

The Regulatory Power Behind Trump's DEI Initiative on Higher Education

During his first week back in office, President Trump issued [a broad executive action](#) related to DEI and affirmative action. The document is sweeping, and I suspect that the new administration is serious about this initiative – meaning that the effects of this action will have extraordinary impact across the federal government and much of the private sector, too.

While the order doesn't exclusively pertain to higher education, education is specifically identified in multiple locations in it, including a directive to both the Attorney General and Secretary of Education to "jointly issue guidance to all State and local educational agencies that receive Federal funds, as well as all institutions of higher education that receive Federal grants or participate in the Federal student loan assistance program ... regarding the measures and practices required to comply with [[FAIR v. Harvard](#)]."

Initial Observations

Some initial observations:

First and second (and obviously and banally): elections have consequences and litigation will ensue.

Third, this executive order, like all such orders issued by every president, cannot override laws enacted by Congress or provisions of the U.S. Constitution, as finally interpreted by federal courts. With that said – both because of the leviathan that is the federal government and the long-standing congressional practice of passing broad-language legislation and empowering agencies of the executive branch to fill in the details – presidents have extraordinary powers to affect the ways such laws are interpreted and enforced.

Fourth, and I think most importantly as it pertains to higher education if the administration aggressively follows through on this action (and I suspect that it will), colleges and universities who resist this action and the philosophy behind it, for the first time will experience the awesome power of the regulatory state deployed against them.

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The Changing Regulatory and Enforcement Landscape

To date, the Departments of Education and Justice have not been drivers of the fight against affirmative action/DEI in higher education. For example, the main cases decided by the U.S. Supreme Court – [FAIR v. Harvard](#), [Fisher v. University of Texas](#), [the Gratz and Grutter v. Bollinger cases](#), [Regents of the University of California v. Bakke](#), etc. – have been initiated by private parties, not the federal government. To be sure, the solicitor general has often argued before the court in such cases. But this would be different.

Discovery in civil litigation is quite unpleasant; it is nothing compared to the investigatory, enforcement and regulatory powers that the federal government can employ. It is one thing to be sued, go through years of pretrial litigation, and then face a judge (or judges, if appealed) who themselves have varying interpretations of Supreme Court precedent; it is quite another to suddenly be visited by federal officials who have almost unfettered investigatory power – and the leverage of criminal prosecution against any person that impedes such an investigation or makes false statements during it. The stakes of resistance in that context are exponentially higher.

If this order signals that the administration is going to aggressively pursue this policy (and, again, I believe that it will) the top leadership of colleges and universities – presidents, members of cabinets, and boards of trustees, in particular – need to reweigh the risks they face from their own institutional policies and practices around race-based programs, DEI offices, hiring, financial aid, and admissions, to name just a few. In short: higher education will ignore or downplay this executive order at its peril.

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