

# Bloomberg

## Trump's Shifting Shutdown Tests Law Dating to Ulysses Grant

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More than a century ago, lawmakers grew so fed up with federal agencies spending money they didn't have that Congress passed a law to rein them in.

Now, legal experts say President Donald Trump may be violating that 149-year-old statute by keeping agencies running despite the budget impasse that has cut off funding for roughly a quarter of the federal government.

The administration's decision to continue some government functions could even bolster court challenges of policy decisions made by supposedly shuttered agencies.

Environmentalists, for example, are researching whether the shutdown could invalidate some drilling permits issued during the lapse in funding. And a government employees union has challenged demands that its members continue working without pay.

"Some agencies are playing fast and loose with their ability to tap either past funds or incoming revenues to keep open," said Charles Tiefer, a professor at the [University of Baltimore](#) law school and a former deputy general counsel to the [House of Representatives](#).

The issue is becoming less theoretical by the day, as the Trump administration takes pains to blunt the effects of the standoff by tapping user-fee revenue, leftover funding and other resources to keep some politically popular agency functions going.

On Tuesday, the U.S. Department of Agriculture said it would keep issuing food stamp benefits through the end of February. And though the Treasury Department had previously decided that a shutdown would bar the Internal Revenue Service from issuing income tax refunds, the administration said Monday it would nevertheless direct the agency to send refunds this time around.

The blueprint for what's allowed is the Antideficiency Act, enacted in the shadow of the Civil War after federal agencies flouted the Constitution's prohibition on drawing money from the Treasury without "appropriations made by law." The final straw came in 1870, when the U.S. Navy committed to spend more than double its available resources.

The obscure law, enacted under former President Ulysses Grant, is the reason hundreds of thousands of government workers have been forced to turn off mobile phones, ignore email and

keep their government-issued laptops closed while Congress and the president battle over funding for a wall on the Mexican border.

There are exemptions for emergencies involving the safety of human life or the protection of property. But the law is clear: Those exceptions don't extend to "ongoing, regular functions of government" where stopping them doesn't pose an imminent threat.

Federal agencies have some latitude to decide what passes muster, though that discretion comes with risk for workers on the front lines. Federal employees who "knowingly and willfully" violate the law face fines of as much as \$5,000 and up to two years in prison.

The Government Accountability Office regularly tallies up possible offenses, but it's up to the Justice Department to prosecute. No one has ever been charged with violating the Antideficiency Act.

And because the issue has never really been litigated, the ground rules aren't clear. Agencies are left trying to discern legal opinions from the Justice Department and guidance from the Office of Management and Budget.

"The administration can exercise a fair amount of discretion in deciding what counts as excepted workers and what counts as protection of life and property," said Georgetown University law professor Timothy Westmoreland.

Although government lawyers have spent decades writing guidance, "if someone now comes into OMB and DOJ and decides simply 'we're going to ignore that and order something different,' I'm not so sure what can be done about it," Westmoreland said.

The National Treasury Employees Union thinks it has an answer. It has gone to court, arguing that forcing certain employees to work during the shutdown is unconstitutional. "The Constitution commands that 'No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,'" the union says in the lawsuit, which was filed in federal district court in Washington and seeks an order to keep the government from forcing NTEU members to work during the funding lapse.

A case can be made that some federal employees are protecting human life and property, said NTEU president Tony Reardon. But "that line of reasoning gets quite shaky when applied to thousands of IRS employees being called back in order to process tax refunds -- and to do so without being paid."

### Uncharted Territory

The case shows how the U.S. is entering uncharted territory as the government shutdown enters its fourth week.

Real-world dilemmas may soon compel answers to previously academic questions about Congress' power of the purse and the Antideficiency Act. Many federal employees are set to miss their first paycheck Friday.

"Each pay period, there will be more legal weapons being brought into play," Tiefer said.

The creative tactics employed by federal agencies to keep some services going could be probed by a future administration.

“This administration is being creative in its ability to break the law and test the boundaries, so there is a possibility that a future administration” could pursue alleged violations, said Sam Berger, a senior adviser at the [Center for American Progress](#), who worked at the Office of Management and Budget under former President Barack Obama. “With this administration and what you see them doing, they are really walking up to and past that line, and so it raises a serious question. I’d think a future DOJ would have to seriously take a look to see if there were criminal violations here.”

It’s not clear who, outside of the Justice Department, can challenge perceived violations. Federal courts may take a skeptical view of the standing of people claiming to be injured by an agency deciding to spend amid the shutdown.

### Legal Challenges

“In general, the courts have been fairly hostile to people saying this expenditure of federal funds is illegal,” said David Kopel, an adjunct professor of constitutional law at Denver University and an adjunct scholar at the Cato Institute. “Their answer to that is ‘maybe it is, but how are you in particular impacted by that?’ ”

But the shutdown could surface in other legal challenges. Environmentalists wary of the Trump administration’s efforts to expand oil development in the Arctic have already warned the government is undermining legally required environmental analysis and consultation by holding public meetings when agency offices are closed and their websites are frozen.

That argument could be raised in future lawsuits challenging the administration’s rewrite of a plan for managing energy development in the 22.1-million-acre National Petroleum Reserve-Alaska.

Questions also have been raised about the Interior Department’s decision to process drilling permits either as an “exempted activity” or by tapping user fees. Antideficiency claims could be added to challenges of the underlying agency action, said William Snape, a fellow at [American University Washington College of Law](#) and senior counsel with the environmental group [Center for Biological Diversity](#).

### Legal Challenges

The Democratic-led House of Representatives could mount a legal challenge, too, by voting to file a lawsuit challenging some agency actions taken during the shutdown as Antideficiency Act violations.

“If I were on the [Supreme Court](#), I’d be sympathetic to that -- to say we need an enforcement mechanism” for the Antideficiency Act, Kopel said. “It’s conceivable, and if the House voted to do it, I’d say they’ve got a fighting chance.”

Even without taking that step, Democrats in Congress have indicated they will closely scrutinize spending amid the shutdown. Representative Raul Grijalva, an Arizona Democrat who heads the Natural Resource Committee, is already encouraging employees to blow the whistle on possible Antideficiency Act violations.

“Career civil servants should not be used as pawns in the administration’s illegal attempts to disguise the very real, very serious impacts of the shutdown the president caused,” Grijalva said.  
“This is no way to run a government.”