

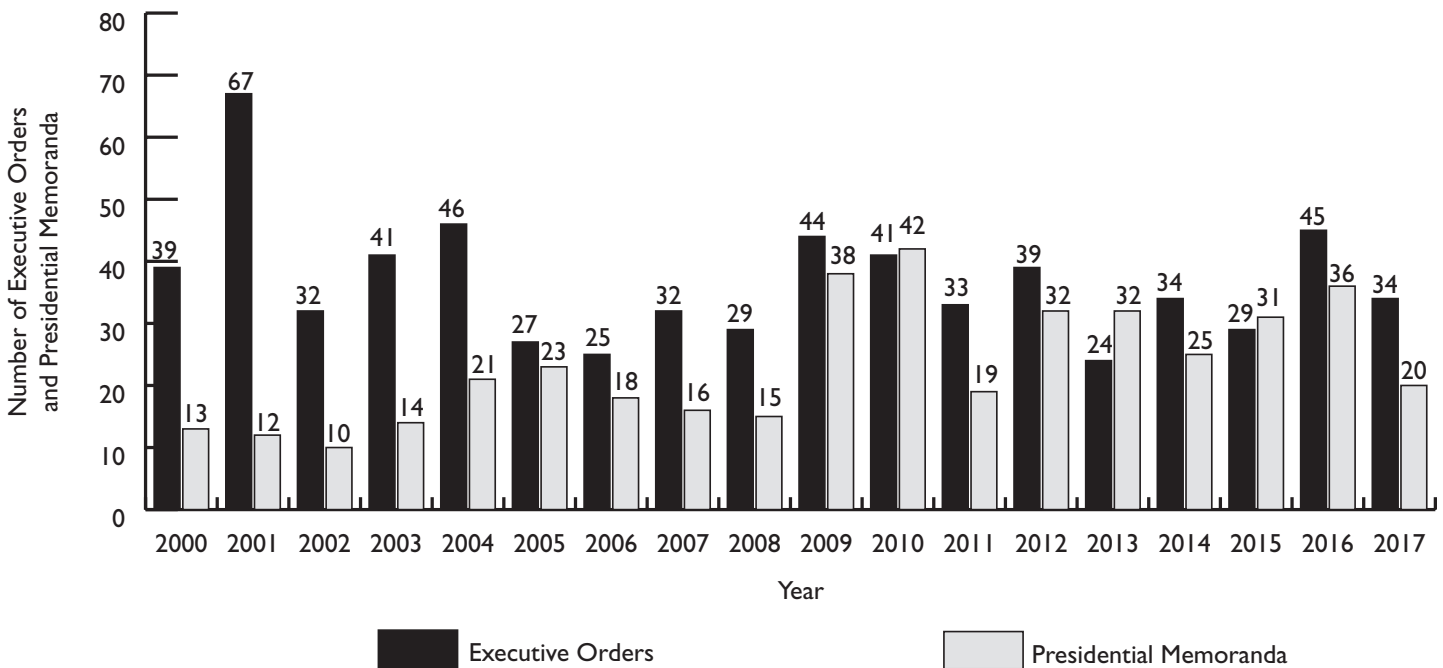
# Presidential Executive Orders and Executive Memoranda

In 2014, President Obama famously pledged to use his “pen and phone” to implement parts of his policy agenda without congressional approval.<sup>51</sup>

Now, President Trump likewise stands accused by some of exceeding legitimate executive authority. Executive orders, presidential memoranda, and other executive actions make up a large component of “pen and phone” lawmaking, which is not well measured and merits heightened attention from lawmakers.<sup>52</sup>

Executive orders ostensibly deal with the internal workings and operations of the federal government. Subsequent presidents can overturn them. Their use is nothing new, and they date back to President George Washington’s administration.<sup>53</sup> Consternation aside, President Obama’s executive order totals were not high compared with those of other presidents. At the end of his term, Obama had issued 276 executive orders, whereas President George W. Bush’s final tally was 291, and that of President Bill Clinton was 364, according to the National Archives’ tally (see Figure 15).<sup>54</sup>

Figure 15. Number of Executive Orders and Presidential Memoranda, 2000–2017



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

Numbers for 2017 are as of April 28, 2017.

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Memoranda may or may not be published, depending on the administration's own determination of "general applicability and legal effect," which make presidential memoranda difficult to count.<sup>55</sup> George W. Bush published 131 memoranda over his entire presidency, whereas Barack Obama issued 257 that were published in the *Federal Register*. Bill Clinton published just 14 during his presidency.<sup>56</sup>

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 government power, such as President Harry Truman's failed attempt to seize control of America's steel mills<sup>57</sup> or President Franklin D. Roosevelt's confiscation of the nation's gold.<sup>58</sup>

Whether lengthy or brief, orders and memoranda can have significant effects. 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.<sup>59</sup> Yet Obama's Executive Order 13563 concerning regulatory review and reform was a pledge to roll back regulation. (It amounted to only a few billion dollars in cuts, which were swamped by other, newly issued rules.<sup>60</sup>) In all, four of Obama's executive orders directly address overregulation and rollbacks.<sup>61</sup> As with the *Federal Register*, counts are interesting but do not tell the whole story.

Other key executive orders directly intending regulatory restraint were President Clinton's 1993 Executive Order 12866<sup>62</sup> and President Ronald Reagan's Executive Order 12291,

which formalized central regulatory review at OMB.<sup>63</sup> Clinton's was a step back from the stronger oversight of the Reagan order in that it sought "to reaffirm the primacy of Federal agencies in the regulatory decision-making process."<sup>64</sup>

The United States existed for many decades before a president issued more than two dozen executive orders—that was President Franklin Pierce, who served from 1853 to 1857. Orders numbered in the single digits or teens until President Lincoln and the subsequent Reconstruction period. President Ulysses S. Grant's administration issued 217, then a record. From the 20th century onward, executive orders numbered over 100 during each presidency and sometimes reached into the thousands. President Franklin D. Roosevelt issued 3,721 executive orders.<sup>65</sup> Table 4 provides a look at executive order counts by administration since the nation's founding.

We live in an era in which the government—without actually passing a law—increasingly dictates parameters for various economic sectors, including health care, retirement, education, energy production, finance, land and resource management, funding of science and research, and manufacturing. One prominent recent example is the Internal Revenue Service's granting of waivers of the Patient Protection and Affordable Care Act's employer mandate without regard to the statute's language.<sup>66</sup>

Counting rules and regulations, executive orders, memoranda, and other regulatory guidance gets us only so far. These alternative regulatory actions should receive more scrutiny and oversight, because they have become powerful means of working around the constitutional system of government envisioned by the Framers of the Constitution: legislation made by elected representatives.<sup>67</sup>

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	13,764	13,489	276
Donald Trump	13,790	13,490	26
<b>Total Number of Executive Orders</b>			<b>15,553</b>

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>.

Executive orders for President Trump are as of April 28, 2017.