

Episode 2: E.O. 13985 & Equity

Introduction: Welcome to a Hard Look: The Administrative Law Review podcast from the Washington College of Law. We'll discuss how administrative law impacts your daily life. From regulator actions by agency and the litigations over them, to the balance of power among the branches of government. This is A Hard Look.

Steven: Welcome to Episode Two of a Hard Look. On today's episode, we'll be discussing Executive power and how it can build regulatory infrastructure of inclusion. To do this, we'll be guided by Professor Olatunde Johnson with her piece [The Equity EO: Building a Regulatory Structure of Inclusion](#), which was published in the Spring 2021 edition of the American Bar Association's Administrative and Regulatory Law News.

Professor Johnson is a Jerome B. Sherman Professor of Law at the Columbia law school her decorated career has won her many awards, winning both the Columbia Law School Willis L.M. Reese Prize for Excellence in Teaching, as well as the Public Interest Professor of the Year award. In addition to her teaching accolades, Professor Johnson brings an incredible list of professional feats. She's clerked for Justice John Paul Stevens at the United States Supreme Court and Judge David Tatel on the United States District Court of Appeals for the District of Columbia. She's also trial and appellate litigation experience where she worked at the NAACP Legal Defense Fund, and worked as well as the senior consultant for racial justice at the ACLU's National Legal Department.

As a disclaimer the views of our guest are her own and they are not a reflection of her employer, organizations, or other parties in which her opinions could be imputed.

With the help of Professor Johnson, we will map the foundations of Executive power and engage in a discussion on current events that have contributed to the necessity of administrating [President Biden's Executive Order 13985](#). And conclude the discussion of where we go from here under this order. Prof Johnson, welcome to A Hard Look.

Steven: So, 2020 is recent to all of us and it's represented more than global pandemic. It has generated a larger national conversation about social and racial justice issues that have yet to be remedied. The killing of George Floyd was the spark that largely ignited this debate. How have the events of 2020 played into the creation and language of the Biden's Administration approach to social and racial inequity issues?

Prof. Johnson: Thank you for the questions, Steven. 2020 opened up a conversation, and I think it's really a conversation about how all institutions, public and private, contribute to racial inequality in the United States. These conversations went well beyond policing and criminal justice; truly look at a range of institutions: housing, healthcare, education, and how they all contribute to racial inequity. And I think the pandemic had a role to play too. COVID, as many people know, had a profound effect on communities of colour. It's continuing to have a profound effect, really laid bare underlying conditions of inequality. And so soon after Biden was inaugurated, his administration announced it would take affirmative approach to address racial and ethnic inequalities. And in particular the administration announced it would use the power of

the federal government to remedy current inequalities as well as promote opportunity and inclusion. So, I think that's how 2020 really set the stage for this kind of executive action that we're going to talk about today.

Steven: Thank you. So, obviously as we now know with the hindsight of history behind us, Executive Order 13985 has come out... what are the specifics of this order that the Biden administration are seeking to do?

Prof. Johnson: Yea, it's kind of a mouthful to get it out, right? The Executive Order, but I'll say the number, Executive Order 13985. And it was one of the first Acts of President Biden's Administration. It's called the Racial Equity and Support for Underserved Communities to the Federal Government Executive Order. And, generally speaking, what this EO does is that it requires the White House and federal agencies to take a systematic approach to embedding fairness, in decisions making. And to examine and redress inequities in their policies and programs that serve as a barrier to equal opportunity. I could go on to really explain some of the components of it. I think we can break it down to really three things that it does. Requires what's known as an equity assessment and that's a direction to federal agencies to conduct assessments of their own agencies, to determine how their programs can better serve, underserved communities, and that their programs are operating fairly on the basis of race, ethnicity, religion and other categories. And just in achieving that goal, the equity assessment it charges the White Houses' domestic policy council to help coordinate these efforts to assure that equity principles are embedded in federal government. It also has a role for the office of Management and budget. to help develop ways of assessing agencies are meeting these equity goals. And to collect data needed to achieve these equity assessments. A second thing that the EO does is that it... tries to ensure the government resources are fairly allocated to underserved communities so it directs agencies to really pay attention to historic failures, to invest equally in communities. as well as to promote fair and equal access going forward. And this can be in lots of different domains. It requires examining the budgets submitted to Congress and really looking at that budget and figuring out whether or not resources are being allocated fairly. it extends to designing and allocating, contracting and procurement opportunities, on a, in a way that promotes opportunity and inequality. And then a third component of the EO is how it requires that agencies, really receive input from members of underserved communities. So, in design programs and policies and doing rulemaking it wants to hear, from, from underserved communities and directs agencies to collect information and get input.

Steven: You mentioned President Biden wanted to use the power of federal government to achieve a lot of these initiatives, could you define how the, what is an Executive Order? Where does this stem authority stem from, from and what purposes does it generally try and serve?

Prof. Johnson: Yeah, an Executive Order is a written directive from the President that manages the operation of the federal government and directs enforcement of federal law in a particular way. And every President has issued Executive Order during their time in office and they can concern a broad range of topics. I mean, some of them are quite narrow and specific, and we don't even talk about them in the context of a podcast. They don't really, warrant or attract that much public attention, but some are quite consequential. President Lincoln issued the Emancipation Proclamation through an Executive Order. President Truman desegregated

military through Executive Order. More notoriously, the directive that authorized the internment of Japanese people in World War II was an Executive Order. So, Presidents can't write law, but the structure of Article II of the Constitution. And other provisions of the Constitution do give the President chief power over the executive functions of government. In addition, uh, Article II directs that the President should take care, that the law be faithfully executed. So, this is what gives the President authority to issue an Executive Order. And they can do it as long as it doesn't conflict with other federal laws, or with the Constitution.

Steven: So, as I mentioned in the introduction you wrote an incredible piece discussing President Biden's Order, and in it you identify three noteworthy aspects. First, you identify the order announces an affirmative and proactive role for federal agencies addressing inequities. Second, you note the order announces an obligation to advance equity as a role of every federal agency. And lastly, that it seeks to cover an expansive range of federal processes. Can you expand on each of these and discuss the significance that each element has?

Prof. Johnson: Yeah, in these components are really related. They're all, at least as I conceptualize them, are about embedding equity. So, the Executive Order is affirmative, as you mentioned. And that means it goes beyond the idea that agencies should not be discriminated. That's not enough, that's what it's implicitly saying. It's saying that agencies have to engage in proactive steps to assess barriers and transform their practices to promote equity. And there's precedent for this approach. This affirmative approach in civil rights. An example is the Fair Housing Act. Which requires federal agencies and federal grantees to take affirmative steps to promote fair housing, which means equal housing opportunity and integration. And this came out of Congress' recognition in 1968 of the role federal agencies played in causing racial segregation. Today, more recently, over the last twenty years, some agencies such as the Department of Transportation, they've had regulations requiring grantees assess the racial, ethnic and disability impact of their transit decision and take steps to promote inclusion, and take steps to promote inclusion. So, I've called these types of statutes and regulations equality directives. A key part of this is that they require that agencies take these affirmative steps as a matter of practice without waiting for a complaint or a lawsuit. The second point I emphasize in the pieces that... this Executive Order extends this equality direction notion that I just mentioned to a broader range of federal agencies. So, it's not just fair housing, it's not just transportation. It applies broadly to federal agencies that deal with healthcare, social welfare programs, tax, and so on. And then a last aspect of it is that it appears at least in how it's written to require examination to extensive a range of policies. Such as how is the program designed? Who is able to enroll? What are the rulemaking processes? Who benefits from procurements and contracts? This overall embedding equity approach is what's really novel about the EO.

Steven: So, since equity is the focal point of this Executive Order, how we can define it and then use it to advance the policy of this order?

Prof. Johnson: Yeah, equity is a broad term. And I still think that we're going to need further guidance, at the agency level, to know what equity means and how it's going to be assessed under the EO. And there's a range of possibilities. I mean probably the thinnest way to evaluate equity is to say that it means the absence of categories of formal discrimination. Which means you can't discriminate on the basis of race, gender, or some other characteristic. But as I've

suggested already, the language in the EO goes broader than that. It talks about removing barriers and providing opportunity. So, it's not just talking about formal explicit forms of discrimination or even intentional discrimination, or disparate treatment. Another way to measure equity is disparate impact. This is a very familiar notion to many in the civil rights area. It has a very specific meaning. It means practices or policies that you can identify, that lead to a statistically significant impact on a group for which there's not a good justification. And most observers would say this is more expansive than formal and intentional discrimination. It can get a broader range of action. But it can still be quite hard to show because you have to prove causation and really examine the reasons offered in a way that really narrows your ability to get at, changes that promote opportunities. So, I think it's still a big question what approach to equity is going to be taken. One approach that I would suggest is to assess the impact of a program in statistical terms as a starting point. Use that as a starting point. Is there some sort of impact on a particular group? And use that as a point of asking questions. About what kinds of design changes or alternatives might mitigate that impact and provide for greater forms of inclusion. And in some ways that builds on the disparate impact approach but extends it further. And I think it would also be important, to assess impact not just in traditional quantitative measure which are of course very important, but also think of qualitative measures of inclusion where this is possible. Developing survey instruments, and this would have the additional benefit to linking to the engagement that the EO wants to promote. And community engagement can also sometimes help identify alternative practices. That might be more inclusive.

Steven: Thinking about what always comes next, towards the ends of your article, you articulate once barriers are identified, there still remains the open question of what does happen next? You also go on to articulate how the public, if at all, will be engaged in this process. In your view, what is it that we can hope to see?

Prof. Johnson: Yeah, so once an agency identifies more inclusive alternative, or says that the budget has a particular impact on a group, that doesn't mean that it's automatically going to happen. This is going to take further implementation from the agencies. Sometimes it might have a budgetary impact. And the President can submit a budget, but that doesn't mean that is what Congress is going to appropriate. Some changes may require new legislation, and the President doesn't have the power to do that alone. So, I really appreciate the work the EO is directing, that the agencies do, because identifying barriers is actually a very important first step, but they'll need to be more work. On the part of the President and budgetary work, but also in terms of Congress and in terms of civil society in order to make that happen. So, there are a lot of people right now who are really engaging this EO and trying to make it meaningful. So, there are advocates and think tanks that are trying to think through how do you design equity assessments? Which is something we talked about a minute ago. Researchers at the Brookings Institution have developed the idea of a scoring system to measure the racial impact of budget proposals. Right now the budgetary impact, the fiscal impact is measured, but what if you measured the racial impact? A lot of housing groups that deal with fair housing have a lot of expertise in developing impact assessments because you need to develop those in the context of implementing the Fair Housing Act's directive to affirmatively further fair housing. And states and localities as well as local advocates have expertise in developing equity tools around, kinds of programs in policies that promote opportunity and equity at the state and local level. And so, I think that there's the

possibility the federal government could draw on some of these kinds of mechanisms and tools and ideas in developing its own equity assessments.

Steven: Professor Johnson, thank you so much for your incredible insight into this important discussion. Are there any parting comments you have related to this subject or others for our listeners?

Prof. Johnson: Well, thank you for speaking to me Steven, about this. This is actually a topic I feel really passionately about. Not just this EO, issue specifically, but just the idea that the federal government is not a neutral player when it comes to questions of equity. Its actions are either promoting inequity or can be used affirmatively to promote equity. So, I think that this recognition of the EO that racial and other forms of inequity are often built into the administrative state is really important. And I think it'll be really fascinating to see the ideas that emerge from this effort.

Steven: As always, I want to thank our guest for her substantial and important contributions to the discussions today, the American Bar Association's Administrative Law section, the Administrative Law Review, and of course, the podcasts' own Kübra Babaturk for their continued support, resources, and work on making this podcast a continued contributor to the important discussions happening in the world of Administrative Law. Thank you and see you on the next episode of A Hard Look!

End.

Professor Johnson has also provided a few extra sources for those wishing to learn more about the topic discussed in this episode.^{[1](#)[2](#)}