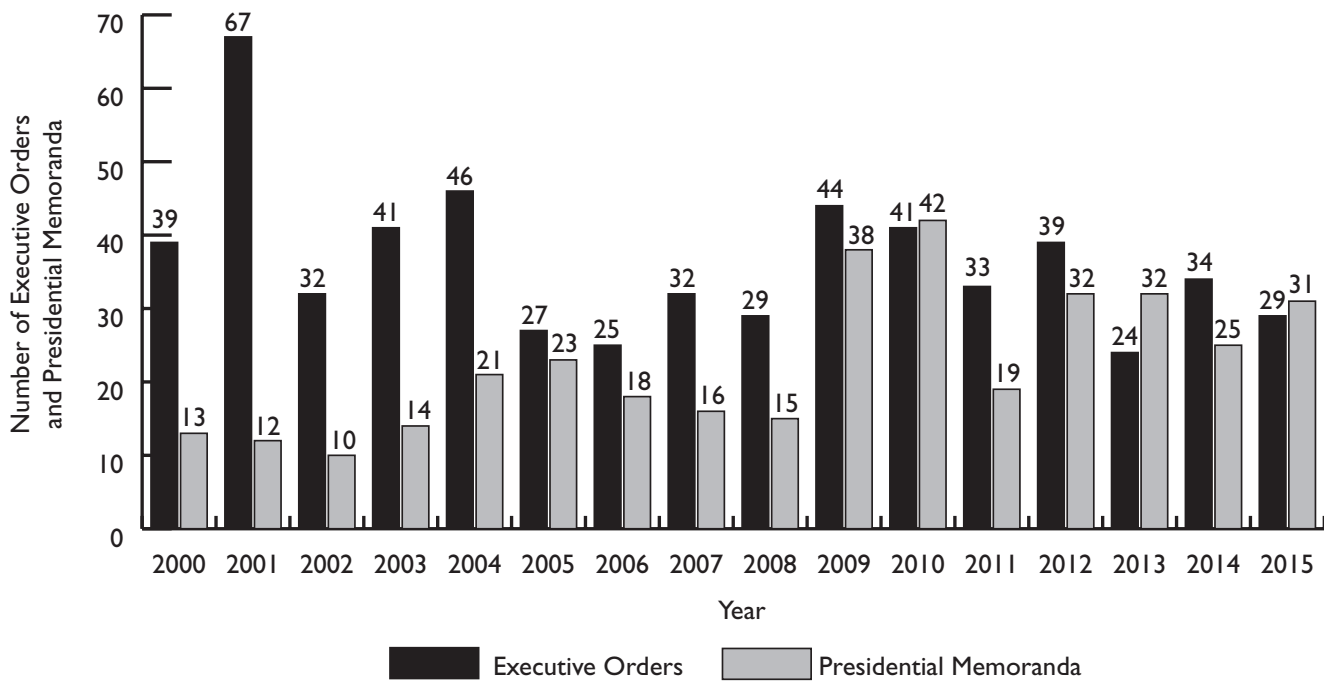


Presidential Executive Orders and Executive Memoranda

President Obama famously pledged to use his “pen and phone” to implement parts of his policy agenda without congressional approval.⁵¹ Executive orders, presidential memoranda, and other executive actions make up a large component of that initiative.⁵² This section examines those numbers, but a considerable amount of executive branch activity is not well measured and merits heightened attention, especially when an administration so explicitly emphasizes unilateral action.⁵³

Executive orders ostensibly deal with the internal workings and operations of the federal government. Subsequent presidents can overturn them. Their use is nothing new, dating back to George Washington’s administration.⁵⁴ President Obama’s totals are not high compared with those of other presidents. At the end of 2015, he had issued 244 executive orders. Figure 15 provides a snapshot of executive orders issued over the past two decades, from 2000 to the present. Obama

Figure 15. Number of Executive Orders and Presidential Memoranda, 2000–2015



Source: National Archives and Records Administration, Office of the Federal Register.

We live in an era in which the government—without actually passing a law—increasingly dictates parameters of various economic sectors.

issued more executive orders in his first term than did President George W. Bush in his second term, but Bush was comparatively more active during his first term.

Presidential memoranda since 1999—which presidential scholar Phillip Cooper has termed “executive orders by another name”—are also depicted in Figure 15.⁵⁵ Memoranda may or may not be published, depending on the administration’s own determination of “general applicability and legal effect,” making it “difficult to count presidential memoranda.”⁵⁶ Obama’s pace since 2009 tops that of George W. Bush, which is unsurprising given his administration’s openness about prioritizing executive action. Bush published 129 memoranda over his entire presidency, whereas Obama issued 219 during his first seven years that were published in the *Federal Register*. (President Bill Clinton published just 14 memoranda.⁵⁷)

The pertinent question as far as regulatory burdens are concerned is what these executive orders and memoranda are used for and what they do. Executive actions can liberalize and enhance freedom, such as President Abraham Lincoln’s Emancipation Proclamation. Or they can expand governmental power, such as President Harry Truman’s failed attempt to seize control of America’s steel mills⁵⁸ or President Franklin D. Roosevelt’s confiscation of the nation’s gold.⁵⁹

Whether lengthy or brief, orders and memoranda can have significant impacts for or against liberty. Therefore, a smaller number of them does not necessarily mean small effects. In 2014 alone, Obama memoranda created a new financial investment instrument and implemented new positive rights regarding work hours and employment preferences for federal contractors.⁶⁰ As with the *Federal Register*, counts are interesting but do not tell the whole story.

Obama’s own Executive Order No. 13563 about review and reform was a pledge to roll back regulation, but it amounted to only a few billion dollars in cuts that were

swamped by other rules issued.⁶¹ In all, four of Obama’s executive orders directly address overregulation and rollbacks.⁶²

Other key executive orders directly affecting regulatory restraint were President Bill Clinton’s 1993 Executive Order No. 12866⁶³ and President Ronald Reagan’s Executive Order No. 12291, which formalized central regulatory review at OMB.⁶⁴ Clinton’s was a step back from the heavier oversight of the Reagan order in that it sought “to reaffirm the primacy of Federal agencies in the regulatory decision-making process.”⁶⁵

The United States existed for many decades before a president issued more than two dozen executive orders—that was President Franklin Pierce, who served during 1853–1857.⁶⁶ Orders numbered in the single digits or teens until President Lincoln and the subsequent reconstruction period. The Ulysses S. Grant administration issued 217, then a record.⁶⁷ From the 20th century onward, orders topped 100 for each president and sometimes numbered in the thousands. President Franklin D. Roosevelt issued 3,467 numbered executive orders. Table 4 provides a look at executive order counts by administration since the nation’s founding and presents a total approximate count of 15,236. (In an expansion of Figure 15, executive orders since 1995 by calendar year appear in Appendix: Historical Tables, Part I.)

We live in an era in which the government—without actually passing a law—increasingly dictates parameters of various economic sectors, including health care, retirement, education, energy production, finance, land and resource management, funding of science and research, and manufacturing. Executive actions and decrees issued in a limited government context have different implications than do those issued in an era of activist government, rendering some of what transpires today without precedent. For example, the Internal Revenue Service granted numerous waivers of the Patient Protection and Affordable Care Act’s employer mandate without regard to the statute’s language.⁶⁸

Table 4. Executive Orders by Administration

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
George Washington	n/a		8
John Adams	n/a		1
Thomas Jefferson	n/a		4
James Madison	n/a		1
James Monroe	n/a		1
John Quincy Adams	n/a		3
Andrew Jackson	n/a		12
Martin van Buren	n/a		10
William Henry Harrison	n/a		0
John Tyler	n/a		17
James K. Polk	n/a		18
Zachary Taylor	n/a		5
Millard Fillmore	n/a		12
Franklin Pierce	n/a		35
James Buchanan	n/a		16
Abraham Lincoln	n/a		48
Andrew Johnson	n/a		79
Ulysses S. Grant	n/a		217
Rutherford B. Hayes	n/a		92
James Garfield	n/a		6
Chester Arthur	n/a		96
Grover Cleveland - I	n/a		113
Benjamin Harrison	n/a		143
Grover Cleveland - II	n/a		140
William McKinley	n/a		185
Theodore Roosevelt			1,081
William Howard Taft			724
Woodrow Wilson			1,803
Warren G. Harding			522
Calvin Coolidge			1,203
Herbert Hoover	6,070	5,075	996
Franklin D. Roosevelt	9,537	6,071	3,467
Harry S. Truman	10,431	9,538	894
Dwight D. Eisenhower	10,913	10,432	482
John F. Kennedy	11,127	10,914	214
Lyndon B. Johnson	11,451	11,128	324
Richard Nixon	11,797	11,452	346

(continued)

Table 4. Executive Orders by Administration (*continued*)

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
Gerald R. Ford	11,966	11,798	169
Jimmy Carter	12,286	11,967	320
Ronald Reagan	12,667	12,287	381
George H.W. Bush	12,833	12,668	166
William J. Clinton	13,197	12,834	364
George W. Bush	13,488	13,198	291
Barack Obama	13,715	13,489	227
Total Number of Executive Orders			15,236

Source: W. Crews's tabulations; Executive Orders Disposition Tables Index, Office of the Federal Register, National Archives, <http://www.archives.gov/federal-register/executive-orders/disposition.html>; "Executive Orders," The American Presidency Project, ed. John T. Woolley and Gerhard Peters (Santa Barbara, CA: 1999–2014.), <http://www.presidency.ucsb.edu/data/orders.php>.

Note: n/a = not applicable or not available

Counting rules and regulations, executive orders, memoranda, and other regulatory guidance gets us only so far. These actions need more scrutiny and oversight, because they

have become powerful means of working around the constitutional system of legislation made by an elected body.⁶⁹