
Amid Shutdown, Supreme Court to Hear Arguments

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The U.S. Supreme Court ended uncertainty Wednesday about whether the federal government shutdown would delay arguments next week. The court will begin as scheduled, October 15.

The justices' announcement came less than a week before lawyers, scheduled to argue in the high court, were packing bags to head east or finishing moot courts.

As shown in the past, neither snow nor hurricanes nor government shutdowns keep the justices from their scheduled arguments.

"I think of the court the way I think of my elementary school in Chicago—it never shuts down," said former acting Solicitor General Neal Katyal of Hogan Lovells, who is set to argue next week. "I've been in arguments during blizzards and the like."

Still unknown, but what will be clear by the end of this week, is the full extent of the court building's availability to visitors, a court spokeswoman said.

The possibility of a court shutdown was never far from the minds of a number of the lawyers scheduled to appear next week. Some of them are first timers, including Thomas Dupree of Gibson, Dunn & Crutcher, and Howard Srebnick of Miami's Black, Srebnick, Kornspan & Stumpf. Other lawyers, including Katyal and Kevin Russell of D.C.'s Goldstein & Russell, have sat at the advocates' table numerous times.

Whether novice or veteran, however, the advocates said they pushed through any uncertainty to focus singularly on their arguments.

"The Court stayed open during Hurricane Sandy when it seemed the rest of the region shut down, so this is a court that takes a business-as-usual approach despite challenging conditions," said Gibson Dunn's Dupree, who will argue for Daimler in *Daimler AG v. Bauman*.

In fact, Russell, his opponent in that case, recalled the blizzard of 1996 when he was clerking for Justice Stephen Breyer and the court stayed open despite the crippling of the entire east coast. "I wasn't able to get down to the court during the blizzard," he said. "They sent out Hummers to get the lawyers but not the clerks."

Russell's clients are in Argentina and none of them had plans to attend the argument. But, he noted, he has some students at Stanford Law School who worked on the case and are planning to fly east for the argument. They had already bought their tickets.

Russell noted that his wife has several friends who are furloughed government workers. "They have been going to (Supreme Court) arguments because they have nothing better to do," he said, but now are unlikely to be disappointed by the court closing as they will still have next week to occupy their free time.

Hogan's Katyal, who will argue on behalf of a capital murder defendant in *Kansas v. Cheever*, said a shutdown creates problems for the high court even when the justices keep the building open.

When he was acting solicitor general, Katyal recalled, the office went through at least two instances where a shutdown seemed imminent during argument cycles at the court.

"I think the hardest thing is that even if the oral advocate in a given case is 'essential personnel,' the rest of the federal government often is not, and the court and the SG's office depend on having moots with a full cross-section of the federal government participating, so as to make sure the oral advocate can apprise the court of the entire federal government's thinking on an issue," Katyal explained. "The shutdown exercises consumed huge amounts of time in the office, and all for nothing."

And a government shutdown, with or without the Supreme Court, can have a ripple effect on an entire appellate team, he added.

"I have the tightest argument schedule of my life," Katyal said. "I will get on a plane literally right after the Cheever argument to San Francisco to argue the huge AUO antitrust case in the Ninth Circuit on Friday." (The case is *U.S. v. AU Optronics Corp.*, an appeal of a \$500 million price-fixing conviction).

Just this week alone, he added, two Hogan associates were arguing two different cases in the Sixth Circuit, a partner was arguing in the Second Circuit, and another appellate associate was arguing a big motion in federal district court in Massachusetts.

"And we have a big D.C. Circuit argument next week, too," Katyal said. "Everything has been choreographed to the point where we have very little room for alteration, and the shutdown of any of these cases can pose a real hardship."

Some of the lawyers arguing next week also had clients and families planning to attend despite uncertainty about the court's schedule.

Miami's Srebnick was already in Washington for his first Supreme Court argument in *Kaley v. U.S.* when word came that arguments would go forward. A graduate of Georgetown University Law Center, he was prepping Wednesday for a moot court at the center's Supreme Court Institute. Srebnick said his client, Kerri Kaley, and her family, are planning to attend.

Kaley's criminal case has stalled pending an answer to the issue before the justices, Srebnick said. The issue is whether a criminal defendant has a right to challenge the evidence supporting her charges in a pretrial hearing when a protective order freezes the money necessary for the defendant to hire her attorney.

The government's position, he said, is that his client cannot use her own funds to hire a lawyer, but she will get a court-appointed lawyer. Ironically, because of the government shutdown, he added, "the government has no money now to pay for those lawyers."

Matthew Wessler of Public Justice will be making his second Supreme Court argument next week in *Heimeshoff v. Hartford Life & Accident Insurance Co.*, a case involving disability benefits under the Employee Retirement and Income Security Act. The organization's legal team on the case already had flown into Washington from several points around the country to help Wessler get ready.

Unlike Srebnick's clients, Wessler's client, Julie Heimeshoff, was never planning to attend the argument, he said. Her case has been ongoing since 2009, he said, and resolution of the issue before the court for her and others similarly situated "would be welcome as quickly as possible."