

"Shutdown May Stall Hearings, But Gov't Probes Quietly Go On," *Law360*

Publications

October 10, 2025

When the federal government enters a shutdown, coverage tends to focus on the practical and political effects for lawmakers and their constituents. Which federal workers will be furloughed? Which federal payments will be disrupted? Which side will voters blame?

But private sector entities and even government agencies that are in the midst of ongoing congressional investigations may also be wondering how the shutdown will affect those proceedings.

As with many things related to Congress, it depends. And while previous shutdowns give us some sense of what to expect, no two shutdowns are precisely alike. But looking at the current state of affairs, this pause in government funding will probably also mean Congress pumps the brakes on the public-facing aspects of its oversight agenda as well.

The logistics on Capitol Hill have evolved since the partial shutdown that ended in January 2019. In that case, a legislative branch appropriations bill had already been enacted, along with bills to fund the Defense and Veterans Affairs departments, so congressional offices continued their work without interruption.

That 35-day shutdown coincided with the transition from the 115th to the 116th Congress and a flip in the House majority — Republican lawyers and staff running investigations at committees in the U.S. House of Representatives wrapped up their projects as incoming Democratic chairs prepared to get to work on an aggressive oversight agenda. Meanwhile, U.S. Senate investigators were able to engage with the subjects of their investigations as usual.

Unlike the 2019 shutdown, there are currently no legislative appropriations for the 2026 fiscal year, which means the current funding conditions are more analogous to 2013, when a full shutdown led to furloughs for nonessential congressional personnel, closed entrances to congressional office buildings and canceled hearings.

As with the current shutdown, the 2013 version involved one side insisting on a clean spending bill and the other pressing for policy measures related to the Affordable Care Act.

There is, however, a key difference between the current situation and the 17-day shutdown that disrupted the 113th Congress: Back pay for congressional staff is now guaranteed.

Since 2019, back pay for federal employees whose paychecks are affected by a shutdown is automatic thanks to the Government Employee Fair Treatment Act, or GEFTA, whereas previously, federal workers — including congressional staff — had to rely on Congress to pass a new bill after each funding lapse to receive back pay for any paychecks that were missed.

The White House has taken the position that GEFTA is not self executing, and accordingly, Congress would have to specifically provide an appropriation to provide back pay for executive branch employees in the bill that ends the shutdown.

That view, however, was largely rejected by Republicans and Democrats in Congress alike, and in any event, Congress is exceedingly unlikely to apply the White House's interpretation of GEFTA to legislative branch employees, including congressional staff.

That bit of assurance for congressional staff has consequences for the subjects of congressional investigations. Because back pay is now guaranteed, House and Senate employees are less likely to be furloughed. Furlough decisions in the executive branch are tightly controlled by the Office of Management and Budget and the Office of Personnel Management, and the specifics of those determinations vary from administration to administration.

For example, the Trump administration has already announced that national parks will remain partially open during the current shutdown; during the 2013 shutdown, the park service made the controversial decision to barricade many parks and national monuments for safety reasons.

The Transportation Security Administration continued to screen baggage during the 2013 and 2019 shutdowns; the U.S. Postal Service continued delivering mail; air traffic controllers, emergency and disaster response personnel, and most types of federal law enforcement and national security officials continued to work, and they will do so again during the current lapse in funding according to plans released by the Trump administration.

The legislative branch's furlough determinations, however, are entirely independent from the process led by the OMB and the OPM.

Decisions regarding essential personnel and furloughs are made by lawmakers on an office-by-office and committee-by-committee basis. Before the Fair Treatment Act went into effect in 2019, lawmakers had to make difficult decisions about which staff to deem essential with no guarantee that such staff would receive back pay for work performed during the shutdown.

This is the first lapse in funding where lawmakers will make furlough determinations knowing their staff will — eventually — be made whole, and accordingly, there is little incentive to furlough personal office or committee staff.

Whereas some committees and offices went quiet in 2013 while furloughed workers were prohibited from conducting official business, the expectation is that committees will remain fully staffed in 2025, and that the core work of congressional investigations will continue apace.

That means congressional investigators will continue to obtain and review documents, request and receive briefings, and draft and issue reports — the investigative work that is performed behind closed doors on Capitol Hill every day.

However, the subjects of congressional investigations may notice a difference in the public-facing aspects of oversight: There will likely be fewer open hearings and business meetings. The Fair Treatment Act of 2019 does not cover the contract workers who keep Capitol Hill running behind the scenes.

Accordingly, many food, janitorial and IT service workers will be furloughed and the services they provide will be closed or limited. Longer security lines and fewer open entrances to House and Senate office buildings will make hearings and business meetings more logistically difficult.

And then of course, as always, politics come into play. While the government is shut down, congressional leadership and committees may be wary of pushing ahead with the public-facing components of investigations, especially any that are particularly contentious or partisan. If tourists are locked out of the Smithsonian museums lining the National Mall, the optics of Congress, a few blocks away, doing anything other than trying to reopen government could come with a political cost.

With all these factors taken together, it is probable that the overall inventory of hearings will be diminished during the shutdown, however long it lasts. A light hearing calendar may be good news for tech companies, nongovernmental organizations, colleges and universities, and any other entity subjected to Congress' high-profile investigations — especially those being led by the House.

In fact, since Oct. 1, when the shutdown started, the House has remained out of session while waiting for the Senate to adopt the House-passed continuing resolution that would fund the government, and that may remain the case for the duration of the shutdown.

The Senate, meanwhile, has held almost-daily votes on the continuing resolution in October, in addition to processing nominations.

Some Senate hearings have been postponed, but two high-profile hearings with relevance to the private sector went forward: a Finance Committee hearing on the taxation of digital assets, and a Commerce Committee hearing chaired by Sen. Ted Cruz, R-Texas, on how government agencies pressured Big Tech companies to censor certain speech.

Both hearings, however, featured friendly witnesses whose testimony aligned with the chairs' perspectives.

The postponement of hearings in the House and Senate may create a backlog and some may never be rescheduled — there are a limited number of in-session days remaining in the 119th Congress, after all.

Oversight hearings, however, tend to be prioritized and are most likely to be placed on the calendar, especially for those matters where committee staff have invested significant resources in the fact-finding process. The bottom line for the subjects of congressional investigations is that their day in the sun may be delayed, but not deferred.

The complex political and logistical dynamics in play during a lapse in funding create uncertainty for congressional investigators and their subjects alike. The subjects of congressional investigations must remain flexible throughout the duration of a shutdown and be prepared for cancellations and postponements without losing sight of the fact that the nonpublic work of congressional oversight is ongoing.

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