

Testimony of Sam Berger
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Subcommittee on Interior, Environment, and Related Agencies
House Committee on Appropriations
“The Power of the Purse: A Review of Agency Spending Restrictions During a Shutdown”
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Chair McCollum, Ranking Member Joyce, and members of the Subcommittee, thank you for allowing me to testify today on how administrations prepare for a shutdown and how the Trump administration carried out this past one.

The Trump administration’s handling of the recent funding lapse was characterized by unusually significant changes to agencies’ established plans during the shutdown, with seemingly little regard for legal constraints or programmatic considerations. Based on my own experience planning for and implementing a shutdown, the current administration’s approach raises serious concerns.

I served as an attorney in the White House Office of Management and Budget (OMB) from 2010 to 2015. While there, I was involved in the planning process for potential shutdowns and part of the senior team providing government-wide guidance during the 2013 shutdown.

Planning for a shutdown is a very time-consuming and involved process. Simply put: the government is not designed to shut down, and determining what shuts down and how is complicated. Since Article I, Section 9 of the Constitution provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,” there are legal limitations on what executive branch officials can and cannot do in the absence of an enacted appropriations law. The legal restrictions on what can continue during a lapse in appropriations are set forth in two opinions issued by the Attorney General almost forty years ago (the Civiletti opinions): *Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriations* (1980) and *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations* (1981). The Department of Justice provided further legal guidance in 1995, including *Government Operations in the Event of a Lapse in Appropriations* (1995) (the Dellinger opinion).

Based on these Department of Justice opinions, during a shutdown, only a limited number of unfunded activities can continue: (1) those necessary to protect life and property; (2) those necessary to the discharge of the President’s constitutional duties and powers; and (3) those authorized to continue during a lapse in appropriations, either expressly or through necessary implication.

In their planning process, agencies must determine the impact of a lapse in funding on the wide range of programs that they administer, some of which may have funding from sources other than annual appropriations bills and some of which do not. They must next determine what unfunded activities can continue pursuant to the narrow circumstances outlined above. Then they must determine which personnel are necessary to keep on in order to perform those activities. And finally, they must communicate with outside stakeholders, contractors, and grantees to alert them to the impacts of a potential shutdown.

This planning process takes time. Each agency is responsible for making determinations about its shutdown plan, in close contact with its office of general counsel to ensure they are acting consistent with applicable law. In the process of drafting plans, agencies work with OMB, which helps them

understand the application of governmentwide guidance to their specific programs and activities, seeks to ensure consistent application of the law across agencies, and shares its own appropriations law expertise with agencies as needed. The drafting of an initial shutdown plan can take weeks, particularly for large agencies or those with complicated funding streams, although subsequent updates to the plan are not as time-consuming.

OMB sets out clear guidelines for what must be included in plans, found in OMB Circular A-11, Section 124. While there is recognition that plans may have to be altered due to unforeseen events, agencies are supposed to plan for how implementation may change depending on the length of the shutdown. Circular A-11 specifies that: “Given that the duration of a lapse in appropriations is inherently uncertain, your plan should describe agency actions to be taken during a short lapse (1-5 days). It also should identify anticipated changes if the lapse extends beyond that time period.”

These plans serve at least two important functions. First, they ensure that agencies have carefully thought through their operations during a shutdown, including ones of varying length. Second, they ensure that relevant stakeholders, Congress, and the public understand how the agency will implement a shutdown, including how it will utilize its funding, and that such implementation will be consistent with the law and driven by sound management practices.

Unfortunately, the Trump administration’s approach to the shutdown strayed from these basic principles, frequently making significant changes to shutdown plans in response to wholly predictable outcomes. One of the most visible examples was the national parks. Because its funding is appropriated annually by Congress, the National Park Service legally can only keep on a skeleton staff during a shutdown, one that is insufficient to protect visitor safety or the natural, cultural, and historical resources within the parks. Faced with this reality, the Obama administration made the difficult choice to close most parks during the 2013 shutdown, a decision that generated significant political backlash.

Rather than follow this precedent, the Trump administration chose to keep the parks open with insufficient staffing. As former director of the National Park Service Jonathan Jarvis noted in *The Guardian*: “leaving the parks open without these essential staff is equivalent to leaving the Smithsonian museums open without any staff to protect the priceless artefacts.”¹ The predictable results: accumulation of trash and human waste,² safety risks to visitors,³ and damage to the parks themselves.⁴

Instead of closing the parks in response to these serious—but easily anticipated—problems, the Trump administration instead chose to alter its plan in the middle of the shutdown and divert visitor fees to fund operations at the parks. The National Parks Conservation Association and Democracy Forward have requested that the Inspector General of the Department of the Interior investigate whether the use of

¹ Jonathan B. Jarvis, *Keeping U.S. national parks open during the shutdown is a terrible idea*, *THE GUARDIAN*, Jan. 3, 2019, <https://www.theguardian.com/environment/2019/jan/03/national-parks-government-shutdown-trump>.

² Ellen Knickmeyer and Jocelyn Gecker, *Garbage, feces take toll on national parks amid shutdown*, *ASSOCIATED PRESS*, Jan. 1, 2019, <https://www.apnews.com/e28b313197bb46bebef0faca24b333ed>.

³ Kevin Byrne, *National parks forced to close, hazards mount at others amid government shutdown*, *ACCUWEATHER*, Jan. 3, 2019, <https://www.accuweather.com/en/weather-news/safety-concerns-health-issues-mount-at-national-parks-throughout-us-as-government-shutdown-continues/70007039>.

⁴ Allyson Chiu, *‘A travesty to this nation’: People are destroying Joshua trees in Joshua Tree National Park*, *THE WASHINGTON POST*, Jan. 11, 2019, https://www.washingtonpost.com/nation/2019/01/11/travesty-this-nation-people-are-destroying-joshua-trees-joshua-tree-national-park/?utm_term=.5a1e48546346.

visitor fee funds in this manner is legal.⁵ But in addition to legal issues, this decision raised serious programmatic concerns by diverting funds intended for much-needed, long-term maintenance in the parks. Moreover, the diversion of these fees cannot mitigate the damage caused by the administration's cavalier policy; former Joshua Tree National Park Superintendent Curt Sauer said that: "What's happened to our park in the last 34 days [of the shutdown] is irreparable for the next 200 to 300 years."⁶

The parks were not the only instance in which agencies made significant alterations to their shutdown plans during the funding lapse. At first, the Internal Revenue Service (IRS) determined that tax refunds would not be paid during the lapse in appropriations, consistent with its longstanding legal determination and the administration's view as expressed in the IRS shutdown plan released in the early part of 2018. However, as political pressure mounted, the Trump administration hastily changed course, determining that it would illegally make refund payments during the shutdown and beginning to bring back tens of thousands of furloughed employees—without pay—to process refunds.

This was just one of many such abrupt shifts weeks into the shutdown. The IRS also chose to change its plan and divert user fees to fund mortgage income verification in response to lobbying from the chief executive of the Mortgage Bankers Association.⁷ In another unusual decision, the Bureau of Ocean Energy Management decided to alter its existing plan and bring back employees to work on offshore oil and gas lease sales.⁸ Similarly, the Bureau of Land Management (BLM) recalled employees to approve oil drilling permits.⁹ BLM also sought to move forward with efforts to drill for oil in the Arctic National Wildlife Refuge,¹⁰ despite serious concerns about the shutdown compromising the public input process.¹¹

This attitude towards shutdown implementation appears to reflect that of the current OMB. Reportedly, political leadership at OMB requested that agencies identify programs that were not operating during a

⁵ National Parks Conservation Association, *Groups Claim Keeping Parks Open Without Adequate Staff During Shutdown is Illegal, Demand Inspector General Investigate Trump Administration's Reckless Decision*, Jan. 11, 2019, <https://www.npca.org/articles/2094-groups-claim-keeping-parks-open-without-adequate-staff-during-shutdown-is>.

⁶ Shane Newell, *Joshua Tree National Park fans rally, decry impact from shutdown*, PALM SPRINGS DESERT SUN, Jan. 26, 2019, <https://www.desertsun.com/story/news/environment/2019/01/26/joshua-tree-national-park-rally-against-shutdown-impact/2689866002/>.

⁷ Lisa Rein and Jeff Stein, *'Could you make these guys essential?': Mortgage industry gets shutdown relief after appeal to senior Treasury officials*, THE WASHINGTON POST, Jan. 11, 2019, 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?utm_term=.61e36ac5be28.

⁸ Ellie Kaufman, *Interior brings back employees during shutdown to work on oil-drilling land sales*, CNN, Jan. 16, 2019, <https://www.cnn.com/2019/01/15/politics/boem-brings-back-employees-drilling/index.html>.

⁹ Alan Neuhauser, *Oil and Gas Deemed 'Essential' in Shutdown*, U.S. NEWS, Jan. 16, 2019, <https://www.usnews.com/news/national-news/articles/2019-01-16/oil-and-gas-deemed-essential-in-shutdown>.

¹⁰ Jennifer A. Dlouhy, *Trump Administration Works Overtime to Make Sure Shutdown Doesn't Stop Oil Drilling*, BLOOMBERG, Jan. 8, 2019, <https://www.bloomberg.com/news/articles/2019-01-08/trump-is-giving-oil-industry-a-bye-in-shutdown-critics-allege>.

¹¹ Umair Irfan, *The government isn't letting the shutdown get in the way of Arctic drilling*, Vox, Jan. 8, 2019, <https://www.vox.com/2019/1/8/18172632/shutdown-interior-arctic-drilling-national-park>.

shutdown that they *wanted* to resume.¹² OMB even went so far as to draft new guidance directing agencies to illegally pay contractors and grantees during a shutdown, similar to the actions taken by IRS with respect to refunds.¹³

Implementing a shutdown in this haphazard manner creates serious concerns. First, it causes difficulties for stakeholders, given that they are unsure as to whether agencies will follow their carefully set forth plans or careen off in another direction. And it makes it challenging for the public and members of Congress to understand how agencies are utilizing public funds and operating during a shutdown.

In addition, it raises serious questions about whether the administration is favoring certain constituencies. While every effort was made to protect oil and gas companies and mortgage companies from the impacts of the shutdown, the Washington Post reported that during the shutdown “nonprofit groups and shelters that receive funding through HUD to subsidize transitional housing costs for domestic violence victims cannot access the grant money because they are locked out of HUD’s computer system.”¹⁴ As is frequently the case when special favors are doled out, it is the most vulnerable who pay the price.

Finally, it raises serious questions about whether the administration is complying with the Constitution and the law in all instances. Agency shutdown plans are carefully crafted with significant input from agency lawyers, who spend time thinking through the relevant legal requirements. When an agency suddenly shifts course in the middle of a shutdown, with limited personnel to think through decisions and tight timelines on which to operate, there is a much greater risk that the agency will take actions inconsistent with the law. This concern is only heightened when abiding by the law does not appear to be at the forefront of the minds of those who are managing the shutdown.

In short, agencies create shutdown plans for a reason, and making significant changes in the middle of a funding lapse undermines many of the reasons for undertaking such planning efforts in the first place. These types of changes are even more surprising given that agencies implemented their plans over a multi-week period just 5 years ago, and subsequently revised plans to reflect that experience. While plans may have to change in small or unpredictable ways, there appears to be little justification for the massive changes in agency plans we saw during this shutdown.

¹² Damian Paletta, *To keep a shut down government running, White House ventures into uncharted territory*, THE WASHINGTON POST, Jan. 10, 2019, 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?utm_term=.941e6ddb4577.

¹³ Charles S. Clark, *White House Wants to Reduce the Shutdown Pain for Contractors*, GOVERNMENT EXECUTIVE, Jan. 24, 2019, <https://www.govexec.com/management/2019/01/white-house-wants-reduce-shutdown-pain-contractors/154412/>.

¹⁴ Lisa Rein, Juliet Eilperin, and Jeff Stein, *‘We’re left in the dark’: As many industries get shutdown relief, those without political clout feel left behind*, THE WASHINGTON POST, Jan. 19, 2019, https://www.washingtonpost.com/national/health-science/were-left-in-the-dark-as-many-industries-get-shutdown-relief-those-without-political-clout-feel-left-behind/2019/01/19/98375914-1b4e-11e9-8813-cb9dec761e73_story.html?utm_term=.b5ee3d88545e.