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Winter 2021

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ONLINE NOTE

EXECUTIVE ORDER 13950: INSUFFICIENT GROUNDS FOR CURBING ACADEMIC FREEDOM

*Arianna Chen**

Amid his tirade upon political correctness and an unprecedented summer framed by COVID-19, President Trump issued an Executive Order on September 22, 2020, that effectively banned implicit bias training under agencies, corporations, and organizations receiving federal grants with threats of defunding.² Entitled Executive Order on Combatting Race and Sex Stereotyping, also known as Executive Order 13950, trainings that explore implicit bias and systemic racism are labeled as “anti-American” and “divisive” literature, which ultimately undermines the nation’s historic progress toward equality.³ In addition, the Trump administration developed a tip-reporting hotline through the U.S. Department of Labor to investigate and reprimand contractual violations of the order, which can include “debarment or blacklisting from government contracts.”⁴ Lambda Legal filed a federal lawsuit in the United States District Court for the Northern District of California San Jose Division to challenge the November 20, 2020 implementation of the ban under the claim that the order is an unconstitutional restriction on free expression.⁵

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² See generally Donald Trump, *Executive Order on Combatting Race and Sex Stereotyping*, White House, (Sep. 22, 2020), <https://bit.ly/3rHq3OI>.

³ *Id.*

⁴ See Hailey Fuchs, *Trump Attack on Diversity Training Has a Quick and Chilling Effect*, New York Times, (Oct. 13, 2020), <https://nyti.ms/3mZJVZF>.

⁵ See Santa Cruz Lesbian and Gay Community Center D/B/A The Diversity Center Of Santa Cruz, et al., v. Donald J. Trump, in his official capacity as President of the United States, et al., No. 5:20-CV-07741-BLF (N.D. Cal. 2020) (demand for jury trial) (plaintiff motion for nationwide preliminary injunction); see also Meet the Plaintiffs Challenging Trump’s Ban on Speech about Systemic Racism, Sexism, and Implicit Bias, Lambda Legal, <https://bit.ly/3aTeDBd>. The Court adopts the terminology used in Plaintiffs’ brief, which refers to organizations that serve patients “experienc[ing] discrimination from other providers on the basis of race, sex and LGBT status.”

The reaction to Executive Order 13950 was both immediate and sweeping from the grant's recipients: from the Environmental Protection Agency (EPA) to Microsoft, organizations reliant upon federal grants indefinitely suspended diversity and critical race theory programming.⁶ Because several organizations' goals — including the NAACP Legal Defense Fund — are contingent upon “workplace attempts to address systemic racism and sex discrimination” as well as federal contracts simultaneously, several other civil rights groups filed suits under the vocational nexus.⁷ Affirming sentiments shared by many other universities dependent on federal research grants, the University of Iowa released a statement regarding their postponement of diversity training and workshops: in their abstractural content review, they cite the undeniable “impact” that such an order holds for the “core values” of their institution.⁸

Based on the reaction by eight public and private universities that sought *amici curiae* to the Lambda Legal motion for preliminary injunction, this order incites a particular jurisprudential tension within the higher education sphere between the free realm of academic exploration and “the seriousness of penalties for non-compliance” with federal orders.⁹ A longstanding tradition of universities, the tenet of academic freedom was upheld in *Sweeney v. New Hampshire* (1957) through Justice Frankfurter's concurrence with the majority opinion, in which he delegates the following specific liberties to universities:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.¹⁰

In mandating annual reports to the Office of Management and Budget (OMB) regarding the syllabi of diversity workshops, the Trump administration not only impedes upon general First Amendment rights, but also those “essential freedoms” granted to universities in determining

⁶ E.g. Melissa Block, *Agencies, Contractors Suspend Diversity Training To Avoid Violating Trump Order*, NPR, (Oct. 30, 2020), <https://n.pr/3rGMwez>.

⁷ E.g. Alexandra Olson, *Trump's diversity training order faces lawsuit*, AP News, (Nov. 12, 2020), <https://bit.ly/3pBumJh>.

⁸ *Id.*

⁹ See *Regarding Executive Order 13950*, University of Iowa, (Oct. 2020), <https://bit.ly/3ht0pZj>; see also *The Diversity Center Of Santa Cruz, et al., v. Donald J. Trump, in his official capacity as President of the United States, et al.*, No. 5:20-CV-07741-BLF (N.D. Cal. 2020) (*amici curiae* of 8 universities in support of preliminary injunction)

¹⁰ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

pedagogical content.¹¹ Besides the negative consequences of obstructing diversity and inclusion efforts within previously segregated institutions, the precedent that follows Executive Order 13950 holds precarious implications for *all* intellectual or systemic future endeavors by academia as plausibly within the reach of executive control.

Additionally, the implementation of diversity training for students and faculty allows universities to fully adhere to practical extracurricular application of federal nondiscrimination and Title IX laws. With these guidelines, the American Council on Education (ACE) — comprising associations of community colleges; state colleges; and universities — addressed a letter to the Trump administration calling for the withdrawal of the order.¹² Specifically, ACE publicly denounced the “chilling effect on the good faith and lawful efforts [to] sustain non-discriminatory... learning communities.”¹³ Not only does the order unduly impose upon university delivery of core educational values, but also hampers their ability to facilitate federal nondiscrimination procedures: this allows the eight universities adequate standing to establish “injury in fact.”¹⁴

Through a general scope, the order impedes upon First Amendment rights to free speech through the coercive, punitive language that condemns “racialized views of America.”¹⁵ Albeit allegedly intended to “promote unity in the Federal workforce,” such orders have been dismissed in *New York Times v. United States* (1971) as transgressions into congressional territory.¹⁶ In other words, the executive cannot justify “a basic departure from the principles of our system of government” through the guise of powers assigned to the President in Article II.¹⁷ Moreover, Supreme Court Associate Justice Black amplifies the importance of free speech within executive scope by explicitly citing the inability of any branch to “wipe out the First Amendment.”¹⁸ While limitations upon implicit bias training as “divisive in the workplace” alone may seem narrow in focus, these “slight deviations” from *stare decisis* enable the advancement of “illegitimate and unconstitutional practices” that can act as a slippery slope toward increased government regulations on universities’ policies relating to free speech.¹⁹

¹¹ *Id.*

¹² Ted Mitchell, American Council on Education, (Oct. 8, 2020), <https://bit.ly/3rETjpd>.

¹³ *Id.*

¹⁴ *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

¹⁵ *See* Donald Trump, *Executive Order on Combating Race and Sex Stereotyping*, White House, (Sep. 22, 2020), <https://bit.ly/3rHq3OI/>.

¹⁶ *Id.* *See also* New York Times Co. v. United States, 403 U.S. 713 (1971).

¹⁷ *Id.* *See also* Sweezy v. New Hampshire, 354 U.S. 234 (1957).

¹⁸ *Id.*

¹⁹ *See* Boyd v. United States, 116 U.S. 616 (1886).

Despite claims of furthering “destructive ideolog[ies]” that hinder workplace efficiency, diversity training advances general collaborative goals shared by any sustainable business model to encourage employees to “learn to work effectively with others.”²⁰ Especially considering the evolving dynamics of the increasingly diverse university body politic in tandem with the polarized sociopolitical climate, acknowledging diversity remains both a pertinent and crucial tenet in shaping an innovative, equitable learning environment for people of all identities.

Attributed to disseminated materials and exercises for “attitude[;] knowledge[;] and skill-based change”, there is substantial evidence corroborating the effectiveness of diversity training in granting students the pedagogical bandwidth and space to develop diversity competency.²¹ While data related to the most prominent outcomes of diversity training — whether it be implicit or explicit effectiveness — is more ambiguous, research qualifies its beneficial effects to a substantial degree across multiple methods: this rationalizes a cogent “case for diversity management in organizations.”²² Exemplified through the facilitation of diversity training in nearly all Fortune 500 companies and universities across the nation, there is demonstrable credence among the American public regarding the central function of diversity in shaping an inclusive, productive environment.²³ Thus, the rebuke of such practices from the Trump administration is largely unrepresentative of emphasized values from the *res publica*.

In response to this Executive Order, the Senate Judiciary Committee released a letter to OMB Director Russell Vought rebuking the order as “profoundly misguided and divisive” and inquiring about the legal foundation for the administration to enforce such expansive bans.²⁴ Under these thematic contentions and substantial establishment of “public interest” in judicial relief, the United States District Court for the Northern District of California San Jose Division has recently granted plaintiffs a nationwide preliminary injunction.²⁵ Allowing the plaintiffs “complete and meaningful relief,” the injunction bars the enforcement of the Order by the federal

²⁰ Donald Trump, *Executive Order on Combating Race and Sex Stereotyping*, White House, (Sep. 22, 2020), <https://bit.ly/3rHq3OI>; see also Kateria Bezrukova, et al., *Reviewing Diversity Training: Where We Have Been and Where We Should Go*, 11 *Academy of Management Learning & Education* 207 (2012).

²¹ See Zachary Kalinoski, et al., *A meta-analytic evaluation of diversity training outcomes*, 34, *Journal of Organizational Behavior* 1076 (2013).

²² *Id.*

²³ *Id.*

²⁴ Cory Booker, et. al., United States Senate, (Sept. 25, 2020), <https://bit.ly/34X0RtG>.

²⁵ The Diversity Center, et al., v. Donald J. Trump, in his official capacity as President of the United States, et al., No. 20-cv-07741-BLF (N.D. Cal. 2020) (order granting preliminary injunction under Sections 4 and 5).

government pending litigation and effectively allows organizations to continue diversity training nationwide.

While President-elect Joseph Biden has not yet directly addressed his plans related to Executive Order 13950, political analysts and strategists consider it highly probable that he will repeal the ban upon inauguration given the alignment of his campaign and transition with diversity: Democratic strategist Tad Devine claims this reversal from the incoming administration would fall in line with the “strong signal” President-elect Biden hopes to promulgate throughout the country and his political base.²⁶ In addition, President-elect Biden faces mounting pressure from prominent congressional colleagues that publicly stand in “profound opposition” to the ban and even crafted H.R. 8595, with over 50 co-sponsors, to nullify the order.²⁷

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²⁶ E.g. Aris Folley, *Trump's controversial diversity order expected to see swift reversal under Biden*, The Hill, (Nov. 19, 2020), <https://bit.ly/3n831gs>.

²⁷ See E.g. Robert Menendez, et. al., United States Senate, (Dec. 17, 2020), <https://bit.ly/3n2FsWf> (letter from prominent Democrat leaders against the order). To nullify the effect of Executive Order 13950 relating to combating race and sex stereotyping, H.R. 8595, 116th Congress (2020). *Nota bene* that the co-sponsors are predominantly comprised of Democratic congress members.