and the IRS rationalized that since taxpayers had an entitlement to tax refunds, this fit the model of Social Security employees working on distributing Social Security payments.<sup>129</sup> Due to President Trump’s large tax cuts for certain people or businesses, it is highly likely that, at the start of 2019, Trump supporters were among the earliest to file tax return, so keeping the IRS functioning during the shutdown served to benefit the President’s

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<sup>122</sup> Rein & Stein, *supra* note 121.

<sup>123</sup> Damian Paletta, *To Keep a Shut Down Government Running, White House Ventures into Uncharted Territory*, WASH. POST (Jan. 10, 2019, 7:56 PM), [https://www.washingtonpost.com/business/economy/to-keep-a-shut-down-government-running-white-house-ventures-into-uncharted-territory/2019/01/10/ff1d5ed4-14e7-11e9-90a8-136fa44b80ba\\_story.html](https://www.washingtonpost.com/business/economy/to-keep-a-shut-down-government-running-white-house-ventures-into-uncharted-territory/2019/01/10/ff1d5ed4-14e7-11e9-90a8-136fa44b80ba_story.html).

<sup>124</sup> Sylvia Mathews Burwell, *Impacts and Costs of the Government Shutdown*, WHITE HOUSE (Nov. 7, 2013, 3:38 PM), <https://obamawhitehouse.archives.gov/blog/2013/11/07/impacts-and-costs-government-shutdown>.

<sup>125</sup> *See id.*

<sup>126</sup> *See* 31 U.S.C. § 1342.

<sup>127</sup> NAT’L TAXPAYER ADVOC., FISCAL YEAR 2015 OBJECTIVES, REPORT TO CONGRESS 81 (2014), <https://taxpayeradvocate.irs.gov/Themes/TAS.theme2/Content/Documents/FY15-Full-Report/Volume-1.pdf>.

<sup>128</sup> Rascoe, *supra* note 116.

<sup>129</sup> *CF. BRASS ET AL.*, *supra* note 10, at 35–36 (explaining that the Social Security Agency continued to employ workers during the shutdown to process entitlements like social security benefits).

supporters.<sup>130</sup>

Unmistakably, the OMB made a complete 180-degree turn on this issue. As explained by one reporter:

One aspect that's in dispute is . . . that the IRS can issue tax refunds during the shutdown. In 2011, OMB directed the IRS not to issue refunds in the event of a funding lapse. This month the IRS cited a permanent appropriation when saying it has long been of the belief that it can distribute refunds, and that OMB has reviewed the law and determined that the agency can pay refunds during the shutdown.<sup>131</sup>

President Trump made a trillion-dollar tax cut a signal feature of his first two years in office.<sup>132</sup> These early refund-seekers were likely the prime beneficiaries of President Trump's tax cut. The Trump Administration would not let the ADA frustrate his constituency. This was met with serious criticism.<sup>133</sup>

## 2. The Interior Department Difference

Similarly, during the 2013 shutdown, the OMB ordered cessation of "several kinds of permitting, reviews, and licensing (e.g., 200 applications for a permit to drill for energy resources) . . . ."<sup>134</sup> It knew that this would be a problem for drilling companies, and if one strained the point one could say the government was losing a property interest: namely, putting off in time the stream of royalties from drilling. The scale of this might be many tens of millions of dollars per month.<sup>135</sup> But the OMB had also known that these types of operations were not an "emergency" threat to "property."<sup>136</sup>

However, during the 2019 shutdown, the press reported that "the Interior Department [was] bringing back furloughed workers to help with planning for an offshore lease sale for oil and gas development in the Gulf of Mexico. The department says it will use leftover funds to support this

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<sup>130</sup> See John Wagner, *Trump Touts Benefits of Tax Cuts for 'the People that Like Me Best'* WASH. POST (Nov. 29, 2017, 6:24 PM), <https://www.washingtonpost.com/news/post-politics/wp/2017/11/29/trump-touts-benefits-of-tax-cuts-for-the-people-that-like-me-best/>.

<sup>131</sup> Naomi Jagoda, *Dems Lash Out at Trump for Recalling Furloughed Workers*, THE HILL (Jan. 19, 2019, 11:01 AM), <https://thehill.com/policy/finance/426123-dems-lash-out-at-trump-for-recalling-furloughed-workers>.

<sup>132</sup> Scott Horsley, *After 2 Years, Trump Tax Cuts Have Failed to Deliver on GOP's Promises*, NPR (Dec. 20, 2019, 11:32 AM), <https://www.npr.org/2019/12/20/789540931/2-years-later-trump-tax-cuts-have-failed-to-deliver-on-gops-promises>; Andy Uhler, *Where Did the \$1.5 Trillion in Trump Tax Cuts Go?*, MARKETPLACE (May 2, 2019), <https://www.marketplace.org/2019/05/29/where-did-trump-tax-cuts-go/>.

<sup>133</sup> Rascoe, *supra* note 116.

<sup>134</sup> BRASS ET AL., *supra* note 10, at 30.

<sup>135</sup> See Alex Park et al., *Triumph of the Drill: How Big Oil Clings to Billions in Government Giveaways*, MOTHER JONES (April 14, 2014), <https://www.motherjones.com/politics/2014/04/oil-subsidies-renewable-energy-tax-breaks/>.

<sup>136</sup> See 31 U.S.C § 1342.

action.”<sup>137</sup> This was met with legal criticism.<sup>138</sup>

Here again, the OMB and the Interior Department applied shutdown law favorably toward President Trump’s corporate constituency. The Trump Administration had taken numerous actions to support the oil industry in general and to support its drilling on public lands in particular.<sup>139</sup> While this step went out of line with shutdown precedents, it stayed in line with Administration support for the industry.<sup>140</sup>

### 3. The National Parks Difference

During the 1995 shutdown, the Clinton Administration famously closed the national parks.<sup>141</sup> The Clinton Administration had to know that park visitors paid fees, but could not imagine that the ADA would allow for park employees to remain on the job, like those processing entitlements like Social Security.<sup>142</sup> To the Clinton Administration, park fees could not constitute the functional equivalent to appropriations in terms of funding “authorized by law.”<sup>143</sup> In contrast, in 2019, “[t]he Trump administration [directed] federal employees . . . [to] open up national parks.”<sup>144</sup> This was met with serious criticism.<sup>145</sup>

#### C. *The Backlash*

Some reports summed up the 2019 shutdown and the actions taken by the OMB and Trump Administration, arriving at conclusions consistent with this Article. For example, as described by one news article: “[t]he rapid and in many cases unprecedented scope of OMB’s directives has prompted criticism from Democrats and some Republicans that the White House is

<sup>137</sup> Rascoe, *supra* note 116.

<sup>138</sup> See generally Sara Divett, *Is Drilling “Essential”?: Oil and Gas Leasing and Permitting in the 2019 Shutdown*, GEO. LAW: GEO. ENV’T L. REV. (Mar. 1, 2019), <https://www.law.georgetown.edu/environmental-law-review/blog/is-drilling-essential-oil-and-gas-leasing-and-permitting-in-the-2019-shutdown/>. “Questions also have been raised about the Interior Department’s decision to process drilling permits to process drilling permits either as an ‘exempted activity’ or by tapping user fees.” Jennifer Dlouhy, *Trump’s Shifting Shutdown Tests Law Dating to Ulysses Grant*, FIN. ADVISOR (Jan. 11, 2019), <https://www.fa-mag.com/news/trump-s-shifting-shutdown-tests-law-dating-to-ulysses-grant-42710.html>.

<sup>139</sup> See, e.g., Brad Plumer & Henry Fountain, *Trump Administration Finalizes Plan to Open Arctic Refuge to Drilling*, N.Y. TIMES (Aug. 17, 2020), <https://www.nytimes.com/2020/08/17/climate/alaska-oil-drilling-anwr.html>.

<sup>140</sup> See Elizabeth Harball, *Despite Shutdown, Trump Administration Continued Effort to Expand Alaska Oil Drilling*, NPR (Jan. 11, 2019, 4:03 PM), <https://www.npr.org/2019/01/11/684472912/despite-shutdown-trump-administration-continued-effort-to-expand-alaska-oil-dril>.

<sup>141</sup> Garance Franke-Ruta, *How the National Parks Became the Biggest Battleground in the Shutdown*, THE ATLANTIC (Oct. 11, 2013), <https://www.theatlantic.com/politics/archive/2013/10/how-the-national-parks-became-the-biggest-battleground-in-the-shutdown/280439/>.

<sup>142</sup> Cf. BRASS ET AL., *supra* note 10, at 35–36 (explaining that the Social Security Agency continued to employ workers during the shutdown to process entitlements like social security benefits).

<sup>143</sup> See 31 U.S.C. § 1342.

<sup>144</sup> Paletta, *supra* note 123.

<sup>145</sup> See, e.g., Jonathan B. Jarvis, *Keeping US National Parks Open During the Shutdown is a Terrible Mistake*, THE GUARDIAN (Jan. 3, 2019, 6:00 AM), <https://www.theguardian.com/environment/2019/jan/03/national-parks-government-shutdown-trump>.

bending the rules to contain political fallout.”<sup>146</sup>

Unfortunately, it seems unlikely this will just constitute a one-time deviation from the well-established view of the ADA, particularly in any instance in which the President, rather than Congress, takes the blame. This is a one-way shift. Future Presidents will not make the blame they shoulder any heavier now that the Trump Administration has pioneered a way to lighten the problem. Rather, they will take what OMB did this time as “the new normal.” They will take the ADA cornerstone as having shifted its ground. For them, it no longer backs up the Appropriations Clause and makes those responsible for appropriations lapses pay a heavy price in public opprobrium. The ADA has been twisted so that anything unpopular during a shutdown can get wished away as a changeable inconvenience.

## VI: PROPOSED SOLUTIONS

Part VI of the Article looks at proposed solutions. Congress has considered a complete solution—an automatic continuing resolution.<sup>147</sup> This type of resolution would provide funds during any lapse between one appropriation and the next.<sup>148</sup> The principal variations consist of how to figure the rate of payment.<sup>149</sup> It could be frozen at the last appropriated rate or at some percentage of the last appropriated rate.<sup>150</sup> But then, the agency would have no way to adapt to new problems or initiatives.

However, an automatic continuing resolution has never had much acceptance and will never overcome congressional antipathy to the importance of its appropriation process. The appropriators do not want to forfeit their role. One or both chambers might accept stalemate in appropriation bills too readily, knowing that the automatic continuing resolution waited as a fallback. This would undermine the acceptance of the necessity for the appropriators to work something out.

One measure that would not have helped in 2019 but did in 2013. In 2019, the lapse in appropriations did not include the defense appropriation, so the partial shutdown did not include the Defense Department.<sup>151</sup> However in 2013, the lapse included defense.<sup>152</sup> Although the armed forces surely were “essential,” that would only have meant they would stay on duty, not that they

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<sup>146</sup> Paletta, *supra* note 123.

<sup>147</sup> See generally JESSICA TOLLESTRUP, CONG. RSCH. SERV., R41948, AUTOMATIC CONTINUING RESOLUTIONS: BACKGROUND AND OVERVIEW OF RECENT PROPOSALS (2015), <https://fas.org/sgp/crs/misc/R41948.pdf>.

<sup>148</sup> *Id.* at 3–4.

<sup>149</sup> *Id.* at 4–5.

<sup>150</sup> *Id.* at 9.

<sup>151</sup> Ogrysko, *supra* note 114.

<sup>152</sup> AMY BELASCO & PAT TOWELL, CONG. RSCH. SERV., R41745, GOVERNMENT SHUTDOWN: OPERATIONS OF THE DEPARTMENT OF DEFENSE DURING A LAPSE IN APPROPRIATIONS 1 (2013), <https://fas.org/sgp/crs/natsec/R41745.pdf>.

would get payment.<sup>153</sup> Congress enacted a measure somewhat like an automatic continuing resolution, called the “Pay Our Military Act.”<sup>154</sup> It provided automatic funding from October 1, 2013, and terminated with a regular enactment on October 17, 2013.<sup>155</sup> Similar continuity could be provided in future shutdowns.

Other measures could ameliorate the sharpest immediate pain of the shutdown, namely, bettering the condition of the unpaid federal employees who are helpless pawns. They eventually get the denied pay after the shutdown ends. But they suffer from not getting the pay in real time, especially if their pay rate has not let them build up savings, and especially as the shutdown goes past their first pay period and then their second. They should, at least, have a federal guarantee letting them borrow against their withheld pay.

It might be argued that without the federal employees suffering, Congress and the President might not have enough pressure forcing them to enact appropriations and end the shutdown, as evidenced by the press coverage of public employee struggle during the 2019 shutdown.<sup>156</sup> However, most Senators and Congressmen do not have a large percentage of public employees in their constituency, and that is not where the main force comes from to drive the passage of appropriations. The driving force to end a shutdown comes from the overall chaos from federal programs either shut down or slowed down. So, easing federal employee suffering during a shutdown is not likely to change the driving force to end shutdowns.

A separate problem concerns the approach the OMB took in 2019, to the Fiscal Constitution, which included keeping many programs going that were just popular and not in any real sense “essential.” The OMB’s approach shifted the ADA away from the role it has played since the Civiletti opinions four decades before—of stopping all programs except essential ones (or, programs like entitlements). Conceivably, at the next shutdown, the President will return to properly following the ADA. Alternatively, Congress could add language to the ADA expressly stating the limits on the Executive Branch.

## VII: CONCLUSION

This Article takes the thinking about shutdowns well beyond the level of seeing it as a rarity or political posturing. The fight is over legal principles of the Fiscal Constitution apply across the board to the entire federal

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<sup>153</sup> *Id.* at 5 (stating that “all military personnel would continue to report for duty. . .”).

<sup>154</sup> TOLLESTRUP, *supra* note 147, at 2; *see also* Pay Our Military Act, Pub. L. No. 113-39, 127 Stat. 532 (2013).

<sup>155</sup> TOLLESTRUP, *supra* note 147, at 2.

<sup>156</sup> *See, e.g.*, Kristina Peterson et al., *Shutdown Breaks Record for Longest in Modern History*, WALL ST. J. (Jan. 13, 2019, 12:00 AM), <https://www.wsj.com/articles/trump-plays-down-emergency-option-to-get-wall-funding-11547238564>.

government. From the 2019 shutdown, it is clear that whichever Branch, most likely the Executive, takes the “blame,” it seeks to mitigate the shutdown by seeking to classify a large fraction of agencies as “essential.” It is too much to expect a cure for shutdowns. This struggle in the separation of powers will continue.