

Regulatory Dark Matter: Presidential Executive Orders and Memoranda

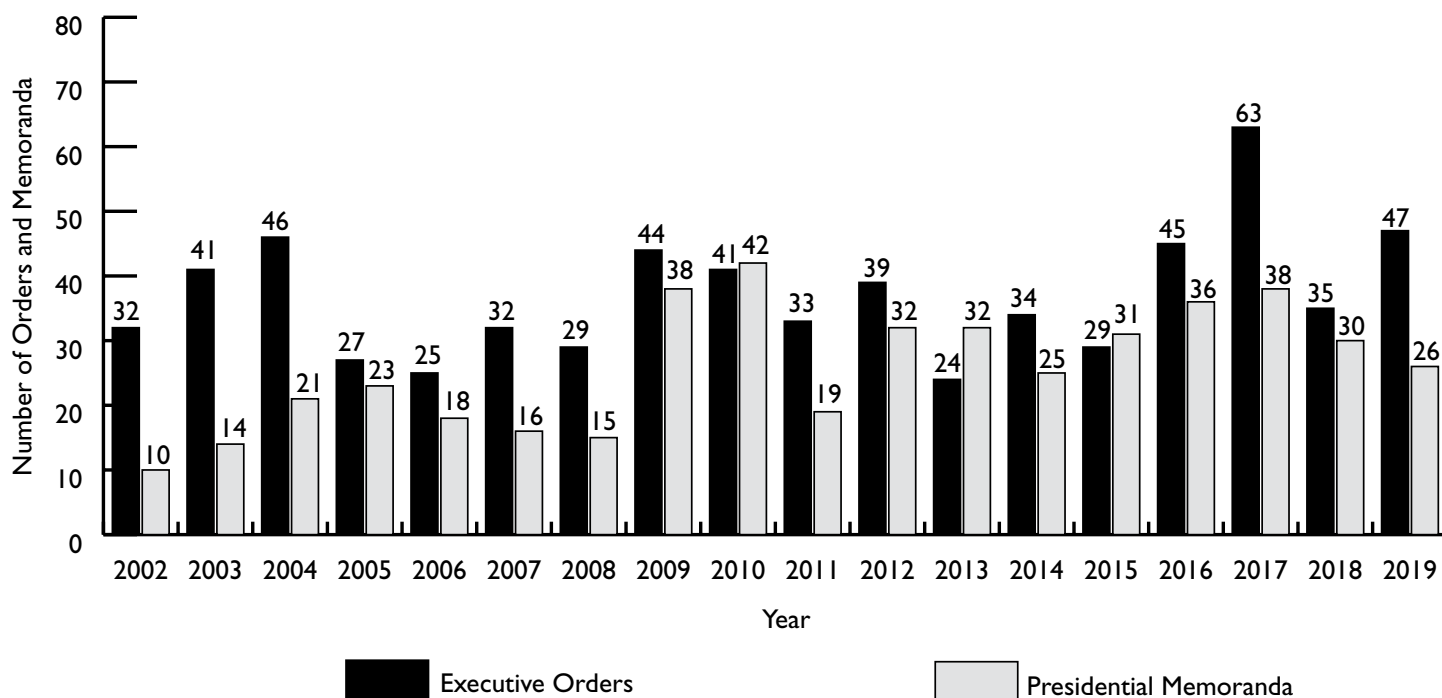
Executive orders, presidential memoranda, and other executive actions make up a large component of executive “lawmaking.” They merit heightened attention from lawmakers, since they can have, or appear to have, binding effect.⁴³⁶

Executive orders ostensibly deal with the internal workings and operations of the federal government, and presidents have traditionally been presumed able to overturn those issued by their predecessors. Their use is not new, dating back to President George Washington’s administration.⁴³⁷ However, this reporting

has not been consistent until recent decades. President Obama’s executive order totals, “pen and phone” notwithstanding, 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 (see Table 4 and Figure 15). Trump issued 63 orders in 2017 (far outstripping anything since Bush’s 2001 high water mark), 35 in 2018, and 47 in 2019.⁴³⁸

Memoranda are trickier to tally. They may or may not be published, depending on each

Figure 15. Number of Executive Orders and Presidential Memoranda, 2002–2019



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

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administration’s own determination of “general applicability and legal effect.”⁴³⁹ George W. Bush published 131 memoranda during his entire presidency, whereas Barack Obama issued 257 that were published in the *Federal Register* (Figure 15). Bill Clinton published just 14 during his presidency.⁴⁴⁰ Donald Trump issued 38 memoranda in 2017, the highest level since 2010, and 30 in 2018. Among the 47 executive orders and 26 memoranda of the past year under Trump are some intended to reduce burdens (see Box 1); but some such proposals are regulatory.

The pertinent question as far as regulatory burdens are concerned is what these executive orders and memoranda are used for and what they do. Whether lengthy or brief, orders and memoranda can have significant effects, and 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.⁴⁴¹ On the other hand, four of Obama’s executive orders addressed overregulation and rollbacks.⁴⁴² Obama’s Executive Order 13563 concerning regulatory review and reform, for example, sought to roll back regulation.⁴⁴³ It amounted to a few billion dollars in cuts, which were swamped by other, newly issued rules and negated by costly guidance. As with the *Federal Register*, counts are interesting but do not tell the full story.

Other key executive orders directed at regulatory restraint were President Clinton’s 1993 Executive Order 12866⁴⁴⁴ and President Ronald Reagan’s Executive Order 12291, which formalized central regulatory review at OMB.⁴⁴⁵ 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.”⁴⁴⁶ In Trump’s case, a handful of his executive orders and memoranda itemized at the beginning of this report comprise perhaps the most aggressive attempt by the executive branch to streamline regulation.

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 Abraham Lincoln and the subsequent Reconstruction period. President Ulysses S. Grant issued 217, then a record. From the 20th century onward, executive orders have numbered over 100 during each presidency and sometimes reached into the thousands. President Franklin D. Roosevelt—the longest-serving president in U.S. history, elected to four terms and having served a full three—issued 3,721 executive orders.⁴⁴⁷ Table 5 provides a look at executive order counts by administration since the nation’s founding through the Obama presidency.⁴⁴⁸

Table 5. Executive Orders by Administration

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
George Washington	n/a	n/a	8
John Adams	n/a	n/a	1
Thomas Jefferson	n/a	n/a	4
James Madison	n/a	n/a	1
James Monroe	n/a	n/a	1
John Quincy Adams	n/a	n/a	3
Andrew Jackson	n/a	n/a	12
Martin van Buren	n/a	n/a	10
William Henry Harrison	n/a	n/a	0

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
John Tyler	n/a	n/a	17
James K. Polk	n/a	n/a	18
Zachary Taylor	n/a	n/a	5
Millard Fillmore	n/a	n/a	12
Franklin Pierce	n/a	n/a	35
James Buchanan	n/a	n/a	16
Abraham Lincoln	n/a	n/a	48
Andrew Johnson	n/a	n/a	79
Ulysses S. Grant	n/a	n/a	217
Rutherford B. Hayes	n/a	n/a	92
James Garfield	n/a	n/a	6
Chester Arthur	n/a	n/a	96
Grover Cleveland - I	n/a	n/a	113
Benjamin Harrison	n/a	n/a	143
Grover Cleveland - II	n/a	n/a	140
William McKinley	n/a	n/a	185
Theodore Roosevelt	n/a	n/a	1,081
William Howard Taft	n/a	n/a	724
Woodrow Wilson	n/a	n/a	1,803
Warren G. Harding	n/a	n/a	522
Calvin Coolidge	n/a	n/a	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
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	13,802	13,490	138
Total Number of Executive Orders			15,691

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 March 26, 2020.