

The 'Damn Good Lawyer' Squaring Off With Trump

By **Evan Weinberger**

Law360, New York (November 6, 2017, 5:36 PM EST) –

Deepak Gupta stood in front of Manhattan's federal courthouse on a crisp October afternoon, fresh off oral arguments in a case alleging President Donald Trump was violating the Constitution because of his failure to divest his hotel, restaurant and other business holdings.

Despite the gravity of the case, Gupta seemed at ease, appearing to almost marvel at what he had just done.

"It's not every day that you get the opportunity to argue against the president in court about a fundamental constitutional provision, let alone a constitutional provision that hasn't been interpreted before and that illustrates the framers' infinite foresight and wisdom," Gupta told reporters.

"They understood that a republic would fail if high officials accept payments from foreign and domestic governments and use their office for profit," he said.

Gupta may have quipped that arguing directly against the president was not an everyday occurrence for him, but it's also not that unusual given the central role he has come to play in what many term the "resistance" to the Trump administration.

Although he has continued to work on the consumer protection and class action appellate cases where he made his name, Gupta has also become a go-to attorney for a series of lawsuits targeting Trump's business dealings and other actions.

His firm, Gupta Wessler PLLC, has taken on a challenge to Trump's one-in, two-out regulatory order, which mandates that executive agencies remove two rules for every new regulation they put in place. Gupta is also

representing an objector to the \$25 million Trump University settlement in a case that could reopen the litigation.

But Gupta, who recently turned 40, doesn't necessarily see his role as being a thorn in the side of the new administration.

"I think one thing you have to ask is: Would we be doing this if the defendant was not Donald Trump?" Gupta said. "And I mean, if the answer is no, then I think we need to think really carefully about whether that's something we really want to be involved in."

In the end, he said, he's doing something more important: protecting the United States' founding values.

"He's a very principled kind of guy," said Alan Kaplinsky, the co-practice leader of Ballard Spahr LLP's consumer financial services group, who has teamed with Gupta to set up multiple Practising Law Institute events.

Kaplinsky, one of the deans of the defense bar on consumer finance issues, also called Gupta "one damn good lawyer."

"He seems to be ideally suited for that role" of challenging Trump, he said.

Liberal Dreams

The law firm of Gupta Wessler was originally intended to be a force for overturning U.S. Supreme Court decisions that have stuck in progressives' crawls for years — including one that marked an early setback for its founder.

A veteran of the U.S. Justice Department's Voting Rights Section, the American Civil Liberties Union and Americans United for Separation of Church and State, Gupta argued his first Supreme Court case in 2011's *AT&T Mobility v. Concepcion*.

Gupta was working at the Public Citizen Litigation Group at that time, and he suffered a loss in the landmark ruling, which upheld mandatory arbitration clauses in consumer contracts. In effect, the ruling allowed companies to shut down a great deal of potential class action litigation before it could get started by forcing consumers into arbitration.

In the runup to Election Day, Gupta had his eye on reversing that loss — with the help of the justices who would be appointed by President Hillary Clinton.

“There were a lot of heady conversations about what’s the strategy for rolling back *Concepcion*? What does that look like?” he said. “All of those conversations were a complete waste of time, in retrospect, because it’s not going to happen.”

Despite the loss, Gupta gained an admirer in Andrew Pincus, the Mayer Brown LLP appellate heavyweight who argued on behalf of AT&T Mobility.

“I think he’s an incredibly talented lawyer,” said Pincus, who has become a close friend of Gupta’s since they went head-to-head in *Concepcion*.

Soon after the *Concepcion* decision, Gupta moved on to the fledgling Consumer Financial Protection Bureau, where he helped develop the agency’s litigation and enforcement strategies — a process that for him echoed the period following a historic economic meltdown.

“I wanted to go there because it felt like the New Deal was happening,” he said. “So you’re in the 1930s, you’re a progressive lawyer, the New Deal is happening. They ask you if you want to be part of it. Do you say no?”



Gupta at his law firm’s offices. “I just quit my job without lining up another job and decided to start another practice,” he said. (Jimmy Hoover | Law360)

But after about two years at the CFPB, bumping up against the bureaucracy inherent to working in the government, he decided to take the leap and start his own firm.

"I just quit my job without lining up another job and decided to start another practice," Gupta said. "I had never been in private practice before and my wife is an artist, and we didn't have a ton saved up."

After a brief period of office-hopping, Gupta and his firm settled into a neat townhouse off Dupont Circle in Washington, a largely residential neighborhood punctuated with bars and shops. From that office, Gupta Wessler staked a name for itself as a premier plaintiffs-side appellate firm. The firm recently moved into an office building near the lobbying hotbed of K Street.

Gupta Wessler had three merits cases lined up for this past Supreme Court term, and it won two of them.

In one case, *Hernandez v. Mesa*, Gupta and his co-counsel secured a narrow victory when the high court ordered the Fifth Circuit to reconsider the question of whether a Border Patrol agent who shot a Mexican national in a cross-border incident should have qualified immunity.

In the other, *Expressions Hair Design v. Schneiderman*, Gupta managed to get the Supreme Court to eliminate a New York law on credit card surcharges on First Amendment grounds. Gupta also represented Texas retailers in similar litigation that the Supreme Court remanded to the Fifth Circuit for further proceedings.

Matthew Wessler, a namesake principal at Gupta Wessler, said Trump's election has not necessarily led to a change in the way that Gupta works or the progressive goals he and his colleagues want to achieve.

But rather than taking on corporations and getting the support of a Democratic administration, as happened during the Obama years, the targets of Gupta and his firm have changed.

"It's less a shift in focus and more about a shift in whose conduct is attacking the progressive ideals that form the bedrock of our firm's mission," Wessler said.

Taking On Trump

Frequently, that approach has meant going up against Trump. Gupta Wessler represents a coalition of public health interest groups that filed an amicus brief arguing that Trump's one-in, two-out order could lead to key Food and Drug Administration and other regulations getting repealed, imperiling American lives.

Gupta's firm is also representing a plaintiff in the Trump University litigation who is seeking to opt out of the \$25 million settlement in an appeal before the Ninth Circuit.

But the highest-profile case that Gupta has taken on in this area is the litigation over alleged violations of the Constitution's emoluments clause, which bars federal government officials from receiving gifts, payments or other personal benefits from foreign governments without congressional approval.

That lawsuit was filed on Jan. 23, just three days after Trump's inauguration.

"I was out at the Women's March Saturday," Gupta said. "Sunday we were in the office polishing the complaint, and then we filed it Monday morning. It was just a very compressed period."

With Trump's extensive business holdings around the world, good-government groups fear that he will use his time as president to make a profit. They point to things like events held by foreign governments at Trump's Washington hotel, saying these events could be used to curry favor with the administration.

The government, representing Trump, argues that Gupta and his clients have no standing to sue and that the relief the plaintiffs are seeking would be unconstitutional because it would amount to an injunction against the president in his official capacity.

Citizens for Responsibility and Ethics in Washington, one of the leaders in the case, is staffed with experienced ethics attorneys like Norm Eisen and Richard Painter — former ethics chiefs of the Obama and George W. Bush administrations, respectively. But the organization needed an outside

lawyer to bring the case together.

Eisen said he and his co-counsel had approached several other attorneys about representing CREW in its case against Trump, but Gupta stood out.

"He is really one of the emerging giants of the appellate and the Supreme Court bar," he said.

The emoluments clause suit Gupta is involved in, which was filed in federal district court in Manhattan and includes restaurant owners and competitors who claim they are harmed by Trump's ongoing business ties, went to oral arguments on Oct. 18.

The businesses, including a New York hotel owner and a Washington event planner, say they are losing business from foreign diplomats and others because of the potential political payoff of spending money at the president's properties.

CREW was also involved in a second suit it filed alongside attorneys general from Maryland and Washington, D.C., in June. A third emoluments clause suit, filed by Democratic members of Congress, is also pending.

The emoluments clause was not something that often appeared on Gupta's radar before he was approached to sign on to the lawsuit. But once he had the chance to look into it, Gupta jumped.

"It would've been a hard decision for a lot of law firms because they wouldn't want to sue the president on day one and risk whatever that would do to their reputation among the business community," he said. "Not a problem for us."

But that doesn't mean his firm has charged into every case against Trump it could enter.

Although Gupta has consulted with attorneys who have challenged the Trump administration's ban on travelers from six predominantly Muslim nations entering the United States, for example, his firm has not taken an active role in that litigation.

With a small staff and a core competency in consumer and regulatory matters, Gupta said he has to be selective in the cases he takes on.

"It's a balancing act, because as you get bigger, you have to care. You have to keep the lights on. You have to pay people's salaries and overhead," he said.

"But we don't want to be driven by that. Because if we are it sort of defeats the whole purpose of having gotten into this in the first place."

Evan Weinberger is a Law360 reporter based in New York City. Editing by Jeremy Barker and Jill Coffey.

All Content © 2003-2017, Portfolio Media, Inc.