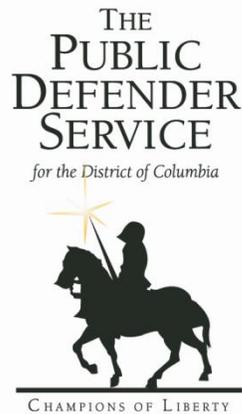


PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA SHUTDOWN PLAN



PLAN OVERVIEW:

The Anti-Deficiency Act, 31 U.S.C. §1341 and §1342, greatly restricts the conduct of operations by agencies during a lapse of appropriations. In a lapse of appropriations, the agency must shut down those activities and release (or furlough) those staff not exempted by agency heads within the guidance established by the Office of Management and Budget (OMB) and the Department of Justice (DOJ).

OMB Circular A-11 Section 124 (Agency Operations in the Absence of Appropriations) requires agency heads to develop and maintain plans for an orderly shutdown of agency operations in the event of an absence of appropriations. Shutdown plans must be submitted to OMB either when first prepared or when revised.

OMB and DOJ guidance authorize agency heads to continue operations (requiring new obligations) when necessary for: 1) the orderly shutdown of agency operations and 2) the protection of life and property. The Public Defender Service for the District of Columbia (PDS) shutdown plan below assumes that the District of Columbia Court of Appeals, the District of Columbia Superior Court, the United States Attorney's Office for the District of Columbia, the Pretrial Services Agency, the Court Services and Offender Supervision Agency for the District of Columbia (CSOSA), the Federal Bureau of Prisons, the United States Parole Commission, the District of Columbia Metropolitan Police Department, and other law enforcement entities within the District of Columbia criminal and juvenile justice systems will continue public safety and protection of property operations throughout the shutdown period.

PDS is integrally related to law enforcement through the provision of constitutionally or statutorily required legal representation as the above agencies engage in their law enforcement function. Thus,

PDS employees engaging in direct client representation and case-related support (181.12 FTE, 168.1 on board) are necessarily encompassed by the designated exemption for law enforcement.¹

Additional PDS employees (21.2 FTE, 19.4 on board) would provide essential administrative support to those engaged in direct representation. Below, PDS details the functioning of the various law enforcement/justice agencies and PDS's plan in response to provide the representation required for these law enforcement/justice activities to continue.

SHUTDOWN PLAN:

A. Shutdown Plan Points of Contact

Avis E. Buchanan, Director
ABuchanan@pdsdc.org
(202) 824-2370 (work)
(202) 345-3150 (cell)

Julia Leighton, General Counsel
JLeighton@pdsdc.org
(202) 824-2480 (work)
(202) 409-2927 (cell)

B. Shutdown Time Period

PDS requires approximately one-half of the business day following the date of the appropriation lapse to complete the initial shutdown of operations. PDS legal representation functions will continue throughout the lapse period. For purposes of this shutdown plan, legal representation functions are only those deemed necessary to complement ongoing law enforcement activities and for protection of life and property.

¹ The determination that case-related services must continue notwithstanding a lack of appropriated funds is also supported by Decisions of the Comptroller General, B-283599, September 15, 1999, and B-284566, April 3, 2000, recognizing that mandatory responsibilities, such as those for representation in criminal cases, must continue to be incurred. Further support can be found in the U.S. Department of Justice, Office of Legal Counsel, Government Operations in the Event of a Lapse in Appropriations, memorandum from Walter Dellinger, Assistant Attorney General, for Alice Rivlin, Director, Office of Management and Budget, August 16, 1995. "... [T]he Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well." Continuing law enforcement activities necessarily implies that PDS must continue providing the responsibilities assigned to PDS by the Constitution, PDS's authorizing statute, and the District of Columbia Rules of Professional Conduct.

C. Shutdown Activities

OMB Circular A-11 requires that agency shutdown plans identify those “activities that are essential to operate their agencies during an appropriations hiatus.” The underlying assumption is that only those law enforcement (and health care) activities deemed necessary for protection of life and property or required for orderly shutdown are to be exempted.

1. Continuation of Pre-trial Law Enforcement: The District of Columbia Court of Appeals and the District of Columbia Superior Court have informed PDS that they will continue those “functions necessary and essential to the continued resolution of cases without interruption,” and, thus, “all essential case supporting services... will be continued.” The Superior Court has stated that this continuation of operations is required both because the Constitution guarantees certain protections² and because “the suspension of criminal, juvenile and neglect operations of the Court would imminently threaten the safety of human life, and the suspension of all civil proceedings would pose an imminent threat to the protection of property under the ‘emergency’ exception.” District of Columbia Court’s Shutdown Plan, March 2011.

Both prosecuting authorities in the District of Columbia, the United States Attorney’s Office for the District of Columbia and the Office of the Attorney General for the District of Columbia, have informed PDS that they will proceed with criminal prosecutions, delinquency prosecutions, and involuntary civil commitments even in the event of a federal government shutdown.

The courts cannot process criminal cases, and prosecuting authorities cannot perform the part of their law enforcement function that occurs in the courts, without court-appointed counsel for criminal defendants and juvenile respondents.

PDS’s Plan: PDS therefore will retain all employees who provide legal representation services for matters before the Court of Appeals and in the Superior Court.³

PDS provides direct representation in these cases through the Trial (63 of 64 FTE), Appellate (18 of 19 FTE), Mental Health (13 of 14 FTE), Civil Legal Services (7 of 8 FTE), Investigations Divisions (30 of 32 FTE); and the Defender Services Office (10 of 12 FTE); and the Office of Rehabilitation and Development (11.6 of 13 FTE).⁴ Five members of the Executive office

² For example, pursuant Supreme Court decisions interpreting the requirements of the Constitution, the District makes detention/release decisions for individuals within two days of their arrest. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (states “must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest”); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (“...we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*”).

³ In most instances, the division level FTE and “on board” staffing complements are equal or nearly equal. The exception is the Trial Division, which has 64 FTE and 57 on board.

⁴ PDS Trial Division attorneys provide representation in over 60% of the most serious felony cases (e.g., homicide, rape, armed carjacking) in the Superior Court. The Investigations Division

represent clients and supervise Trial Division attorneys or support case matters (4.5 of 12 FTE). In addition, four members of the administrative staff support case matters (4 of 12 FTE)

2. Continuation of Post-conviction Law Enforcement: PDS understands that the Court Services and Offender Supervision Agency for the District of Columbia (CSOSA) and the U.S. Parole Commission intend to continue essential law enforcement operations. Thus, CSOSA will continue to execute parole violator warrants, and the U.S. Parole Commission will continue to hold the required probable cause hearings and revocation hearings within the statutorily required time frames.

PDS's Plan: PDS's Parole Division (11 of 12 FTE) provides representation in 95% of these cases, and the staff in that Division would be retained.

3. Continued Operation of Federal and District of Columbia Secure Facilities: There is no plan for an alteration of conditions of confinement for committed youth or individuals incarcerated in Federal Bureau of Prisons, D.C. Department of Corrections, and D.C. Department of Youth Rehabilitation facilities during a federal government shutdown.

PDS's Plan: Those PDS lawyers within the Community Defender Division representing clients in administrative institutional hearings must provide representation in those matters and would be retained (5 of 8 FTE).

4. Continuation of Immediate Systemic Case Work: Some of PDS's systemic case work is not time-sensitive. Where, however, a systemic case is at a posture involving deadlines that must be met to avoid prejudice to a client, PDS needs to proceed.

PDS's Plan: PDS will identify those pressing systemic matters and staff them accordingly. Currently, PDS requires attorneys to work on two such matters (3 of 8 FTE) and to continue to

supports the work of these lawyers. Without investigation, the representation provided by these lawyers would be constitutionally insufficient. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986) (failure to investigate and present Fourth Amendment claim was constitutionally ineffective assistance of counsel). The Office of Rehabilitation and Development provides mitigation services to the Trial Division lawyers and clients. Without mitigation investigation, the representation provided by the trial lawyers would be constitutionally insufficient. *See Wiggins v. Smith*, 539 U.S. 510 (2003) (decision of counsel not to expand their investigation of petitioner's life history for mitigating evidence beyond presentence investigation report and department of social services records fell short of prevailing professional standards). The Mental Health Division provides representation to over 60% of indigent individuals facing involuntary civil commitment. The Civil Legal Services Division provides special education representation for children facing delinquency charges and immigration advice to Trial Division lawyers and represents individuals facing various civil actions as the collateral consequences of criminal charges. The Defender Services Office supports the court appointment system by determining the eligibility for court-appointed counsel of every child and adult arrested in the District of Columbia and coordinating the availability of non-PDS attorneys and PDS attorneys for appointment to new cases on a daily basis.

work on appellate cases on a reassignment basis (1 of 8 FTE); PDS will therefore retain this staff during a government shutdown.

5. Administrative Support: Per OMB Circular A-11, an agency must inform OMB if the number of non-law enforcement (and non-health care) employees to be retained to protect life and property would exceed five percent of the number of employees on board at the beginning of a shutdown less those exempt.

Of the 235 FTE, 181.1 are exempt. Five percent of the 53.9 remaining FTE equals 2.7 FTE. Of the 219 employees expected to be on board at the time of a shutdown, 168.1 are exempt. Five percent of the 50.9 remaining employees equals 2.5 employees (rounded off).

The 181.1 exempt FTE (168.1 on board) employees will provide direct client services, without which law enforcement/justice agencies cannot resolve matters. An additional 21.2 FTE (19.4 on board) are required to provide core support services to those exempt staff. These employees include one administrative assistant for each of eight of ten divisions providing direct representation (e.g., Trial Division, Appellate Division) (8 FTE); one receptionist to facilitate entry into the main office (1 FTE); administrative services for mail delivery, copying and supplies (3 FTE); and library, paralegal, forensic science, and language interpreter services (6 FTE). In addition, the Information Technology Division must maintain PDS's telephone and network infrastructure and the Help Desk (2 of 10 FTE); Human Resources must maintain sufficient staff for time and attendance duties and for processing releases (2.2 of 5 FTE); Budget and Finance (1 of 6 FTE) must maintain sufficient staff to support the purchase of expert services directly related to ongoing cases (e.g., fingerprint examiners, firearms examiners, psychologists) and payment of bills for such services already completed; and the Executive office must be staffed to provide oversight and administrative support (3 of 12 FTE).

Staff to be Released: PDS plans to release employees, including attorneys, involved in long term administrative and legal projects (e.g., legislative analysis, planning, and systemic litigation) (32.7 FTE. 31.5 on board) during a lapse in funding provided there are no contractual or court deadlines within three weeks of the start of the shutdown. [235 Total FTE – 181.1 Exempt – 21.2 Protect life and property = 32.7 FTE released; 219 Total on board – 168.1 Exempt on board – 19.4 Protect life and property on board = 31.5 on board released]

D. Preliminary PDS Notification to Employees

The PDS Director will issue a preliminary notification to all PDS staff and applicable contractors of a possible shutdown due to a lapse of appropriations. The timing of this advance notification will be based on OMB guidance and/or the imminent nature of the situation. Staff will be notified as follows:

- PDS may be shut down on an approximate date due to a lapse of appropriations.
- Once appropriations have lapsed, some normal PDS operations will cease, and a shutdown process will take place on the first regular business day after the appropriation lapse. All PDS staff, regardless of leave, travel, AWS, or telecommuting status, must report to work on this date either in person or through

electronic means unless they are unable to do so (e.g., because they are out of the country, etc.).

- Supervisors must immediately contact staff currently on leave or travel to notify them of the possible shutdown.
- Certain staff will be retained through all or part of the shutdown period. Retained staff are necessary to continue PDS's direct legal representation functions and protect life and property. Certain staff will be released through all or part of the shutdown period. PDS will inform staff members of their retention/release status. All staff will be formally notified of their retention/release status during the shutdown process.
- All PDS policies remain in effect for both released and retained staff.
- PDS rules and approval processes surrounding outside employment apply to all staff during the lapse of appropriation.
- In the event the appropriation lapse takes place just before or during non-regular business days, all retained staff must continue to perform scheduled work during the non-regular business days leading up to the next regular business day (shutdown day).
- Staff must postpone/cancel all planned PDS training and non-case-related travel scheduled to take place within the shutdown period.
- All planned/approved paid leave (e.g., annual, sick) during the shutdown period is cancelled. All paid leave during a lapse of appropriations is cancelled, and all employees will either be in retained work status or released. All AWS schedules for retained employees will be suspended during the shutdown period.
- Information concerning employee pay, benefits, and leave throughout the shutdown period will be issued by PDS based on OPM guidance.
- Released staff may not perform voluntary work for PDS during the shutdown period. Released staff should not use PDS cell phones or Blackberrys or access PDS systems for work purposes other than to obtain information related to administration of the shutdown.
- Contracting officer technical representatives (COTRs) and contracting officers (COs) must ensure that all contractors receive preliminary notification that they must contact their COTRs and COs to determine the contractors' work status during a shutdown.
- Staff must stay apprised of PDS's shutdown status and when those who have been released must return to work. This notification may be done by their supervisors, the PDS Internet, or PDS voice mail or through the media.
- Released employees will be advised to use voice mail and out-of-office email functions to redirect calls and messages as appropriate.

E. Shutdown Day

All PDS staff who are able must report either in person or through electronic means to work on the first regular business day after appropriation lapse.

Supervisors will provide release notices to appropriate staff. Released staff will be asked to complete necessary functions, secure their belongings/office, and return home. In cases where released employees do not report to the office, supervisors must make every effort to contact them and inform them of their release status. All released staff will be expected to leave their duty stations within four hours after arrival.

Retained staff must continue to perform their normal business functions according to their normal business schedules.

F. Contractors

In accordance with Federal Acquisition Regulation (FAR) § 42.1303, stop-work orders will be issued by PDS's Budget and Finance Division (B&F) to all affected contractors on the first business day following an appropriation lapse. B&F will coordinate with program managers to compile a complete list of all current contractors, determine those contractors with funding and purpose necessary to continue work in an appropriation lapse, and determine those contractors to whom stop-work orders will be issued.

Contractors funded by prior-year appropriations, non-appropriated funds, or current fiscal year (*i.e.*, FY 2011) appropriated funds properly obligated prior to an appropriation lapse may continue to perform services according to the terms (purpose, funding, period of performance) of the contract. However, in cases where a COTR of such a contractor is released, COTR responsibilities must be formally transferred to a qualified, retained employee or a stop-work order must be issued to the contractor. In addition, it may be determined that the contractor's function is not necessary or cannot be performed effectively during the shutdown; in that instance, a stop-work order will be issued.

Contractors funded by prior-year appropriations, non-appropriated funds, or current fiscal year (*i.e.*, FY 2011) appropriated funds properly obligated prior to the appropriation lapse and who do not receive stop-work orders may work under the terms of the contract. However, payments will not be issued to the contractor for these goods/services until an appropriation is passed by Congress.

PDS will retain two contractors – one who supplies necessary administrative support to the Civil Legal Services Division and one whose services are provided as part of a nonsegregable contract for copier equipment service.

Contractors who are to receive properly obligated current fiscal year (*i.e.*, FY2011) appropriated funds and who are to perform case-related functions may work pursuant to the terms of the contract. Payments will not be issued to the contractor for these goods/services, however, until an appropriation is passed by Congress and signed into law. Contractors who are to receive properly obligated current fiscal year (*i.e.*, FY 2011) appropriated funds but whose work is not case related or otherwise required for the protection of life and property will be issued stop-work orders.

G. FY 2011 Obligations and Payments After Appropriation Lapse

During an absence of appropriations, agency heads must limit new obligations to “excepted services or goods.” Excepted services or goods are those needed for 1) conducting orderly shutdown of agency operations, and 2) the protection of life and property.

PDS may incur necessary new FY 2011 obligations for these two purposes; PDS cannot pay (disburse funds) for these new obligations until an appropriation is passed. Retained employees and vendors who are directed to perform new tasks in the absence of appropriations will be assured that the United States will not contest its legal obligation to make payment for such services and that they will be paid when an appropriation is passed by Congress.

Contractors:

PDS may incur new obligations for expert or other services directly related to on-going cases, and then, only when delay in procuring the expert or other service would adversely impact a client.⁵ PDS may not issue payments for any obligations incurred post appropriation lapse until after an appropriation is passed by Congress.

Personnel/Employee Salaries and Benefits:

PDS may retain employees during an appropriation lapse.

If authorized, PDS may issue payments to employees during the shutdown period for work performed prior to appropriation lapse.

PDS may not issue payments during the shutdown for work performed by retained employees after an appropriation lapse, including that performed by retained/released staff on the shutdown day and all work performed by retained employees throughout the shutdown period, until after an appropriation is passed by Congress.

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⁵ No purchases of goods or services will be permitted other than those required to further case resolution activity (e.g., expert witnesses, transcription services, video enhancements).