

How a Would-Be Biden Official Abused Her Power during the Obama Administration

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On Tuesday, the Senate Judiciary Committee will hold a nomination hearing for Vanita Gupta, President Biden’s choice for associate attorney general. If confirmed, Gupta would become the third-highest-ranking official in the Department of Justice.

Much of the questioning at Gupta’s hearing is likely to focus on her policy priorities during her previous stint in government, when she led the DOJ’s civil-rights division from 2014–2017. But senators on the committee would do well to also ask Gupta about *how* she came to assume that role.

Despite Gupta’s multi-year tenure leading the civil-rights division, a job that normally requires Senate confirmation, Tuesday’s hearing represents the first time she has ever appeared before the Senate as a nominee for any position. That’s because the Obama administration used aggressive interpretations of the Federal Vacancies Reform Act to both install her as the acting head of the division and keep her in charge when her statutory time limit ran out. The successful use of both strategies set questionable precedents that have significantly weakened the Senate’s role in vetting executive branch officials.

First, consider Gupta’s appointment. The Vacancies Act is intended to allow placeholders to temporarily fill executive offices during the interregnum period after one officer leaves and before another can be confirmed by the Senate. These placeholders are called “acting officers,” and the Act allows them to begin serving immediately without Senate approval. Because they are meant to be only placeholders, all acting officers must have already been serving somewhere in government: either in the high-ranking civil service, in some other Senate-confirmed job, or in the “first-assistant” position to the vacant office itself.

Yet when President Obama wanted to appoint Gupta as acting civil-rights head, she wasn’t in government at all: She was working at the ACLU. So Obama took advantage of an ambiguity in the text of the Vacancies Act, appointing Gupta to the vacant position of deputy civil-rights head and then instantaneously elevating her to the acting-head position.

Gupta’s appointment clearly went against the spirit of the Vacancies Act, which permits first assistants to assume acting roles, presuming they will have relevant experience from serving as second-in-command — experience Gupta did not have. Even the National Task Force on Rule of Law & Democracy, housed in the left-leaning Brennan Center for Justice, characterized the move as “exploit[ing]” a “loophole.”

But, in fact, Gupta's appointment may not have been a true loophole, because it may not have been legal at all. When the Trump administration later attempted a similar maneuver to install Ken Cuccinelli as acting head of Citizenship and Immigration Services, a federal court invalidated the appointment. The court cabined its holding to situations in which the first-assistant position was created solely for the purpose of elevating someone to acting officer, but the court suggested that in a future case it might consider a broader ruling. As the court noted, there is strong evidence that when the Vacancies Act was passed, the understood meaning of "first assistant" did not "encompass those appointed to the first-assistant position after the vacancy arose."

There is similar legal ambiguity surrounding the length of Gupta's service as civil-rights head. To encourage permanent nominations, an acting officer may only serve for seven months unless the president puts forward a permanent nominee (which, with rare exceptions, cannot be the acting officer herself). Although it was at first presumed that Obama would nominate Gupta — which would have immediately ended her tenure as acting head — he never did. Indeed, Obama never nominated anyone, meaning Gupta's statutory time limit expired after seven months in early 2015.

How, then, did Gupta continue to lead the division until Obama left office? Through exploitation of yet another loophole in the Act, which allows a non-Senate-confirmed person who is not officially an "acting officer" to nonetheless perform all the "non-exclusive" (i.e., shared or delegable) duties of an office indefinitely. When Gupta's time limit expired, Attorney General Loretta Lynch simply purported to delegate to her all the duties of the civil-rights head position, arguing that they were all nonexclusive.

When the DOJ attempted this strategy, Ilya Shapiro and I predicted that parties subject to Gupta-authorized enforcement actions would challenge her authority in court. Some did, indeed. But courts accepted Gupta's argument that all of the powers she exercised must be presumed nonexclusive absent explicit text to the contrary, and all of the challenges failed.

Nonetheless, the legality of this strategy is still not settled. A federal court recently struck down a similar move by the Trump administration, remarking that performing the nonexclusive duties of an office while being barred from using the "acting officer" title constitutes "a distinction without a difference."

Ironically, Gupta's tenure helped establish two strategies that would be used to an even greater extent by the Trump administration in its attempts to avoid Senate advice and consent. Perhaps, then, it would be worth asking her whether she would still support the use of similar strategies to install those serving below her should she finally be confirmed.

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