

**From:** Paoletta, Mark R. EOP/OMB  
**Sent:** Saturday, January 12, 2019 1:14 PM  
**To:** Leopold, Matt (OGC)  
**Cc:** O'Scannlain, Kevin S. EOP/WHO; Matich, Nicholas T. EOP/OMB; Walsh, Heather V. EOP/OMB; Spencer, Raquel A. EOP/OMB  
**Subject:** RE: EPW Democrats question Wheeler's hearing prep during shutdown

Matt,

I am following up to memorialize our discussion last week and the legal conclusion we reached. OMB agrees that the Acting Administrator may prepare for and participate in his confirmation hearing that has been scheduled by the Congress for next week and that the Acting Administrator may also receive support from EPA staff as necessary to prepare for the hearing. This work constitutes an excepted activity that may continue during the lapse in appropriations for two reasons. First, it falls under the President's constitutional authority under the Appointments Clause and is necessary for the President's discharge of such authority. And, second, as the legislative branch has enacted appropriations for FY 2019 and is not subject to the lapse in the appropriations, Acting Administrator Wheeler's participation in the scheduled hearing is necessary for the Congress's funded function to be effective (and his absence from his own confirmation hearing would significantly damage the Committee's confirmation hearing), and is therefore necessarily implied to continue during EPA's lapse in appropriations. As we discussed, this is consistent with the December 13, 1995 Office of Legal Counsel decision *Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department's Appropriations*. Thank you again for reaching out to OMB, and please let us know if we can be of any further assistance during the lapse.

Mark

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