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EXECUTIVE ORDERS & FEDERAL DIRECTIVES CANNOT OVERRIDE LEGISLATION, CASE LAW, & U.S. CONSTITUTION

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Executive orders have been a part of presidential power since George Washington. They are written directives issued by the president primarily directing officials in the executive branch to ensure current laws are faithfully executed. It is important to note that they do not have the force of law, cannot usurp legislative authority, appropriate funds, or contradict or override federal laws and statutes. Similarly, federal guidance, including "Dear Colleague" letters, are issued by federal agencies and cannot override statutes, create new law, or impose legal restrictions that violate current laws or the constitutional rights of individuals.

WHAT IS AN EXECUTIVE ORDER?

The U.S. Constitution vests the president with the executive power of the United States.[1] In exercising these powers, the president may convey directives through various written instruments, including executive orders, presidential proclamations, and executive memoranda. Article II of the U.S. Constitution also includes the obligation to "take care that the laws be faithfully executed."[2] Executive orders ("EOs") emanate from these executive powers.[3] Such directives issued by a sitting president generally explain how their administration plans to interpret and enforce the laws passed by Congress. Although EOs interpret laws, they cannot override federal laws or contradict case law interpreting those laws.[4] Federal agencies are bound by executive orders in how they enforce existing laws, but an executive order cannot expand the limited constitutional authority of a sitting president. Moreover, the Constitution gives the president "authority, not to make, or alter, or dispense with the laws, but to execute and act the laws."[5] Accordingly, any legislative powers that a president has must be granted expressly (*e.g.*, veto power) and cannot be implied from a general grant of executive power.[6]

WHAT IS THE EFFECT OF AN EXECUTIVE ORDER ON LEGAL PROTECTIONS?

Executive orders (EOs) explain how an administration plans to interpret and enforce the law.[7] EOs cannot override statutes or case law interpreting those laws.[8] Although federal executive agencies are bound by EOs with regard to how they enforce existing laws, such as Title VI, courts are not bound by EOs and may enjoin an EO.[9] It is critical to understand that any action the president directs federal agencies to take must be based on an existing statute or the president's own constitutional power.[10] If it is not, the EO may be declared invalid by a federal court.

WHAT IS A "DEAR COLLEAGUE" LETTER (DCL)?

A "Dear Colleague Letter" (DCL) is a type of guidance often issued by federal agencies, including the Department of Education, to communicate the agency's interpretation of laws, regulations, and enforcement policies.[11] DCLs are not legally binding and cannot override statutes or case law.[12] DCLs cannot create new law, nor can they impose legal restrictions that violate the constitutional rights of individuals. Rather, guidance issued by a federal agency in the form of a DCL provides, in effect, interpretive rules that "simply state what the administrative agency thinks the statute means, and only 'remind' affected parties of existing duties."[13] When a DCL surpasses the bounds of an interpretive rule and "effects a substantive change in existing law or policy" by imposing new legal obligations on regulated parties, it is subject to all APA requirements for promulgating a legislative rule, such as requiring a notice and comment period.[14] A DCL will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding."[15] If that is the case, the executive action may be challenged in court as a final action.[16]

LEGAL CHALLENGES TO EXECUTIVE ACTIONS

If an executive order or other executive action asserts authority or directs action beyond its constitutional authority or in contradiction of statutory law or case law, it may be challenged in court.[17] Many of the current administration's executive orders and other federal actions have been challenged in lawsuits across the country.[18] Some legal actions seek to stop the impact of an executive action for the whole country, and others seek to protect the rights of particular states or impacted organizations or categories of individuals.[19]

Because litigation can be complicated and fast-moving, it is best to consult with a lawyer if you believe your rights are affected by a particular executive action or related lawsuit. You can also track the public progress of many executive actions and lawsuits challenging them at EducationCounsel's Summary and Analysis of Trump Administration Executive Actions Impacting Education and Democracy Forward's Response Center.

An executive order can also be stopped or nullified if Congress enacts a law that contradicts or reverses what the president has done, provided that Congress has the constitutional authority to act on the issue. And any future president can issue a new executive order that rescinds or amends the earlier executive order.

WHAT IS PREEMPTION? DO EXECUTIVE ORDERS OR GUIDANCE PREEMPT STATE LAW?

The U.S. Constitution states that federal law is "the supreme law of the land" and overrides conflicting state or local law.[20] This is called "preemption." Preemption can be determined if a federal law expressly provides that state laws on a topic are preempted, or if a court finds that it is impossible to comply with both federal and state law, or because the state law frustrates the accomplishment of the federal law's objectives.[21]

But note that in order to preempt state law, a federal action — whether taken by Congress, an executive branch agency, or by the president — must have the force and effect of law.[22] Formally promulgated regulations (rules) that are within an agency's scope of congressionally delegated authority can have preemptive power.[23] An executive order will only have the force and effect of laws if "issued pursuant to a statutory mandate or delegation of authority from Congress."[24]

The mere citation of an existing law or assertion about the meaning of existing law in the text of an executive order or Dear Colleague letter does not mean that the EO or DCL was issued pursuant to an act of Congress. An agency's interpretation in a guidance document is not binding and therefore would need to be assessed by a court to determine whether it is consistent with the law and with a president's constitutional authority and thus can be afforded deference.[25] As the Supreme Court has long recognized, preemption is not to be lightly presumed.[26]

Generally, courts have viewed federal law as a floor, not a ceiling, and allowed states to legislate more protectively.[27] Advocates for state civil rights laws have long argued that there is no conflict with federal civil rights laws because the state laws can provide protections and rights to individuals greater than the federally required minimum.[28]

[1] U.S. Const. art. II, § 1.
[2] U.S. CONST. art. II, § 3.
[3] Courts have recognized Article I executive orders as rooted in authority delegated to the president by Congress, such as the authority to close federal properties, while Article II orders arise from the president's own inherent "supervisory authority over the Executive Branch" to direct lawful action by his subordinates. *Building & Const. Trades Dept., AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002). However, these lines are often blurred.
[4] "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). "He cannot make new law or devise new authority for himself — by executive order or otherwise. He may only wield those powers granted to him by Congress or by the Constitution." *League of United Latin Am. Citizens v. Exec. Off. of the President*, No. CV 25-0946 (CKK), 2025 WL 1187730, at *15 (D.D.C. Apr. 24, 2025) (barring unilateral exercise of authority that violates the separation of powers principle).
[5] 2 JAMES WILSON, "Of the Constitutions of the United States and of Pennsylvania—Of the Legislative Department," reprinted in 2 COLLECTED WORKS OF JAMES WILSON 829, 878 (Kermit L. Hall & Mark David Hall eds., 2007); see also *League of United Latin Am. Citizens,* 2025 WL 1187730 at *15 (granting preliminary injunction on ground that president lacked constitutional power over election regulation form requiring documentary proof of citizenship); *United States v.*

Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806)("The president of the United States cannot control the statute, nor dispense with its execution and still less can he authorize a person to do what the law forbids").
[6] Article I, Section 1 of the Constitution vests "[a]ll legislative Powers" in Congress. U.S. CONST. art. I, § 1
[7] American Bar Association, *What Is an Executive Order?*, 2021, https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order-/.
[8] *Id.*
[9] American Bar Association, *General FAQs on Executive Orders*, 2021, https://www.americanbar.org/groups/public_education/resources/teacher_portal/educational_resources/executive_orders/.
[10] *PFLAG, Inc. v. Trump*, 769 F.Supp.3d 405, 435 (D.Md. 2025), citing *Youngstown*, 343 U.S. at 585 (The president's authority to act "must stem either from an act of Congress or from the Constitution itself.").
[11] Educ. Rts. Inst., *Understanding the February 14, 2025 Dear Colleague Letter from the Office for Civil Rights Regarding Title VI and Race Discrimination in Schools*, UNIV. OF VA. (March 2025), https://www.law.virginia.edu/sites/default/files/documents/understanding-dear-colleague-letter.pdf.
[12] *Id.*
[13] *Children's Hosp.*, 896 F.3d at 620 (citation omitted) (interpretive rules are "clarification[s] or explanation[s] of an existing statute or rule").
[14] 5 U.S.C. § 706(2)(D) (agency action must be set aside where implemented "without observance of procedure required by law"); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015). The requirements for notice-and-comment rulemaking are exacting. *See* 5 U.S.C. § 553; *see also North Carolina Growers' Assn. v. United Farm Workers*, 702 F.3d 755, 768 (4th Cir. 2012) ("The statutory requirements in § 553(b) are clear, and they constitute an important part of the APA's procedural safeguards related to agency rulemaking.").
[15] *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002).
[16] *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 600, 136 S.Ct. 1807, 195 L.Ed.2d 77 (2016) (agency action was final where failure to comply carried penalties).
[17] 5 U.S.C. § 704 (APA permits judicial review of "final agency action for which there is no other adequate remedy in a court."). "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024); 5 U.S.C. § 706 (courts must "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning ... of the terms of an agency action").
[18] *See* Tracking the lawsuits against the Trump administration, (A.P. August 8, 2025), https://apnews.com/projects/trump-executive-order-lawsuit-tracker/ (tracking over 270 lawsuits filed against the current administration on a range of topics).
[19] For example, in *Am. Fed'n of Tchrs. v. Dep't of Educ.*, 779 F. Supp. 3d 584, 610 (D. Md. 2025), an action filed by several unions and organizations, a district court issued a nationwide order enjoining the administration's February 14th DCL which purported to clarify schools' nondiscrimination obligations under Title VI and Equal Protection Clause. Ruling to enjoin the DCL, the court held that plaintiffs were likely to succeed on their claims that the guidance exceeded executive authority, violated plaintiffs' First Amendment speech and association rights, Fifth Amendment due process rights, and the APA. The court found that direct prohibitions on teaching certain content paired with vague and overbroad terms relating to DEI raised "reasonable views that broad swaths of content might be legally suspect," rendering the DCL arbitrary and capricious. *See also Perkins Coie LLP v. U.S. Dep't of Just.*, No. CV 25-716 (BAH), 2025 WL 1276857, at *49 (D.D.C. May 2, 2025) (permanently enjoining EO against law firm on ground that it violated First, Fifth, and Sixth Amendments and was therefore null and void).
[20] U.S. Const. art. VI, cl.2.
[21] See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (state law must yield to federal law where Congress intends federal law to "occupy the field" and state law is naturally preempted due to a conflict with a federal statute, such as making it impossible to comply with both state and federal law).
[22] See *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) ("[A]n agency regulation with the force of law can pre-empt conflicting state requirements.").
[23] *See Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982)(federal bank board's regulation permitting federally chartered savings and loan associations to exercise due-on-sale clauses preempted contrary state law); *Qwest Corp. v. Scott*, 380 F.3d 367, 371 (8th Cir. 2004) (absent persuasive evidence of preemptive intent by FCC, federal regulations did not preempt authority of state to regulate special access services on interstate lines).

[24] *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234 (8th Cir. 1975); *cf. Crosby*, 530 U.S. 374-75 (holding that executive order made pursuant to an "express investiture of the President with statutory authority to act for the United States" had force and effect of law such that it preempted a conflicting state statute).
[25] *See e.g. Tennessee v. Cardona*, 737 F. Supp. 3d 510, 521 (E.D. Ky. 2024), a*ppeal dismissed sub nom. Tennessee v. McMahon*, No. 24-5588, 2025 WL 848197 (6th Cir. Mar. 18, 2025) (striking down Biden-era Title IX regulations affirming protections for transgender students, pregnant and parenting students, and victims of sexual assault).
[26] *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981).
[27] *See e.g., California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (California statute requiring employers to provide leave and reinstatement to employees disabled by pregnancy is not preempted by Title VII and Pregnancy Discrimination Act, which stands as a floor, not a ceiling, for pregnancy disability benefits); *See also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. Abrams,* 899 F.2d 1315, 1324 (2d Cir. 1990)(federal warranty act and FTC regulations did not preempt state lemon law amendments); *Wyeth v. Levine, 555 U.S. at 573* (New York failure-to-warn claims against drug manufacturer were not preempted by less rigorous federal laws); *Ferebee v. Chevron Co.*, 736 F.2d 1529, 1543 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1062 (1984).
[28] *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. at 280-281.