

The Presidential Dimension of Regulatory Dark Matter: Executive Orders and Memoranda

Executive orders, presidential memoranda, presidential directives,²⁴⁹ ersatz fact sheets of recent administrations, and other executive proclamations make up a substantial component of what has replaced much actual law-making in today's United States.

Although executive orders and actions ostensibly deal with the internal workings and operations of the federal government, they increasingly can have binding effect and influence private behavior, which is unlawful.²⁵⁰ Congress should give them more oversight.

Executive orders date back to George Washington's administration.²⁵¹ Since the nation's founding, presidents have issued 15,611 of them (see Table 4). The reporting and numbering of these documents have not

been consistent until recent decades. As for executive orders' durability, presidents have traditionally been presumed to be able to overturn at will those issued by prior administrations.²⁵²

Joe Biden issued 77 executive orders in his first year of 2021, easily the most seen in recent decades, followed by a drop to 29 in 2022 (see Figure 16). Sixteen executive orders issued by Trump in the closing weeks of his term in January 2021 brought the total for that year to 93.²⁵³ Trump had issued 67 executive orders in 2020, a level not seen since 2001 (but which, as a transition year, included 14 Clinton orders and 53 for George W. Bush). Trump also issued 63 executive orders in 2017, 35 in 2018, and 47 in 2019, with oft-stated intent to streamline

Table 4. Executive Orders by Administration

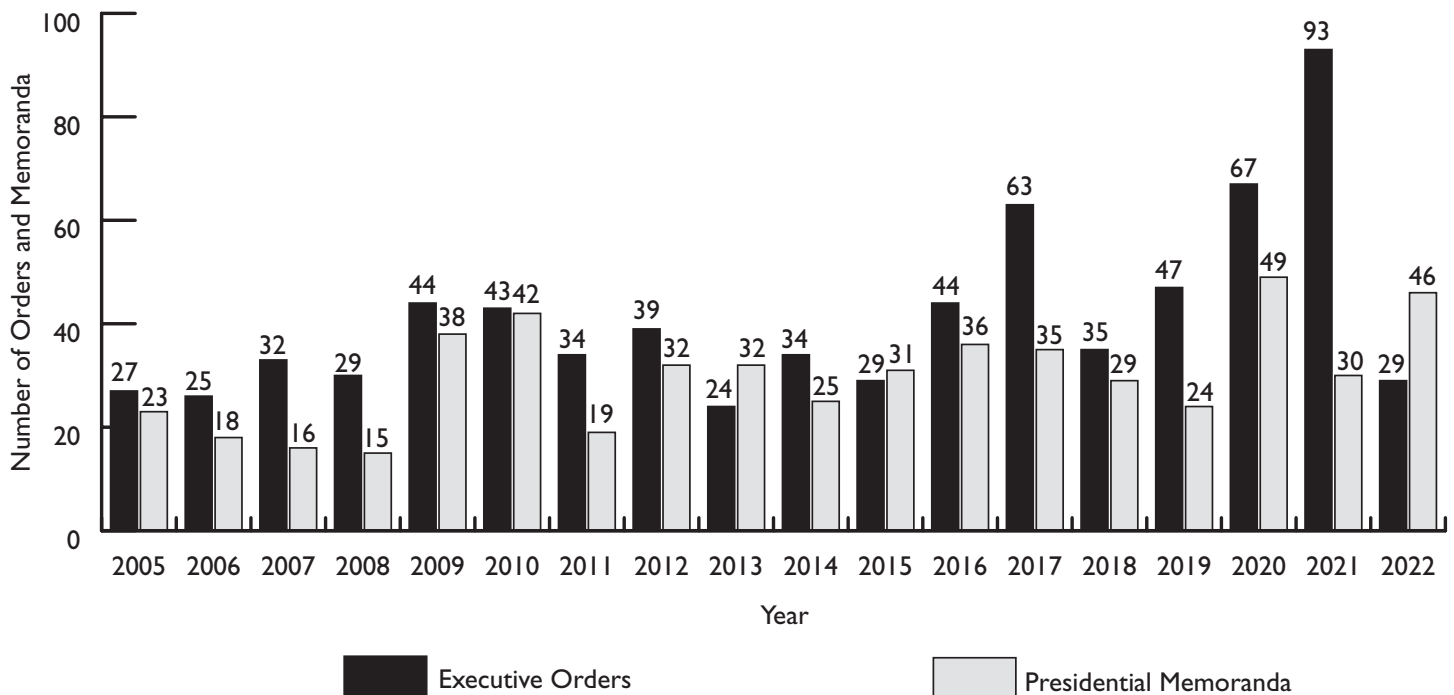
	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
George Washington	n/a	n/a	8
John Adams	n/a	n/a	1
Thomas Jefferson	n/a	n/a	4
James Madison	n/a	n/a	1
James Monroe	n/a	n/a	1
John Quincy Adams	n/a	n/a	3
Andrew Jackson	n/a	n/a	12
Martin van Buren	n/a	n/a	10
William Henry Harrison	n/a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

	Sequence Number		Total Number of Executive Orders
	Ending	Beginning	
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	13,984	13,765	220
Joe Biden	14,090	13,985	106
Total Number of Executive Orders			15,611

Source: Author'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>.

n/a = not applicable or not available.

Figure 16. Number of Executive Orders and Presidential Memoranda, 2005–2022



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

the federal government. Obama’s executive order totals were in line with those of other presidents. By the end of their terms, Obama had issued 276 executive orders, compared with George W. Bush’s final tally of 291 (see Table 4 for all predecessors).²⁵⁴

Following are most of Biden’s 29 executive orders from 2022. In instances such as the bipartisan infrastructure law and the CHIPS Act, Congress has handed substantial law-making and regulatory powers to the executive branch. These powers will likely surface in future presidential decrees.

- Establishing the President’s Advisory Council on African Diaspora Engagement in the United States, December 19, 2022
- Lowering Prescription Drug Costs for Americans, October 19, 2022²⁵⁵
- Enhancing Safeguards for United States Signals Intelligence Activities, October 14, 2022²⁵⁶
- Expanding Eligibility for Certain Military Decorations and Awards, October 6, 2022
- Promoting the Arts, the Humanities, and Museum and Library Services, October 5, 2022²⁵⁷
- Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States, September 20, 2022
- Implementation of the Energy and Infrastructure Provisions of the Inflation Reduction Act of 2022, September 16, 2022
- Advancing Biotechnology and Biomanufacturing Innovation for a Sustainable, Safe, and Secure American Bioeconomy, September 15, 2022²⁵⁸
- Implementation of the CHIPS Act of 2022, August 30, 2022
- Securing Access to Reproductive and Other Healthcare Services, August 11, 2022

- Bolstering Efforts to Bring Hostages and Wrongfully Detained United States Nationals Home, July 21, 2022
- Establishing an Emergency Board to Investigate Disputes between Certain Railroads Represented by the National Carriers' Conference Committee of the National Railway Labor Conference and Their Employees Represented by Certain Labor Organizations, July 20, 2022
- Protecting Access to Reproductive Healthcare Services, July 13, 2022
- Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, June 21, 2022
- Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, May 31, 2022
- Enhancing the National Quantum Initiative Advisory Committee, June 9, 2022
- Strengthening the Nation's Forests, Communities, and Local Economies, April 27, 2022
- Continuing to Strengthen Americans' Access to Affordable, Quality Health Coverage, April 8, 2022
- Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression, April 8, 2022
- Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency, March 18, 2022²⁵⁹
- Prohibiting Certain Imports, Exports, and New Investment with Respect to Continued Russian Federation Aggression, March 15, 2022
- Ensuring Responsible Development of Digital Assets, March 14, 2022
- Prohibiting Certain Imports and New Investments with Respect to Continued Russian Federation Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, March 10, 2022
- Blocking Property of Certain Persons and Prohibiting Certain Transactions with Respect to Continued Russian Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, February 23, 2022
- Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan, February 15, 2022
- Use of Project Labor Agreements for Federal Construction Projects, February 9, 2022

Presidential memoranda and notices are trickier to tally than executive orders.²⁶⁰ They may or may not be published in the *Federal Register* or other readily accessible sources, depending on each administration's own determination of "general applicability and legal effect."²⁶¹ Nor are memoranda always classified or numbered the way executive orders are now, although one does find the categories in addition to "Memorandum." These include "Determination" (the baby formula emergency decree was a determination), "Notice," "Proclamation," "Presidential Order," and "Other."

They can be minor declarations celebrating events or people; or noting grave and sweeping needs, such as the February 2022 Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic;²⁶² or extending mask requirements on planes and public transit,²⁶³ as masking in health care facilities was quietly set aside by the Centers for Disease Control and Prevention.²⁶⁴ Notable in 2022 have been Biden's boasts of new executive actions on gun dealers, and background checks, serial numbers, and the like, to address the "epidemic of gun violence."²⁶⁵

In 2022, Biden made promises on student loan forgiveness known to be unconstitutional,²⁶⁶ unjustified by any emergency, and imposing costs well beyond the \$30 billion per year already acknowledged.²⁶⁷ Congressional authority is needed for debt forgiveness.²⁶⁸ Raising tuition for future students will add further costs to the rule and may contribute to a decline in college enrollment.²⁶⁹ Behind the scenes in classic dark-matter fashion, a Department of Education website notice disqualified millions who thought they were covered under debt relief,²⁷⁰ by which time the Consumer Financial Protection Bureau had already issued

guidance to lenders on their loan-forgiveness communications with borrowers.²⁷¹

As Figure 16 shows, according to the FederalRegister.gov online database (which records totals back to 1994), there were 30 memoranda in 2021, with 26 from Biden and 4 from Trump. There were 46 memoranda from Biden in 2022. Apart from Trump's higher final count of 49 that pressed a deregulatory agenda, 2022 marks the highest single-year count to appear in the *Federal Register* database (2010's 42 comes in second). Trump issued 137 memoranda during his term.²⁷²

Recognizing that overlap occurs in transition years, one sees that during the eight calendar years encompassing George W. Bush's presidency, 129 memoranda were published in the *Federal Register*, whereas the Obama years saw 255. Clinton published 84 memoranda during his presidency.²⁷³ Following is a sample of Biden's 46 presidential memoranda of 2022:

- Over 20 "delegations of authority" under the 1961 Foreign Assistance Act (the last on December 28, 2022²⁷⁴), a law until recently seen as a Cold War "anachronism"²⁷⁵
- Certifications Regarding Disclosure of Information in Certain Records Related to the Assassination of President John F. Kennedy, December 20, 2022
- Promoting Accountability for Conflict-Related Sexual Violence, December 6, 2022
- Uniform Standards for Tribal Consultation, December 5, 2022
- Presidential Waiver of Statutory Requirements Pursuant to Section 303 of the Defense Production Act of 1950, as Amended, October 6, 2022
- Delegation of Authority under Sections 102 and 106 of the CHIPS Act of 2022, August 15, 2022
- Partnership for Global Infrastructure and Investment, June 6, 2022
- Establishment of the White House Task Force to Address Online Harassment and Abuse, June 22, 2022

- Delegation of Authority under the European Energy Security and Diversification Act of 2019, June 14, 2022
- Addressing the Long-Term Effects of COVID-19, April 4, 2022
- Maximizing Assistance to Respond to COVID-19, March 4, 2022
- Maximizing Assistance to Respond to COVID-19, January 3, 2022

The pertinent question regarding federal intervention is what these executive orders and memoranda are used for and what they do, as well as the authority or lack thereof used to justify them. One must also recognize that the *Federal Register*, apart from the solid cataloging of executive orders, is an incomplete compendium of executive actions.

Orders and memoranda can have significant effects. A smaller number of them may not necessarily mean smaller effects. One finds presidents of both parties promising and following through on unilateral executive actions if Congress fails to act on their agenda and, in Biden's case, facing pressures to act aggressively even in the wake of Supreme Court decisions at odds with a progressive agenda.²⁷⁶

As with the *Federal Register* rule counts, the tallies of orders and memoranda are noteworthy and necessary to track, but do not tell the full story. In 2014, Obama administration memoranda and directives, which did not appear among the presidential ones embedded in Figure 16, created a new financial investment instrument, implemented new positive rights regarding work hours, and applied employment preferences for federal contractors.²⁷⁷ In contrast, four of Obama's executive orders addressed overregulation and rollbacks,²⁷⁸ such as Obama's Executive Order 13563 on regulatory review and reform.²⁷⁹ That deviation did apparently deliver a few billion dollars in cuts that ended up swamped by other rules and guidance. The same may be said, in some respects, for the Trump program.

The foundational executive orders directed at regulatory restraint were Clinton's 1993 Ex-

Executive Order 12866²⁸⁰ and President Ronald Reagan's Executive Order 12291, which formalized central regulatory review at OMB.²⁸¹ Clinton's was a pullback 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."²⁸² It was dominant until Biden's "Modernizing Regulatory Review" directive, although still nominally invoked by the administration.

The United States existed for several decades before any 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's federal consolidations²⁸³ and the subsequent Reconstruction period. President Ulysses S. Grant's 217 set a record.

From the 20th century onward, executive orders have numbered over 100 during every presidency and have sometimes soared into

the thousands. President Franklin D. Roosevelt—the longest-serving president in U.S. history, elected to four terms and serving a full three—issued 3,467 executive orders.²⁸⁴ Table 4 provides a look at executive order counts by administration since the nation's founding through Biden's second year.²⁸⁵

In addition to the notices and executive orders that appear in the *Federal Register*, there are pronouncements on the periphery. As in the Obama years, one sees numerous unclassified and uncounted fact sheets, such as that on "Equity Action Plans."²⁸⁶ Others include a Justice Department meat processing directive,²⁸⁷ new standards for a national electric vehicle charging network,²⁸⁸ specifications on clean school buses and other infrastructure,²⁸⁹ an effort under way to expand the number of government agencies tracking and countering private drones,²⁹⁰ and one titled "The United We Stand Summit: Taking Action to Prevent and Address Hate-Motivated Violence and Foster Unity."²⁹¹