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The Illegal Tenure of Civil Rights Head Vanita Gupta

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EXECUTIVE SUMMARY

In April 2015 Vanita Gupta's tenure as the acting assistant attorney general (AAG) for the civil rights division expired. In such a situation, the Federal Vacancies Reform Act (FVRA) requires that all duties assigned solely to the AAG by statute or regulation must be performed by the attorney general herself—in this case, Loretta Lynch. One such duty is to “conduct[], handle[], or supervise[] . . . [e]nforcement of all Federal statutes affecting civil rights . . . and authorization of litigation in such enforcement.” Nonetheless, to get around the FVRA's rules, Loretta Lynch has purported to delegate this enforcement power to the principal deputy AAG—which happens to be Vanita Gupta herself.

This delegation raises a disturbing possibility. If successful and unchallenged, administrations may continue to use

this tactic to subvert the FVRA, creating acting officers in all but name who can hold their office indefinitely without Senate consent. But there is legal recourse to stop this tactic, because the FVRA's drafters anticipated such a maneuver. An analysis of the law's plain text shows that these delegations of power—and the actions taken by Gupta under their authority—are legally illegitimate. Unless the government can show that Loretta Lynch was in fact “supervis[ing]” each enforcement action brought by Gupta since April 2015, a legal challenge to the validity of each of these enforcement actions would have a very strong chance of success. Gupta's long-unnoticed violation of the FVRA suggests that a new dedicated watchdog may be necessary to monitor when officials who have not received Senate consent claim to be exercising delegated powers.

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INTRODUCTION

This Policy Bulletin is a case study of how the executive branch has attempted to undermine the purposes behind the Federal Vacancies Reform Act (FVRA).¹ President Clinton’s nominee for assistant attorney general for the Justice Department’s Civil Rights Division, Bill Lann Lee, prompted the passage of the FVRA by indefinitely retaining his title as “acting officer” and thereby drawing more attention to his own unauthorized powers. Now President Obama’s nominee to the same post, Vanita Gupta, has undermined the law by forgoing the title of “acting officer” while still claiming a collection of “delegated” powers which, when combined, make her an “acting officer” in all but name.

Using the authority of some strongly worded letters to display a claim to continued power, Gupta has managed to violate the terms of the FVRA for over a year, with hardly anyone noticing. As a new administration takes control, drawing attention to this case may discourage future attempts to subvert the FVRA, and with it the Constitution’s Appointments Clause itself.

The Appointments Clause declares that the president

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.²

As Alexander Hamilton wrote, this system of Senate confirmation was designed to be “an excellent check upon a spirit of favoritism in the President.”³ Gouverneur Morris likewise supported splitting the appointment power between the two branches since “as the President was to nominate, there would be

responsibility, and as the Senate was to concur, there would be security.”⁴

But the Framers also included an exception to the requirement of Senate consent, allowing that

the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁵

This “Excepting Clause” was added “foreseeing that when offices became numerous and sudden removals necessary, [advice and consent] might be inconvenient” in particular circumstances.⁶

Congress acknowledged one such administrative necessity when it passed the “Vacancies Act” in 1868.⁷ The law authorized the president to make temporary appointments of “acting” officers—without the Senate’s advice and consent—when vacancies arose in certain offices. These “acting” officers had as much power as their permanent counterparts, but could only stay on the job for a limited time, during which Congress and the president were meant to find someone mutually agreeable for the permanent position. The Vacancies Act remains on the books today, having since been amended several times to match the realities of each era’s Senate confirmation process. Most important, several revisions have lengthened the tenure of acting officers as the confirmation process has gotten more involved and time-consuming.⁸

4. 2 Farrand’s Records: The Records of the Federal Convention of 1787, at 539 (Max Farrand ed., 1911).

5. U.S. Const. art. II, § 2, cl. 2.

6. See *United States v. Germaine*, 99 U.S. 508, 510 (1878).

7. See Act of July 23, 1868, ch. 227, 15 Stat. 168 (1868).

8. For an account of this history, see *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 210 (D.C. Cir. 1998) (describing how the tenure of valid temporary appointments was set at 10 days in 1868, then lengthened to 30 days in

1. Federal Vacancies Reform Act of 1998, Pub. L. No. 105277, 112 Stat. 2681.

2. U.S. Const. art. II, § 2, cl. 2.

3. The Federalist No. 76, at 455–56 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Although the Supreme Court has never ruled on exactly how the Vacancies Act fits into our constitutional framework, the most straightforward view is that “acting” officials are “inferior officers” as described in the Excepting Clause, and therefore the Vacancies Act derives its constitutionality from Congress’s power to vest the appointment of inferior officers in “the President alone.”⁹ Thus, any exercise of power by an officer who has not been confirmed by the Senate *and* who is not serving under the terms of the Vacancies Act goes beyond a mere statutory violation. Congress has neither given its assent directly (through Senate confirmation) nor indirectly (through the passage of a statute authorizing such service). Such a unilateral appointment cuts to the heart of the separation of powers that the Framers created with the Appointments Clause.

Despite the gravity of such unauthorized appointments, presidents have often attempted to push the boundaries of who may serve in the executive branch—and for how long—without Senate consent.¹⁰ Such conflicts between Congress and the president reached a crescendo in 1998: Bill Lann Lee, who had never been confirmed to lead the Civil Rights Division, retained the title of acting AAG for nearly a year—far longer than the then-120-day deadline set in the Vacancies

1891, then to 120 days in 1988). This period was again lengthened to 210 days in 1998. *See* 5 U.S.C. § 3346(a)(1) (2012).

9. For a more thorough presentation of this argument, see Brief of Cato Institute as Amicus Curiae Supporting Respondent at 3–13, *NLRB v. SW General*, No. 15-1251 (Sup. Ct. filed Sept. 26, 2016).

10. For example, in 1973 President Nixon appointed Howard Phillips acting director of the Office of Economic Opportunity (OEO), even though the terms of the Vacancies Act did not expressly encompass appointments to the OEO. The legitimacy of the appointment was eventually challenged in the Federal District Court for the District of Columbia, which held his appointment to be invalid and enjoined Phillips from acting as director of the OEO. *See Williams v. Phillips*, 360 F. Supp. 1363, 1371 (D.D.C. 1973).

Act.¹¹ In response, Congress passed the latest major revision of the Vacancies Act, called the “Federal Vacancies Reform Act” (FVRA).¹² This act was meant to crack down on unauthorized lengthy tenures of “acting” officials.

FACTUAL BACKGROUND

The events that led to Vanita Gupta’s FVRA violation began in July 2013 when Tom Perez was promoted from assistant attorney general (AAG) for the Civil Rights Division to secretary of labor. President Obama nominated Debo Adegbile, formerly an attorney with the NAACP, to replace Perez.¹³ But Adegbile’s nomination never made it out of the Senate. It came to light that during his tenure at the NAACP, Adegbile had contributed to a brief on behalf of Mumia Abu-Jamal, a highly controversial convicted murderer and cause célèbre. This connection prompted an outpouring of objections that effectively doomed Adegbile’s nomination.¹⁴

While Adegbile’s nomination was pending in the Senate, the Civil Rights Division was led by a sequence of “acting heads,” as permitted under the terms of the FVRA.¹⁵

11. For a general overview of this incident, see George F. Will, *Back to Bill Lann Lee*, Wash. Post, Dec. 13, 1998, https://www.washingtonpost.com/archive/opinions/1998/12/13/back-to-bill-lann-lee/5c64312f-41d9-4f66-b882-5041f55cd92c/?utm_term=.024bf6810299. For a more in-depth account of the legal problems with the appointment, see Steven J. Duffield & James C. Ho, *The Illegal Appointment of Bill Lann Lee*, 2 Tex. Rev. L. & Pol. 335 (1998).

12. 5 U.S.C. §§ 3345–3349 (2012).

13. *See* Ryan J. Reilly, *Obama Nominates Former NAACP Official to Top Civil Rights Post*, Huffington Post, Nov. 15, 2013, http://www.huffingtonpost.com/2013/11/14/debo-adegebile-doj-civil-rights_n_4277392.html.

14. *See* Wesley Lowery, *How Mumia Abu-Jamal Doomed Debo Adegbile in the Senate*, Wash. Post, Mar. 5, 2014, https://www.washingtonpost.com/news/the-fix/wp/2014/03/05/how-mumia-abu-jamal-doomed-dego-adegebile/?utm_term=.6f2ff226f019.

15. From July 2013 to July 2014, Jocelyn Samuels served as acting AAG. From July 2014 to October

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Eventually, in September 2014, Adegbile permanently withdrew his nomination in the face of certain defeat.¹⁶ Under the terms of the FVRA, acting officers may serve for only 210 days after the withdrawal or rejection of a second nomination for the position of permanent officer.¹⁷ Adegbile had already been nominated and withdrawn once under a procedural maneuver,¹⁸ which meant this statutory timer immediately began running upon his permanent withdrawal.

A month after Adegbile’s withdrawal, Vanita Gupta was appointed principal deputy AAG (and therefore the acting AAG).¹⁹ Though news reports speculated that Gupta would be put forward for Senate confirmation to lead the division permanently,²⁰ such nomination never came. Even though the FVRA’s seven-month time limit was intended to incentivize the president and the Senate to reach a consensus on a new, permanent official to fill a vacancy,²¹ neither she nor anyone else

2014, Molly J. Moran served as acting AAG. See Al Kamen, *AG Holder Taps his Deputy Chief of Staff to be Acting Chief of Civil Rights Division*, Wash. Post, Jul. 31, 2014, <https://www.washingtonpost.com/blogs/in-the-loop/wp/2014/07/31/ag-holder-taps-his-deputy-chief-of-staff-to-be-acting-chief-of-civil-rights-division>.

16. See Josh Gerstein, *Obama’s Civil Rights Nominee Withdraws*, Politico, Sep. 15, 2014, <http://www.politico.com/blogs/under-the-radar/2014/09/obamas-civil-rights-nominee-withdraws-195512>.

17. 5 U.S.C. § 3346(b)(2)(B) (2012).

18. For an official record of Adegbile’s second withdrawal, see United States Senate Committee on the Judiciary, PN1241-113: Debo P. Adegbile, <https://www.judiciary.senate.gov/nominations/executive/pn1241-113> (last visited Dec. 22, 2016).

19. See Lakshmi Gandhi, *Obama Nominates Vanita Gupta to lead DOJ’s Civil Rights Division*, NBC News, Oct. 16, 2014, <http://www.nbcnews.com/news/asian-america/obama-nominates-vanita-gupta-lead-dojs-civil-rights-division-n227476>.

20. See *id.* (“Gupta is expected to be nominated to become the permanent head of the division later this year.”).

21. See 144 Cong. Rec. 27,498 (Oct. 21, 1998) (statement of Sen. Byrd) (“[T]he enforcement mechanism should not be considered, nor is it intended to be, a form of punishment, but, rather, a

was nominated for the position during the remainder of Obama’s tenure—more than two years. The seven-month statutory clock thus ran out in April 2015, when Vanita Gupta was still only the deputy AAG. The authority and legal status of Gupta’s actions since April 2015 will be the subject of this analysis.

Applying the FVRA to Gupta’s Enforcement Actions

In April 2015 Vanita Gupta began signing all Civil Rights Division legal briefs and correspondence as “principal deputy assistant attorney general,” rather than before when she signed as “acting assistant attorney general.”²² It is clear from this tacit acknowledgment that Gupta was aware her statutory period as a valid acting officer had expired. Nonetheless, from April 2015 to the present, Gupta has continued to exercise duties assigned by regulation solely to the AAG.

Two letters sent by Gupta after April 2015 serve as examples of both the authority she has claimed and the justification for that authority that she has put forward. On June 22, 2015, Gupta sent a letter to the City Attorney’s Office of Lubbock, Texas, notifying the city that she had authorized an impending Title VII lawsuit. In the letter, Gupta wrote:

Title VII provides that when a local government employer has engaged in a pattern or practice of discrimination in violation of the [Civil Rights] Act,

means of providing incentive for the timely submission of nominations.”).

22. Compare Brief for Petitioner/Cross Respondent, *Castillo Condominium Ass’n v. U.S. Dept. of Housing and Urban Development*, 821 F.3d 92 (1st Cir. 2016) (Nos. 14-2139, 15-1223), 2015 WL1906185 (brief filed April 14, 2015 and signed “Vanita Gupta, Acting Assistant Attorney General”), with Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellees and Urging Affirmance, *Nat’l Federation of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016) (No. 14-2001), 2015 WL 1695500 (brief filed April 15, 2015 and signed “Vanita Gupta, Principal Deputy Assistant Attorney General”).

“Many of the duties given to the attorney general by statute are specifically delegated to particular lower officers by regulation.”

the Attorney General may apply to the appropriate court for an order that will ensure compliance with Title VII and remedy the effects of past discrimination. This duty has been delegated to the Principal Deputy Assistant Attorney General in the Department’s Civil Rights Division, who has authorized the filing of suit against the City.²³

Similarly, on May 4, 2016, Gupta wrote a letter to North Carolina Governor Pat McCrory, also to inform him of an impending Title VII suit:

When the Attorney General of the United States has a reasonable basis to believe that a state or person has engaged in a pattern or practice of discrimination in violation of Title VII, she may apply to the appropriate court for an order that will ensure compliance with Title VII. *See* 42 U.S.C. § 2000e-6(a). This responsibility has been delegated to the Principal Deputy Assistant Attorney General of the Civil Rights Division.²⁴

If one looks at the statute Gupta cites, this enforcement power does seem to be the attorney general’s. As the statute reads:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter . . . the

Attorney General may bring a civil action in the appropriate district court of the United States.²⁵

Gupta does not cite a specific statute for her further claim that the attorney general may *delegate* this power to the principal deputy AAG (or to anyone else, for that matter), but she is most likely relying on 28 U.S.C. § 510, which declares:

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.²⁶

This expansive statutory power of delegation seems to place very broad discretion in the attorney general. However, many of the duties given to the attorney general *by statute* are specifically delegated to particular lower officers *by regulation*. The most important and wide-sweeping such regulation concerning the Civil Rights Division is 28 C.F.R. § 0.50, which states:

The following functions are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General, Civil Rights Division:

(a) Enforcement of all Federal statutes affecting civil rights, including those pertaining to elections and voting, public accommodations, public facilities, school desegregation, employment (including 42 U.S.C. 2000e-(6)), housing, abortion, sterilization, credit, and constitutional and civil rights of Indians arising under 25 U.S.C. 1301 et seq., and of institutionalized persons, *and authorization of litigation in such enforcement*, including criminal prosecutions and civil actions and proceedings on behalf

23. Letter from Vanita Gupta to Mitchell Satterwhite 2 (Jun. 22, 2015), *available at* <http://www.kcbd.com/story/29390520/doj-says-lpd-discriminated-against-hispanic-female-job-applicants> (click “Department of Justice Letter to City of Lubbock”).

24. Letter from Vanita Gupta to Governor Pat McCrory 2 (May 4, 2016), *available at* <http://online.wsj.com/public/resources/documents/2016.05.04StateFinal.pdf>.

25. 42 U.S.C. § 2000e-6(a) (2012).

26. 28 U.S.C. § 510 (2012).

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of the Government and appellate proceedings in all such cases.²⁷

Gupta’s authorizations of the suits against both Lubbock and North Carolina undeniably fall within the powers assigned to the AAG by this regulation. Both letters sent by Gupta described “authorization[s] of litigation” enforcing 42 U.S.C. § 2000e-(6).

The question, then, is which provision should take precedence: the attorney general’s statutory right to delegate her powers to whomever she wishes (including, presumably a deputy AAG like Vanita Gupta), or the specific delegation of powers to the AAG (and *only* the AAG) made by regulation?

Anticipating such a conflict, the FVRA answers this question clearly. Because it was intended to prevent presidential workarounds that would bypass advice and consent, the FVRA is by its own terms “the exclusive means for temporarily authorizing an acting official to perform the functions and duties of” a Senate-confirmed office, unless a statutory provision either “expressly authorizes” the designation of “an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity” or “[expressly] designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.”²⁸

27. 28 C.F.R. § 0.50 (2016) (emphasis added). Some specified exceptions are then assigned by the same regulation to the assistant attorney general for the Criminal Division, none of which are at issue here.

28. 5 U.S.C. § 3347(a) (2012). Office of Legal Counsel testimony from 1998 reveals that a regulation formerly vested the principal deputy AAG with the duties of the AAG during a vacancy. *See* 22 Op. O.L.C. 44, 46 n.2 (1998) (“When the office of Assistant Attorney General is vacant, the Attorney General by regulation has assigned the duties set out in 28 C.F.R. § 0.50 to the ranking Deputy Assistant Attorney General or such other official as she designates. *Id.* § 0.132(d).”). However, because this vesting was by *regulation* rather than *statute*, it would not have overridden the procedures of the FVRA even if it remained on the books. And in fact, it no longer remains on the books. 28 C.F.R.

Further, the FVRA clarifies that general delegation statutes such as 28 U.S.C. § 510 are *not* examples of such express authorizations: “Any statutory provision providing general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(2) applies.”²⁹

Indeed, we can be particularly sure that 28 U.S.C. § 510 is one of the “general authority” statutes described here, since the legislative record behind the drafting of this section is unusually apposite to a controversy concerning the AAG for the Civil Rights Division. The Bill Lann Lee controversy, which prompted the passage of the FVRA, concerned *exactly the same statute and office*. In many ways, then, 28 U.S.C. § 510 was the *model* of the type of statute Congress wished to constrain.

The Office of Legal Counsel specifically cited 28 U.S.C. § 510 when it was asked to provide a legal justification for Lee’s indefinite service as acting AAG. In that testimony to a Senate committee, the O.L.C. described 28 U.S.C. § 510 as a statute which effectively allowed indefinite service without Senate consent, beyond whatever time limits the Vacancies Act may place on such service:

In the vesting-and-delegation statutes, Congress gave the Attorney General wide discretion to assign duties and powers within the Department. Department officials below the Attorney General, for the most part, have few duties that are specifically imposed on them by statute. Instead, they carry out duties assigned by the Attorney General under 28 U.S.C. §§ 509 and 510. . . . The

§ 0.132 has since been redesignated as 28 C.F.R. § 0.137 (2016) (*see* 68 FR 4923, 4926 (2003)) and that regulation now explicitly vests acting powers only in the first assistants of *non*-Senate-confirmed officers (who are not covered by the FVRA). *See* 28 C.F.R. § 0.137(c); (d).

29. 5 U.S.C. § 3347(b) (2012).

“Senator Byrd specifically referenced 28 U.S.C. § 510 as the prime example of a statute that could no longer be used to vest someone with the powers of an acting officer.”

Attorney General’s exercise of this authority in the designation of Bill Lann Lee as Acting Assistant Attorney General in charge of the Civil Rights Division shows how the vesting-and-delegation statutes supplement the Vacancies Act.³⁰

Thus, the Senate was well aware of the potential power and scope of this statute (at least in the eyes of the executive branch). The FVRA was intended to overrule this legal reasoning, and prevent future administrations from using similar ones. This is why, in explaining the FVRA on the Senate floor, Senator Byrd specifically referenced 28 U.S.C. § 510 as the prime example of a statute that could *no longer* be used to vest someone with the powers of an acting officer:

Moreover, in an effort to squarely address past problems, the Act specifically prohibits the use of general, “housekeeping” statutes as a basis for circumventing the Vacancies Act. Provisions such as, but not limited to, 28 U.S.C. 509 and 510, which vest all functions of the Department of Justice in the Attorney General and allow the Attorney General to delegate responsibility for carrying out those functions, shall not be construed as providing an alternative means of filling vacancies.³¹

This brings us to the one difference between the Lee precedent—which the FVRA explicitly overruled—and the service of Gupta. While Lee relied on 28 U.S.C. § 510 to continue using the title “acting assistant attorney general,” Gupta has refrained from using that title since her statutory period expired. Most of the comments of the FVRA’s sponsors were implicitly focused on the situation of an acting officer attempting to retain both the powers *and title* of acting officer indefinitely, as Lee did. Thus,

Gupta’s tenure raises a new question: Even if 28 U.S.C. § 510 may not be used to indefinitely prolong a term as an acting officer, can it still be used to delegate the same *powers* that an acting officer would have, if not the actual title?

It should not be a huge surprise that the FVRA has a clear answer to this question as well. Though titles may have some formalistic importance, it is the actual performance of *duties* by officers that gives them their power. For this reason, the FVRA creates a direct link between the existence of a valid acting officer (or lack thereof) and the performance of that officer’s duties:

Unless an officer or employee is performing the functions and duties in accordance with [the terms of the FVRA], if [a Senate-confirmed] officer of an Executive agency . . . dies, resigns, or is otherwise unable to perform the functions and duties of the Office- (1) the office shall remain vacant; and (2) . . . *only the head of such Executive agency may perform any function or duty of such office.*³²

We can apply each of the clauses of this statute to the present situation. Once the statutory period for Gupta’s service as an acting officer ended in April 2015, no one was performing the functions and duties of the AAG as an acting AAG pursuant to the terms of the FVRA. Thus, since April 2015, the office of AAG has been vacant, and only the attorney general (the head of the AAG’s executive agency) has had the legal authority to perform the “functions and duties” of the AAG. And so, to finally determine whether Gupta’s enforcement actions were valid, the last question we must answer is whether the powers laid out in 28 C.F.R. § 0.50—including the power to authorize Title VII suits under 42 U.S.C. § 2000e-6(a)—are “function[s] or dut[ies]” of the AAG.

To answer that question, we must turn to the FVRA’s definition of “function or duty”:

30. 22 Op. O.L.C. 44, 45–46 (1998).

31. 144 Cong. Rec. 27,498 (Oct. 21, 1998).

32. 5 U.S.C. § 3348(b) (2012) (emphasis added).

“If any lawsuit was in fact brought by Gupta while she exercised power in violation of the Federal Vacancies Reform Act, such a lawsuit would have to be dismissed entirely.”

[T]he term “function or duty” means any function or duty of the applicable office that— (A)(i) is established by statute; and (ii) is required by statute to be performed by the applicable officer (and only that officer); or (B)(i)(I) is established by regulation; and (II) is required by such regulation to be performed by the applicable officer (and only that officer); and (ii) includes a function or duty to which clause (i) (I) and (II) applies and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.³³

Applying what we know about the power to authorize civil rights litigation, we can see that it meets this definition. Unlike several other regulations, 28 C.F.R. § 0.50 does *not* vest its functions in the principal deputy AAG as an alternative to the AAG,³⁴ meaning that its vesting of powers in the AAG *alone* is plainly intentional. Thus, they are “function[s] . . . established by regulation and . . . required by such regulation to be performed by the applicable officer (and only

33. 5 U.S.C. § 3348(a)(2) (2012).

34. For examples of regulations that *do* explicitly vest functions in the principal deputy AAG as well as the AAG, see, e.g., 28 C.F.R. § 0.175 (2016) (“The Assistant Attorneys General or any Deputy Assistant Attorney General of . . . the Civil Rights Division . . . are authorized to . . . approve the application of a U.S. Attorney to a Federal court for an order compelling testimony”); 28 C.F.R. § 0.52 (2016) (“The Assistant Attorney General in charge of the Civil Rights Division and his Deputy Assistant Attorney Generals are each authorized to . . . certify that the legal proceeding, in which a motion to take testimony by deposition is made, is against a person who is believed to have participated in an organized criminal activity”); 28 C.F.R. § 0.13 (2016) (“Each Assistant Attorney General and Deputy Assistant Attorney General is authorized to . . . designate Department attorneys to conduct any legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct.”).

that officer).” And the regulation has been unchanged since 2011, meaning it was in effect for at least one of (indeed, for *all* of) the 180 days preceding the vacancy.³⁵

Thus, the effect of the FVRA is clear: ever since Gupta ceased to be the acting AAG in April 2015, only the attorney general herself—in this case Loretta Lynch—has had the legal right to perform the functions and duties of the AAG laid out in 28 C.F.R. § 0.50.³⁶

Gupta’s Possible Defenses

If Vanita Gupta has indeed been acting without authority since April 2015, what are the consequences? As the D.C. Circuit recently explained, “the FVRA renders actions taken by persons serving in violation of the Act void ab initio. ‘An action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect’ and ‘may not be ratified.’”³⁷ Thus, if any lawsuit was in fact brought by Gupta while she exercised power in violation of the FVRA, such a lawsuit would have to be dismissed entirely.

It would seem, then, that a challenge to the validity of lawsuits authorized by Gupta after April 2015 would have a strong chance of success. What might be the government’s best arguments against such a challenge?

The most plausible argument would focus on the opening language of 28 C.F.R. § 0.50, which states that the authorization of lawsuits “shall be conducted, handled, or supervised by” the AAG. Specifically, the phrase “or supervised by” could be read to mean that the AAG—or, in this case, the attorney general

35. For the most recent amendment to 28 C.F.R. § 0.50, see 76 FR 21239–01 (2011).

36. The same holds true for those functions and duties set out in any other regulation that vests functions or duties *solely* in the AAG, though a complete investigation of whether any other such duties have been performed by Gupta since the end of her tenure as acting AAG is beyond the scope of this Policy Bulletin.

37. *SW General, Inc. v. N.L.R.B.*, 796 F.3d 67, 71 (D.C. Cir. 2015) (quoting 5 U.S.C. § 3348(d)(1)–(2) (2012)), cert. granted, 136 S. Ct. 2489 (Jun. 20, 2016).

vested with the sole right to perform the functions of the AAG—may allow someone else to actually authorize a lawsuit. Under this theory, such an authorization would be legitimate so long as the attorney-general-as-AAG “supervises” the choice to make the authorization.

The Second Circuit has accepted a similar argument, though one in which the language of the regulation at issue more strongly implied a power of delegation. In *Schaghticoke Tribal Nation v. Kempthorne*,³⁸ the dispute centered around a regulation that required the assistant secretary for Indian affairs (AS-IA) in the Department of the Interior to issue “Indian acknowledgment decisions.”³⁹ The office of AS-IA was vacant at the time of a disputed Indian acknowledgment decision, and no one was validly serving as acting AS-IA. Nonetheless, rather than performing this function of the AS-IA himself, the secretary of the Interior had delegated the power to make the disputed Indian acknowledgment decision to a lower officer in the Department of the Interior.

Although the Second Circuit agreed that the FVRA required the secretary himself to perform the exclusive duties of the AS-IA while the vacancy remained, the court nonetheless accepted this delegation as valid. This was because the regulation *itself* contemplated delegation by the AS-IA, since it defined all usages of the term “assistant secretary” to mean “the assistant secretary for Indian Affairs, or that officer’s authorized representative.”⁴⁰ The court thus reasoned that since the AS-IA himself had an implied power of delegation to an authorized representative, so must the Secretary, inhabiting the role of AS-IA, also have an implied power of delegation. As the court explained,

Just as an Assistant Secretary, in the ordinary course, may name an ‘authorized

representative’ to make Indian acknowledgment decisions, the Secretary of the Interior in February 2005, performing the Assistant Secretary’s duties, simply named an ‘authorized representative’ . . . to decide whether to acknowledge the Schaghticoke[’s Indian status].⁴¹

If the delegations of power to Gupta as principal deputy AAG are challenged, the dispute will likely turn on an interpretation of the word “supervise” in 28 C.F.R. § 0.50. A court could find that Attorney General Lynch, inhabiting the role of AAG as required by the FVRA, validly “supervised . . . [the] authorization of litigation” against Lubbock, North Carolina, and others. However, the government would not have nearly as strong a case as it had in *Schaghticoke*, since the word “supervise” implies a duty to retain some decision-making power, rather than to completely delegate the function to another.⁴² Unless there is evidence that Attorney General Lynch played such a supervisory role in each of the lawsuits authorized after April 2015 (unlikely, since Gupta’s own letters said that Lynch had delegated all duties to her), those suits are in serious legal jeopardy.

If this argument does indeed fail, is there any other way the suits brought by Gupta could nonetheless survive? It is possible, because courts may be reluctant to accept FVRA arguments that were not raised at the very beginning of litigation. The D.C. Circuit stressed this limitation on FVRA arguments in its recent decision, writing that

“Courts may be reluctant to accept Federal Vacancies Reform Act arguments that were not raised at the very beginning of litigation.”

38. 587 F.3d 132 (2d Cir. 2009).

39. See *Schaghticoke*, 587 F.3d at 135 (quoting 25 C.F.R. § 83.10 (2016) (providing that the “Assistant Secretary shall make a final determination regarding the petitioner’s [Indian] status”).

40. See *id.* (quoting 25 C.F.R. § 83.1 (emphasis added)).

41. *Id.*

42. “Supervision” is defined as “[t]he series of acts involved in managing, directing, or overseeing persons or projects.” Black’s Law Dictionary 1667 (10th ed. 2014). By contrast, a “representative” is “someone who stands for or acts on behalf of another,” *id.* at 1494, a definition much closer to that of complete delegation. (“Delegate” itself is defined as “[t]o give part of one’s power or work to someone in a lower position within one’s organization.” *Id.* at 519).

“The Federal Vacancies Reform Act’s oversight provision is ill-equipped to detect the more subtle type of violation that occurred.”

We address the FVRA objection in this case because the petitioner raised the issue in its exceptions to the ALJ decision as a defense to an ongoing enforcement proceeding. We doubt that an employer that failed to timely raise an FVRA objection—regardless whether enforcement proceedings are ongoing or concluded—will enjoy the same success.⁴³

Thus, in practical terms, the odds of dismissing the suits brought by Gupta may depend on how deeply into the litigation process they have already progressed.

CONCLUSION

Regardless of whether it is too late to challenge the suits brought by Gupta, her example should serve as a cautionary tale, one that raises a serious question as to whether a new oversight reform is needed.

Under the terms of the FVRA, the comptroller general of the United States is tasked with tracking and reporting violations of the 210-day limit on service as an acting officer.⁴⁴ If such a violation is found, the comptroller general must immediately notify several Congressional committees, as well as the president and the Office of Personnel Management.⁴⁵

43. *SW General, Inc. v. N.L.R.B.*, 796 F.3d 67, 83 (D.C. Cir. 2015).

44. 5 U.S.C. § 3349(b) (2012).

45. *Id.*

This oversight provision appears to have worked as intended, with several violations during both the Bush and Obama administrations having been discovered and reported.⁴⁶

What the Gupta case shows, however, is that merely ceasing to employ the title of “acting officer” after 210 days does not mean that an officer has fully complied with the FVRA. The FVRA’s oversight provision is ill-equipped to detect the more subtle type of violation that occurred here, since Gupta duly ceased to refer to herself as “acting assistant attorney general” after 210 days. A new, more robust oversight provision may be necessary—one that tasks either the comptroller general or another dedicated watchdog with monitoring claims of delegated authority under statutes such as 28 U.S.C. § 510. After all, it is the exercise of such authority, not any symbolic title, that gives these officers so much power over normal citizens’ lives.

46. *See, e.g.*, Letter from Anthony H. Gamboa, General Counsel of the Government Accountability Office, to President George W. Bush (Mar. 18, 2002), *available at* <http://www.gao.gov/assets/80/75124.pdf> (informing the president that James Michael Kelly had violated the 210-day time limit in his service as Acting General Counsel of the Department of Agriculture); Letter from Susan A. Poling, General Counsel of the Government Accountability Office, to President Barack Obama (Mar. 30, 2015), *available at* <http://www.gao.gov/assets/670/669447.pdf> (informing the president that Richard J. Griffin had violated the 210-day time limit in his service as Acting Inspector General of the Department of Veterans Affairs).