

# ‘Premium on proactivity’: how IP practices weathered shutdown storm

The longest government shutdown in US history froze ITC operations, yet IP practices stayed steady as firms relied on early preparation and client communication

**T**he longest government shutdown in US history came to an end earlier this month after 43 days during which there was limited government activity.

From October 1 to November 12, the country faced significant disruptions to its public services and federal operations, spurring concern in a variety of industries.

Despite heightened anxieties, intellectual property practices remained mostly operational, with USPTO services among those remaining steady.

Jarom Kesler, partner at Knobbe Martens in Orange County, says his firm expected federal courts to experience some disruption due to limited funds, but no such effect was seen.

He cites his peripheral involvement in a recent case at the Central District of California, noting that the shutdown had no impact.

Jordan Coyle, partner at White & Case and ITC expert, shares these observations, saying his firm’s diversified IP practice meant they too felt little effect.

## ITC disruption

Both partners note, however, that while their overall IP practice groups were minimally impacted, operations at the International Trade Commission (ITC) were completely disrupted, which had a knock-on effect.



The ITC, which relies on congressional appropriations, was forced to halt operations entirely. New complaints could not be filed during the shutdown.

Kesler notes: “All of our ITC cases got put on hold. If you’re an ITC attorney, that’s a big deal because the ITC process is very quick and intense.”

Coyle at White & Case says the biggest impact on his practice was not being able to pitch new cases.

“Typically, firms like ours will watch the docket, and when complaints are filed, we start to do our research, look for connections, and reach out to potential clients and do pitches, but none of that was happening,” he says.

The break in ITC activity also created disruptions in case schedules, prolonged the importation of infringing

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products, and caused uncertainty for the future of IP business operations.

However, while they had to navigate these challenges, practitioners say the pause in operations also created openings for strategic client work.

Coyle notes that some of his clients welcomed the delay in ITC operations.

“For companies typically on the defendant’s side, I’m sure they appreciated the reprieve,” he says.

He adds that the shutdown prompted White & Case lawyers to explore different counselling approaches, taking advantage of the ITC’s temporary halt.

“The shutdown created some additional advisory opportunities with clients reaching out to say: ‘We were in negotiation, the other side threatened an ITC suit, and now the ITC is closed. How do you think that affects our negotiation? How does that affect our leverage?’”

He notes that several plaintiffs filed cases in the district courts during the shutdown, but it became apparent that there was going to be a companion ITC case once the agency reopened.

### Future shutdowns

Now that the government is resuming normal operations, attorneys are reflecting on the shutdown and how they avoided ramifications.

“We’ve been through shutdowns before, and we knew the USPTO would stay open. The nervousness was all regarding the ITC and the district courts because it was uncertain if we would see any effects there,” says Kesler.

He adds: “We did advise clients that there might be some potential adverse effects on the district court, but we didn’t see anything. That’s a good lesson learned that the courts can continue longer than we initially expected.”

Coyle says that, despite disruptions, he would still advise clients to pursue ITC action.

“I don’t see the threat of this type of shutdown being too much of a deterrent to complaints being filed in the future.”

He adds that he would discourage clients from pausing an ITC action in anticipation of another shutdown.

“If our strategy is to file in the ITC because that’s the best forum to resolve your dispute, then we should maintain that strategy.”

With work back to normal, firms are considering how to prepare for future government shutdowns.

Coyle says there is a “tremendous premium on proactivity”.

He notes that attorneys who moved quickly in the early days of the shutdown to reschedule trials, have internal conversations with colleagues and clients, and monitor government updates, were able to operate with minimal disruption.

Both partners say their experience gave them confidence that their teams can handle long gaps in government operations.

“The lesson I’d convey to clients who are involved in IP litigation is that a shutdown doesn’t affect our approach to the work that we’re doing. We are still going to litigate as though there is no shutdown,” says Coyle.

He adds: “Unfortunately, we always have to keep the possibility of a shutdown in mind when advising clients.”



**Sanjana Mishra**  
Senior reporter  
Managing IP