

United States Senate

WASHINGTON, DC 20510

September 25, 2020

The Honorable Russell T. Vought
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

The Honorable Pat A. Cipollone
Counsel to the President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Director Vought and Mr. Cipollone:

We write to express concern about a recent executive order extending the Trump Administration's prohibition on racial sensitivity and diversity training to cover not only federal agencies but also federal contractors and grantees. This troubling executive order raises serious constitutional concerns, and it is plainly intended to broadly sweep away an array of critically important training programs about countering bias and discrimination. The Administration's actions are all the more alarming as they come while the nation is confronting a historic moment with racial justice and Americans are taking to the streets to protest systemic racism, and as the nation mourns the loss of a preeminent champion of gender equality.

On September 22, 2020, President Trump issued an executive order purportedly intended to "combat offensive and anti-American race and sex stereotyping and scapegoating."¹ The order declared, "[I]t shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees."² The order claimed that "many people" are promoting a "destructive ideology" that is "rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans."³ The order specifically required federal contractors to (1) "not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating," (2) "send to each labor union or representative of workers . . . a notice . . . advising the labor union or workers' representative of the contractor's commitments under" this executive order, and (3) include the order's relevant provisions "in every subcontract or purchase order . . . so that such provisions will be binding upon each subcontractor or vendor."⁴ If a contractor fails to comply with these provisions, the order stated, the underlying "contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts."⁵

¹ *Executive Order on Combating Race and Sex Stereotyping*, WHITE HOUSE (Sept. 22, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-combating-race-sex-stereotyping> (pmb.) (scheduled to be published in the Federal Register as Exec. Order No. 13,950, available at <https://www.federalregister.gov/d/2020-21534>).

² *Id.* (§ 1).

³ *Id.* (§ 1).

⁴ *Id.* (§ 4(1), (2), (4)).

⁵ *Id.* (§ 4(3)).

This executive order is patently geared toward discouraging federal contractors and grantees—a wide variety of entities across the country that do business with the federal government or receive federal funds—from providing training for their employees about preventing discrimination and fostering sensitivity.

President Trump’s executive order marks a disturbing and drastic departure from orders issued by his predecessors that have sought to root out invidious discrimination within the federal government and among federal contractors. President Johnson issued an executive order forbidding federal contractors from discriminating “against any employee or applicant for employment because of race, color, religion, sex, or national origin.”⁶ President Obama later issued an executive order adding sexual orientation and gender identity to that list of protected characteristics.⁷ Likewise, President Nixon promulgated an executive order prohibiting discrimination against federal employees on the basis of race, color, religion, sex, national origin, disability, and age.⁸ President Clinton subsequently added sexual orientation to that list.⁹

This order comes on the heels of an equally troubling Office of Management and Budget memorandum issued on September 4, 2020, to the heads of the federal government’s executive departments and agencies that began by calling racial sensitivity and anti-racism training sessions “divisive, anti-American propaganda.”¹⁰ Director Vought, in that memorandum you stated that President Trump had “directed me to ensure that Federal agencies cease and desist from using taxpayer dollars to fund” these programs.¹¹ Pending “more detailed guidance on implementing the President’s directive,” the memorandum instructed agencies to start identifying all federal training programs on issues like “critical race theory” or “white privilege.”¹² It also directed agencies to try to “cancel any such contracts and/or to divert Federal dollars away from these un-American propaganda training sessions.”¹³ The memorandum concluded, “The divisive, false, and demeaning propaganda of the critical race theory movement is contrary to all we stand for as Americans and should have no place in the Federal government.”¹⁴

President Trump has promoted these actions with antagonistic and divisive rhetoric. He issued a tweet earlier this month supporting the September 4 memorandum, stating, “This is a sickness that cannot be allowed to continue. Please report any sightings so we can quickly extinguish!”¹⁵ In a speech last Thursday—for Constitution Day, the day commemorating the document’s

⁶ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965).

⁷ Exec. Order No. 13,672, 79 Fed. Reg. 72,985 (2014); *see also* Press Release, Office of the Press Sec’y, White House, Fact Sheet: Taking Action To Support LGBT Workplace Equality Is Good for Business (July 21, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0>.

⁸ Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969).

⁹ Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (1998).

¹⁰ Memorandum from Russell Vought, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to Heads of Exec. Dep’ts & Agencies 1 (Sept. 4, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 2.

¹⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2020, 7:52 AM), <https://twitter.com/realDonaldTrump/status/1302212909808971776>

signing in 1787—President Trump opted to denounce critical race theory as a “Marxist doctrine” and called teaching it to children “a form of child abuse in the truest sense of the word.”¹⁶ And upon the issuance of the September 22 memorandum, President Trump tweeted, “A few weeks ago, I BANNED efforts to indoctrinate government employees with divisive and harmful sex and race-based ideologies. Today, I’ve expanded that ban to people and companies that do business . . . with our Country, the United States Military, Government Contractors, and Grantees. Americans should be taught to take PRIDE in our Great Country, and if you don’t, there’s nothing in it for you!”¹⁷

Director Vought, you have echoed the President’s sentiments, tweeting, “President @realDonaldTrump just signed an Executive Order to prohibit discrimination by Federal contractors through divisive #CriticalRaceTheory. This is another important step that builds off his directive to agencies to stop trainings that push a radical anti-American agenda.”¹⁸ And you previously tweeted about the memorandum, “@realDonaldTrump asked people to report any sightings of #CriticalRaceTheory ‘training.’ We have been working with agencies to identify un-American trainings. We have set up an email to report these sightings. These must be stopped!”¹⁹ In addition, you have issued tweets celebrating reported cancelations of training sessions at several federal agencies.²⁰

The September 4 memorandum cited only unspecified “press reports” as instigating this directive,²¹ but it appears to have been prompted by Fox News segments and articles from other conservative media outlets untethered from the facts.²² To the contrary, as experts have explained, “racial and diversity awareness trainings are essential steps in helping rectify the pervasive racial inequities in American society, including those perpetuated by the federal government.”²³ Indeed, a new study has shown that the U.S. economy lost \$16 trillion over the last two decades because of discrimination against African Americans in wages, education, housing, and investment.²⁴ An attorney who has provided hundreds of diversity training sessions for businesses and the government has noted, “If we are going to live up to this nation’s promise—‘we hold these truths to be self-evident, that all men are created equal’—we have to see each other as human beings,

¹⁶ Morgan Chalfant & Brett Samuels, *Trump Announces Commission To Further ‘Patriotic Education,’* HILL (Sept. 17, 2020), <https://thehill.com/homenews/administration/516941-trump-announces-commission-to-further-patriotic-education>.

¹⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 22, 2020, 6:53 PM), <https://twitter.com/realDonaldTrump/status/1308539918075883523>.

¹⁸ Russ Vought (@RussVought45), TWITTER (Sept. 22, 2020, 7:10 PM), <https://twitter.com/RussVought45/status/1308544280701612034>.

¹⁹ Russ Vought (@RussVought45), TWITTER (Sept. 16, 2020, 8:14 PM), <https://twitter.com/RussVought45/status/1306386119412641795>.

²⁰ Russ Vought (@RussVought45), TWITTER (Sept. 22, 2020, 6:34 PM), <https://twitter.com/RussVought45/status/1308535115006570498>; Russ Vought (@RussVought45), TWITTER (Sept. 15, 2020, 11:08 AM), <https://twitter.com/RussVought45/status/1305886092361715713>.

²¹ Vought, *supra* note 10, at 1.

²² Brian Stelter, *Analysis: Fox News Segment Prompts Trump To Target Diversity Training*, CNN (Sept. 6, 2020), <https://www.cnn.com/2020/09/06/media/donald-trump-fox-news-critical-race-theory/index.html>.

²³ Josh Dawsey & Jeff Stein, *White House Directs Federal Agencies To Cancel Race-Related Training Sessions It Calls ‘Un-American Propaganda,’* WASH. POST (Sept. 5, 2020), <https://www.washingtonpost.com/politics/2020/09/04/white-house-racial-sensitivity-training>.

²⁴ Adedayo Akala, *Cost of Racism: U.S. Economy Lost \$16 Trillion Because of Discrimination, Bank Says*, NPR (Sept. 23, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/23/916022472/cost-of-racism-u-s-economy-lost-16-trillion-because-of-discrimination-bank-says>.

and we have to do whatever it takes, including taking whatever classes make that possible.”²⁵ Furthermore, responding to the September 4 directive’s “mischaracterization” and “caricature” of critical race theory scholarship as “anti-white propaganda,” one leading scholar on the issue has stated, “The focus of Critical Race Theory is on the way that race is baked into the current political, economic, and social system so that racial subordination is reproduced through normal operations, often without regard to intent.”²⁶ And as another scholar has posited, the Administration’s rhetoric decrying “un-American” thought appears to harken back to McCarthyism-era “scare tactic[s]” and “government actions from decades past that criminalized or scrutinized elements of academic study, political thought and activism.”²⁷

Directives like the September 22 executive order and the September 4 memorandum clearly and deliberately carry a serious risk of chilling protected speech and sweeping away training sessions of all kinds relating to discrimination, bias, and diversity. Late last week, a news report emerged that at least one Justice Department office has effectively canceled its unconscious bias training program because of the Administration’s directive. According to this report, employees in the Justice Department’s Antitrust Division were told that a previously scheduled training program on unconscious bias set for last week had been indefinitely postponed until further guidance was provided.²⁸ “It does not appear that the Division has much, if any, discretion related to postponing the training at this moment,” a senior official in the Division reportedly wrote in an e-mail to employees, expressing disappointment about this development. “We were excited about this training. We had received a lot of positive responses about the training, and we were looking forward to it.”²⁹ A description of this unconscious bias training program stated that it was “strongly recommended for all Division employees, particularly for managers and those involved in hiring,” and the description did not include the terms “white privilege” or “critical race theory.”³⁰

These recent pronouncements and activities by the Trump Administration are deeply concerning—and in this latest move to crack down on discrimination, bias, and diversity training sessions conducted by federal contractors and grantees, the Administration has doubled-down on its profoundly misguided and divisive strategy. At this critical time when the nation is grappling with racial justice and policing practices, and when many Americans across the country are striving to eliminate invidious discrimination of all kinds, providing robust training programs on discrimination, bias, and diversity is as important as ever.

In light of these concerns, we respectfully request that you respond to the following questions:

²⁵ *Id.*

²⁶ Cheryl Harris, *What Is Critical Race Theory and Why Is Trump Afraid of It?*, NATION (Sept. 17, 2020), <https://www.thenation.com/article/politics/trump-critical-race-theory>.

²⁷ Derrick Clifton, *Why the Trump Administration Is Slashing Anti-Discrimination Training*, NBC NEWS (Sept. 11, 2020), <https://www.nbcnews.com/news/nbcblk/why-trump-administration-slashing-anti-discrimination-training-n1239903>.

²⁸ Andrew Keshner, *Trump’s Crackdown on ‘Critical Race Theory’ Training Leads to Cancellation of Justice Department ‘Unconscious Bias’ Program*, MARKETWATCH (Sept. 17, 2020), <https://www.marketwatch.com/story/trumps-crack-down-on-critical-race-theory-training-leads-to-cancellation-of-justice-department-unconscious-bias-program-2020-09-17>.

²⁹ *Id.*

³⁰ *Id.*

1. Do you believe that training sessions on implicit bias, unconscious bias, or any other form of discrimination are “divisive, un-American propaganda,” in the terminology used by the September 4 memorandum?³¹ If so, please indicate the research, data, evidence, or studies you rely upon to support your assertion.
2. What would you articulate as the specific basis under the September 22 executive order and/or the September 4 memorandum for canceling a training session on implicit bias, unconscious bias, or any other form of discrimination?
3. President Trump’s tweet about the September 22 executive order referenced “divisive and harmful sex[[]]-based ideologies.”³² Does the executive order’s training ban apply to any kind of training about sexual assault or harassment?
4. What is the Administration’s specific claimed legal basis for banning training sessions conducted by federal contractors and grantees that seek to prevent invidious discrimination, address bias, and foster inclusion?
5. In your view, how is a training session prohibited by this executive order directly related to the performance of the underlying federal contract? In your answer, please identify what you believe to be any relevant judicial precedents concerning speech restrictions imposed by the government on federal contractors and grantees.
6. Does the Administration intend to impose penalties under this executive order on any federal contractors or grantees that conduct training sessions on implicit bias, unconscious bias, or any other form of discrimination?
7. Does the Administration intend to impose penalties under this executive order on any federal contractors or grantees that conduct training sessions about sexual assault or harassment?

We appreciate your prompt attention to this matter and respectfully request a response no later than October 9, 2020.

Sincerely,



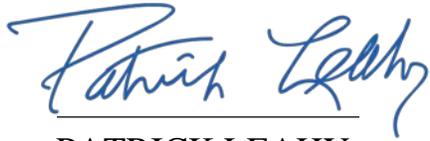
CORY A. BOOKER
United States Senator



DIANNE FEINSTEIN
Ranking Member

³¹ Vought, *supra* note 10, at 1.

³² Trump, *supra* note 17.



PATRICK LEAHY
United States Senator



RICHARD J. DURBIN
United States Senator



SHELDON WHITEHOUSE
United States Senator



AMY KLOBUCHAR
United States Senator



CHRISTOPHER A. COONS
United States Senator



RICHARD BLUMENTHAL
United States Senator



MAZIE K. HIRONO
United States Senator



KAMALA D. HARRIS
United States Senator