



## RACE MATTERS Policy Assessment

# An Assessment of the Executive Order on Combating Race and Sex Stereotyping

## Introduction

On September 22, 2020, the President issued an [Executive Order on Combating Race and Sex Stereotyping](#) (the “Order”). Its stated goals are to promote unity and to “combat offensive and anti-American race and sex stereotyping” within the federal workforce. It purports to do so by defining and restricting the use of federal resources on teaching “divisive concepts.” The Order is at odds with established public health law principles pertaining to health equity.

The Order is a solution in search of a problem that creates a chilling effect on diversity trainings essential to building a healthy and equitable society. There is wide consensus that [racism is a social determinant of health](#). This includes individual racism and systemic racism reflected in social and institutional structures that produce consistent and identifiable disparities among certain racial demographics, with Black people and Latinos/as frequently faring worse on a variety of metrics. Although the emergence of COVID-19 may have highlighted this reality, there is still much to be taken-in, discussed, reflected upon, and learned so that we can create more equitable communities. The Order, however, makes standard trainings on race and racism seem suspect—even creating a hotline to report federal contractors who “utilize trainings” that include alleged divisive concepts.

This assessment uses a public health lens to highlight four fundamental shortcomings of the Order: (1) it contradicts core public health findings; (2) it promotes a narrative that portrays diversity trainings that address racism as dangerous; (3) it is ahistorical; and (4) is so vague that it has a foreseeable chilling effect on legitimate trainings.

## A Brief Overview

The Order lists 11 divisive concepts which it claims are derived from a “malign ideology” that has moved from the “fringes of American society” to “diversity” trainings in the Federal Government and by Federal contractors.

Ostensibly the Order addresses race and sex, but, as discussed more below, the content of the Order shows the target is really diversity trainings related to race discrimination, rather than sex discrimination.

This conclusion is further supported by the fact that the Order was bookended by two White House Memorandums to the Heads of Executive Departments and Agencies, issued prior to and shortly after the Order. The Memorandums seek information on [“divisive, anti-American propaganda”](#) on critical race theory and white privilege, and call for agencies to review “diversity” trainings using [key word searches](#) for the terms “critical race theory,’ ‘white privilege,’ ‘intersectionality,’ ‘systemic racism,’ ‘positionality,’ ‘racial humility,’ and ‘unconscious bias’” as a way to identify prohibited trainings.

If the Order were truly concerned with divisive concepts related to sex/gender, why not include terms like feminism, gender theory, false consciousness, sexism, patriarchy, and subordination—all terms that are commonplace in the parlance of gender theory. Accordingly, it is with this lens—that the Order really has almost an exclusive focus on race and racism—that the Order should be assessed.

The Order lists the following as “divisive” concepts:

#### **11 Divisive Concepts (Executive Order on Combating Race and Sex Stereotyping)**

1. One race or sex is inherently superior to another race or sex
2. The U.S. is fundamentally racist or sexist
3. An individual by virtue of his/her race or sex is inherently racist, sexist, or oppressive (consciously or unconsciously)
4. An individual should be discriminated against or receive adverse treatment solely or partly because of his/her race or sex
5. Members of one race or sex cannot and should not attempt to treat others without respect to race or sex
6. An individual’s moral character is necessarily determined by his or her race or sex
7. An individual by virtue of his or her race or sex bears responsibility for actions committed in the past by other members of the same race or sex
8. Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his/her race or sex
9. Meritocracy or traits such as hard work ethic are racist or sexist, or were created by a particular race to oppress another race
10. Any other form of [“race or sex stereotyping”](#)
11. Any other form of [“race or sex scapegoating”](#)

U.S. Uniformed Services, government contractors, federal grantees, and federal agencies are banned from using federal resources to teach or promote “divisive concepts.” Some of the prohibitions are:

- The U.S. Uniformed Services cannot teach, instruct, or train members on divisive concepts;
- Government contractors cannot have workplace trainings which “inculcates” divisive concepts in employees;
- Federal grantees cannot use federal funds to promote divisive concepts; and
- Federal agency heads must ensure training, workshops, forums, or similar programing “do not teach, advocate, act upon, or promote” divisive concepts.

The Order is effective immediately, except for government contractors, who are subject to the restrictions 60 days from the date of the Order.




## The Order and Public Health: Four Big Problems

**The Order Runs Afoul of Accepted Public Health Findings on Race and Racism:** The notion that concepts like systemic racism are divisive contradicts core public health findings. The prevalence of systemic racism is the reason why states and localities have increasingly [declared racism to be a public health crisis](#). Recently, the Hogg Foundation for Mental Health [declared racism to be a mental health crisis](#), with numerous entities co-signing. Declarations that recognize systemic and other forms of racism to be a public health crisis are supported by empirical findings that show significant racial disparities with adverse impacts. Take COVID-19 for example. [Latinos/as experience disproportionate](#) rates of COVID-19 infections and hospital rates that are linked to social determinants of health (SDOH) like language barriers and immigration status. Similarly, a recent [Morbidity and Mortality Weekly Report](#) (MMWR) by the Centers for Disease Control and Prevention found that although COVID-19 related deaths among youths (those under 21) are relatively low, Black, Hispanic, and Native American/Alaskan Natives comprised 75% of those deaths—while composing only 41% of that population. An analysis in Massachusetts found that [community level factors](#) (SDOHs) that created disparities in COVID-19 among Latinos/as were different than the factors that contributed to disparities in the Black community.

These disparities have led many to conclude that racism is having an over-sized impact on public health. Therefore, rather than viewing concepts like systemic racism, critical race theory, and white privilege as dangerous and divisive, those who seek to promote public health increasingly see unpacking these concepts through learning, dialogue, and shared understandings as important tools for eradicating vast health disparities for people of color. The Order therefore undermines important trends in public health to create health equity for all. It also operates to ensure that unequal outcomes along clearly delineated racial lines will persist by silencing important discourses. For these reasons, the Order works against attempts to address a recognized public health crisis.

**The Order Promotes a False Narrative that Diversity Trainings on Racism are Dangerous:** The Order uses decontextualized examples of so-called divisive concepts that say very little about what really goes on in actual trainings. In particular, it takes issue with discussions about white privilege. There are legitimate reasons to talk about white privilege. To highlight an example that has received renewed attention, there is ample evidence that [clinical and medical algorithms routinely disadvantage Black people](#) and benefit white people. These algorithms, however, either are not based on any rational criteria or use a rationale that relies on [“outdated, suspect racial science or \[\] biased data.”](#) To acknowledge that white people benefit from such systemic racism is not a “vision of America” that denies “the inherent and equal dignity of every person as an individual” as the Order would assert; instead, it is an evidence-based insight. It is precisely these types of insights that have been used to push for reforms that call for [better understandings of how racism operates](#) in the health profession. This is just one example illustrating how diversity trainings on systemic racism and white privilege have a legitimate purpose.

The Order works to make important conversations about race suspect and dangerous. It does this in large part by painting a straw-man portrait of anti-racism diversity trainings. For example, some “malign” ideologies it highlights include: a “vision of America that is grounded in hierarchies” and that “America is an irredeemably racist and sexist country.” As an initial matter, the Order ignores the obvious difference between being descriptive versus prescriptive. Clearly, recognition of existing hierarchies is not the same as advocating for their continuance. Further, it would be surprising if trainings routinely asserted that anyone (or a nation) is



“irredeemably,” “inherently,” or “fundamentally” racist and sexist (see divisive concepts 3, 4, 5)—these are characteristics that by definition cannot be modified. As such, these concepts spurn any real possibility of change or growth. But change and growth are exactly the point of providing diversity trainings on race/racism. If trainings actually operated in the manner described in the Order, promoting the idea that we are incapable of change and cannot relate to each other as human beings, then there would be no need to prohibit these trainings via executive order—their unpopularity and ineffectiveness would ensure that these trainings would die on their own.

The Order also refers to “[re]search” purporting to show that “blame-focused diversity training reinforces biases and decreases opportunities for minorities.” It offers no insight into what research it is referring to. All the specific examples of “blame-focused diversity training” identified in the Order involve white people (e.g., trainings that “promoted” the idea that “‘virtually all White’ people contribute to racism, or that “‘[f]acing your whiteness is hard and can result in feelings of guilt, sadness, confusion, defensiveness, or fear.’”) This reveals that the “malign” ideologies deemed to be dangerous, even threatening, to national security, are really teachings that encompass discussions of white privilege. But these conversations are not dangerous; they are necessary to devise needed reforms.

**The Order is Ahistorical:** One of its most glaring defects is that the Order decontextualizes history to justify its own necessity. The Order’s “[p]urpose” section references “the bus boycott in Montgomery,” “the Selma-to-Montgomery marches” and quotes Martin Luther King Jr.’s [I Have a Dream Speech](#) in which he dreams of a day when his children will “not be judged by the color of their skin but by the content of their character.” The Order reads as if MLK Jr. fought to end diversity trainings, stating “pernicious and false belieff[s]” allegedly promoted in today’s diversity trainings are “pushing a different vision of America” than civil rights icons of the past. This alone should give us pause.

The Order pushes this narrative further by equating modern day anti-racism diversity trainings with Stephen A. Douglas’s advocacy of white supremacy. It does this by drawing on a decontextualized quote from a speech by Douglas. The Order states that:

Although presented as new and revolutionary [the destructive ideology grounded in misrepresentations of our country’s history and its role in the world] resurrect the discredited notions of the nineteenth century’s apologists for slavery who, like President Lincoln’s rival Stephen A. Douglas, maintained that our government ‘was made on the white basis’ ‘by white men, for the benefit of white men.’

This claim ignores that Douglas was espousing the [absolute moral correctness of white supremacy](#) and generally making the case that Black people are not “capable of self-government” when he made that statement. He was arguing that the exclusion of Black people from the right to life, liberty, and the pursuit of happiness under the law reflected *Divine* law. And he was also defending the U.S. Supreme Court’s decision in [Dred Scott v. Sanford](#) (concluding that Black slaves, and their descendants, are property and cannot become “citizens” entitled to the rights, privileges, and immunities afforded by the U.S. Constitution).

To equate modern day trainings on systemic racism to the “the nineteenth century’s apologists for slavery” is to engage in a radical revisionist history that silences the voices of marginalized communities. To reiterate, there are legitimate public health concerns about how our institutions continue to privilege white people over Black people—this is not a “divisive” concept. Having shared understandings and conversations about this reality is a

common-sense way to untangle vast racial inequalities. The Order's ahistorical justification cannot give the Order the legitimacy it seeks.

**The Order is Vague and Will Have a Chilling Effect on Legitimate Trainings:** The U.S. Department of Labor recently posted [guidance](#) on the Order. It addresses whether unconscious/implicit bias training are prohibited by the Order stating that “[u]nconscious or implicit bias training is prohibited to the extent it teaches or implies that an individual, by virtue of his or her race, sex, and/or national origin, is racist, sexist, oppressive, or biased, whether consciously or unconsciously.” What falls under these criteria? It is common when talking about unconscious bias to acknowledge that the [harms of unconscious bias](#) too often flow to certain clearly identifiable groups (e.g., Black people, Latinos/as), while simultaneously recognizing that certain groups (often white people) benefit. Would pointing out this reality run afoul of the order?

Similarly, a [recent poll](#) by the Kaiser Family Foundation and The Undefeated found that 71% of Black people polled identified unconscious bias as an obstacle for achieving equal outcomes with white people, with 63% of Hispanic people and only 45% of white people agreeing. In fact, the percentage of Black adults who ranked unconscious bias as an obstacle in their lives was 71%—higher than individual racism (65%), structural racism (65%), and historic wealth gaps (63%). Does the Order preclude conversations on this topic? What does it mean to “imply” that a person is unconsciously racist by virtue of their race? Would pointing out racial disparities qualify? If not, what? Businesses and non-profits have [collectively called for the Order to be withdrawn](#) because the Order creates confusion and uncertainty, and will result in non-meritorious investigations.

## Conclusion

This assessment highlights some of the core problems with the Order using a public health lens that puts health equity front and center. Its purpose is to identify how the Order contravenes core public health law principles. In addition, some have raised questions about the Order's legality. In fact, the National Urban League and the National Fair Housing alliance, represented by the NAACP, [filed a federal lawsuit](#) alleging the Order restricts protected speech in violation of the Constitution's First Amendment and the Equal component of the Fifth Amendment's Due Process Clause.

## SUPPORTERS



Robert Wood Johnson Foundation

Support for the Network provided by the Robert Wood Johnson Foundation. The views expressed in this document do not necessarily reflect the views of the Foundation.

This document was developed by April Shaw, PhD, JD, Staff Attorney, Network for Public Health Law – Northern Region, and endorsed by the by the Network for Public Health Law's Health Equity Working Group, with contributions and in collaboration with Kathleen Hoke, JD, Director, Network for Public Health Law – Eastern Region; Carrie Waggoner, JD, Senior Attorney, Network for Public Health Law – Mid-States Region; Gene Mathews, JD, Director, Network for Public Health Law – Southeastern Region; Dawn Hunter, JD, MPH, Deputy Director, Network for Public Health Law – Southeastern Region, and Carrie McLachlan, MA, Program Development Manager, Network for Public Health Law.

November 2020