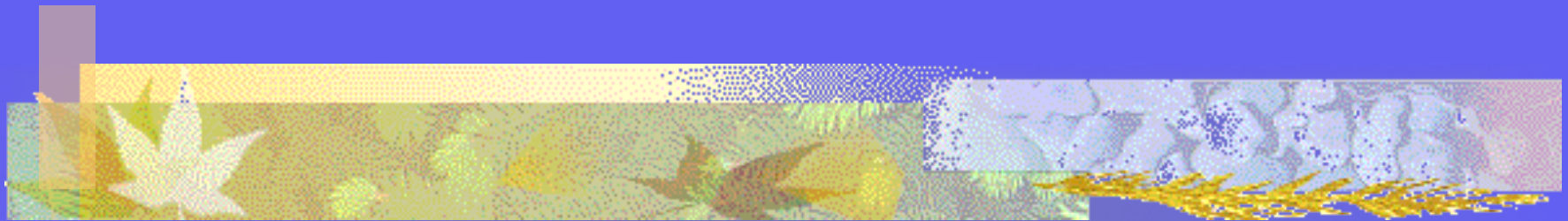


# Risk Policy in the Bush II Administration

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Society for Risk Analysis Forum  
*Current Controversies in Risk Analysis*  
June 18, 2001  
Arlington, VA



# Sources and Levers of Executive Power

- Sources of Legitimacy
  - U.S. Constitution, Article II
  - Delegated authority to legislate
- Levers of Influence
  - Presidential appointments
  - Budget
  - White House leadership
  - Public opinion



# Constraints on Executive Power

- Congress
  - Appropriations
  - Clarity in lawmaking
  - Oversight
- Executive bureaucracies
  - Special interest constituencies
  - Divergent institutional and political interests
- Elite opinion
  - Press
  - Ideas industry
  - Public Opinion Manufacturing Sector



## Focus on Risk Regulation

- Risk policy in the budget is important but different
- Regulation is the dominant source of controversy in risk management
  - Resources are commandeered, not appropriated
  - Commitments are not subject to expenditure caps
  - Size of commitments subject to dispute



# What's a President to Do? Supervise!

- Define the problem
  - Agencies (and agency heads) resist presidential suasion
- Nixon
  - Quality of Life Reviews
  - Leadership or interference?
- Ford
  - Inflation Impact Statements
- Carter
  - Regulatory Analysis Review Group
  - Paperwork Reduction Act of 1980 established Office of Information and Regulatory Affairs (OIRA)
- Outcomes: small successes, large controversies



# What's a President to Do? Supervise More!

- Define the problem
  - Executive review needs to be comprehensive
  - White House needs a mechanism to say “no”
- Reagan
  - Established centralized Executive regulatory review
  - Created Task Force on Regulatory Relief
- Bush I
  - Maintained centralized Executive regulatory review
  - Converted Task Force into Council on Competitiveness
- Outcomes: small successes, large controversies



# What's a President to Do? Supervise Less!

- Define the problem
  - Review is unfocused, too time-consuming, too adversarial
  - Conflict resolution very messy politically
- Clinton
  - Established agency primacy
  - Limited review to “significant” rules, delegated oversight of “nonsignificant” rules to agencies, collegiality over conflict
  - Explicit role established for Vice President
    - A major source of conflict in Reagan and Bush I
    - Conflicts with agency primacy, suggesting a logical inconsistency
    - Paper transparency, but impossible to verify compliance
- Outcomes: trivial successes, small controversies



# Setting the Stage for Executive Review in Bush II

- Presidents have lots of experience with Executive review
  - 30 years' practice attempting to guide agency decision-making
  - 20 years' practice with centralized Executive review
- No model has proved successful in general application
  - All agencies have adapted to the process; some have mastered it
  - Threat of enforcement lacks credibility
    - “The soft bigotry of low expectations”
    - Where “race to the bottom” analogy really does apply
      - No State wants zero environmental quality
      - All agencies prefer zero Executive oversight

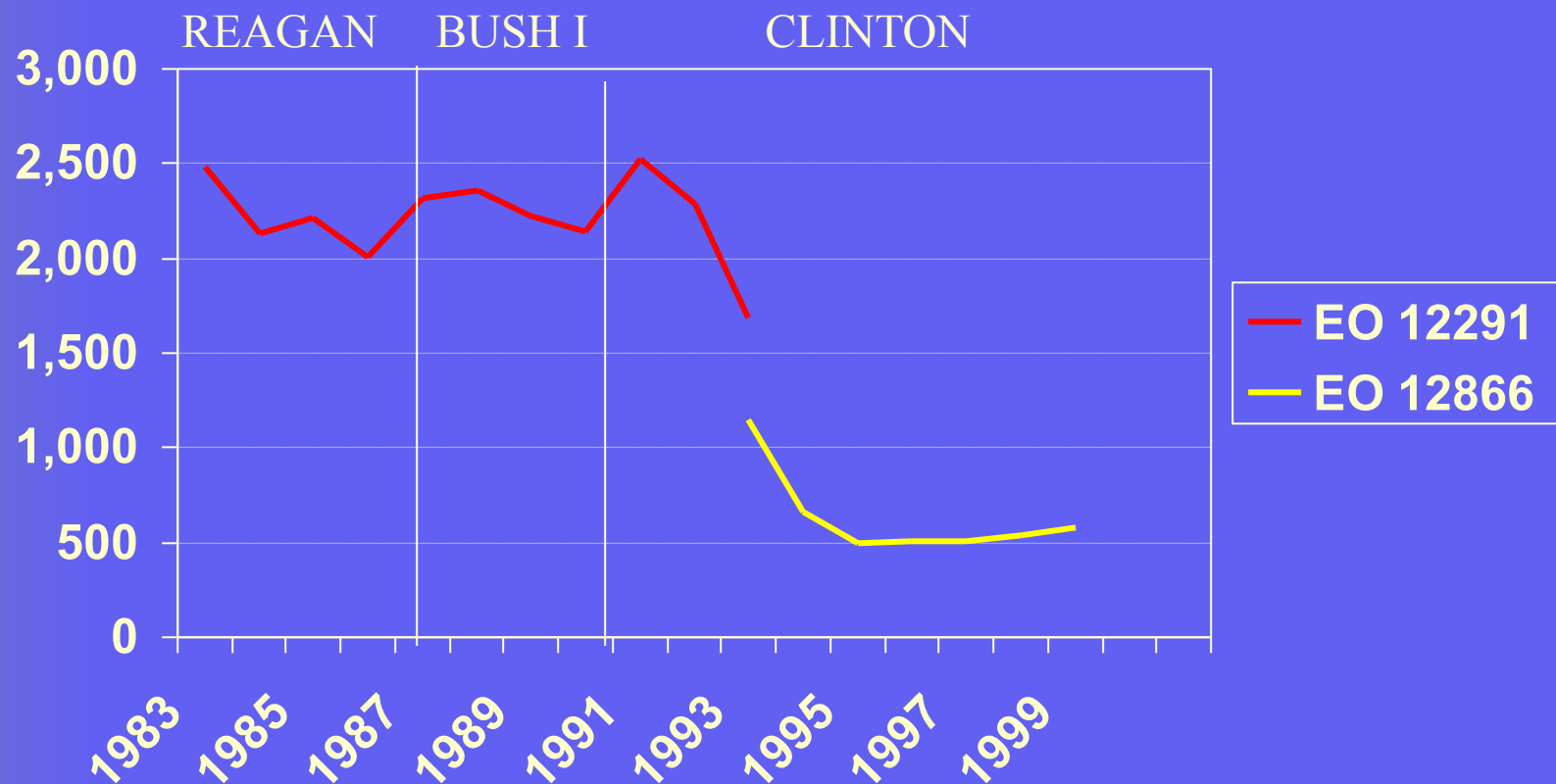




# Setting the Stage for Executive Review in Bush II

- Conflicting objectives remain undisturbed
  - Provide independent information to White House officials
  - Enforce stated regulatory policy principles
  - Advance the President's agenda

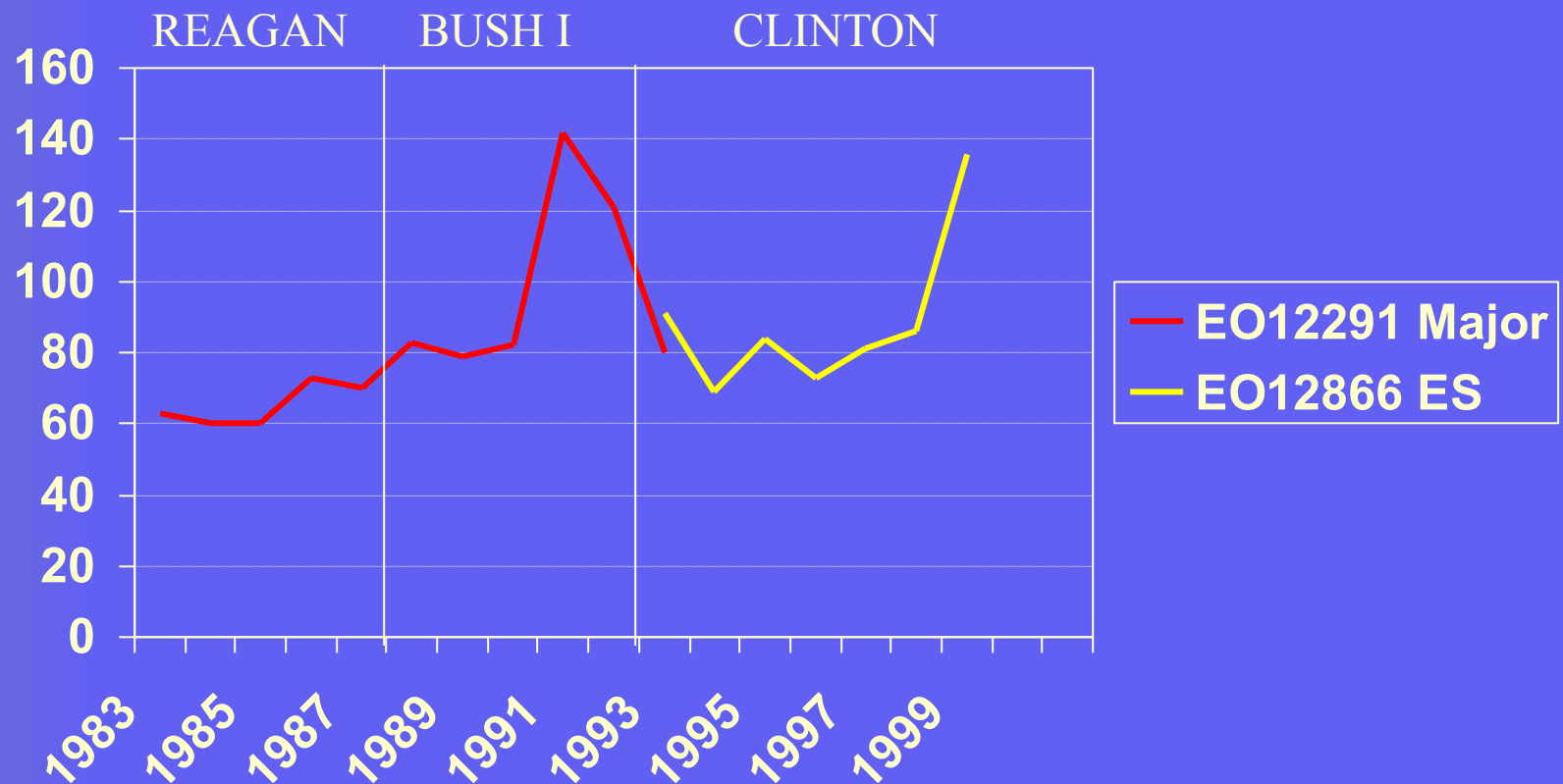
# Regulations Reviewed, 1983-1999



# Interpreting the Data

- Covers 20% of Executive branch regulations
- Pros
  - Focuses on actions with the highest stakes
  - Makes agencies responsible for what OMB does not review
- Cons
  - Highest stakes actions may have the least room for compromise
  - No mechanism in place to hold agencies accountable
  - No data available on what slips under the radar
  - Asymmetrical information creates perverse incentives
    - Agencies best informed about the likely effects of their actions
    - More disclosure to OMB increases scope and scale of controversy

# High-Stakes Regulations Reviewed, 1983-1999





## Interpreting the Data

- Number of high-stakes actions is relatively constant
- Sharp peaks occur during presidential election cycles with high probability of party turnover
- Inadequate review capacity at OMB
  - 25+ majors per staff economist slot most years
  - 40+ majors per staff economist slot in election cycles
  - No staff capacity in other sciences



# Measuring Executive Review Performance

- Bad but popular measures
  - Federal Register pages
  - CFR pages
  - Aggregate cost of regulations
- Useful but easily misinterpreted measures
  - Rules returned by OMB
  - Rules changed due to OMB review
  - Lawsuits successfully defended
    - OIRA as “canary in the mine”

# OIRA Transactions, 1999

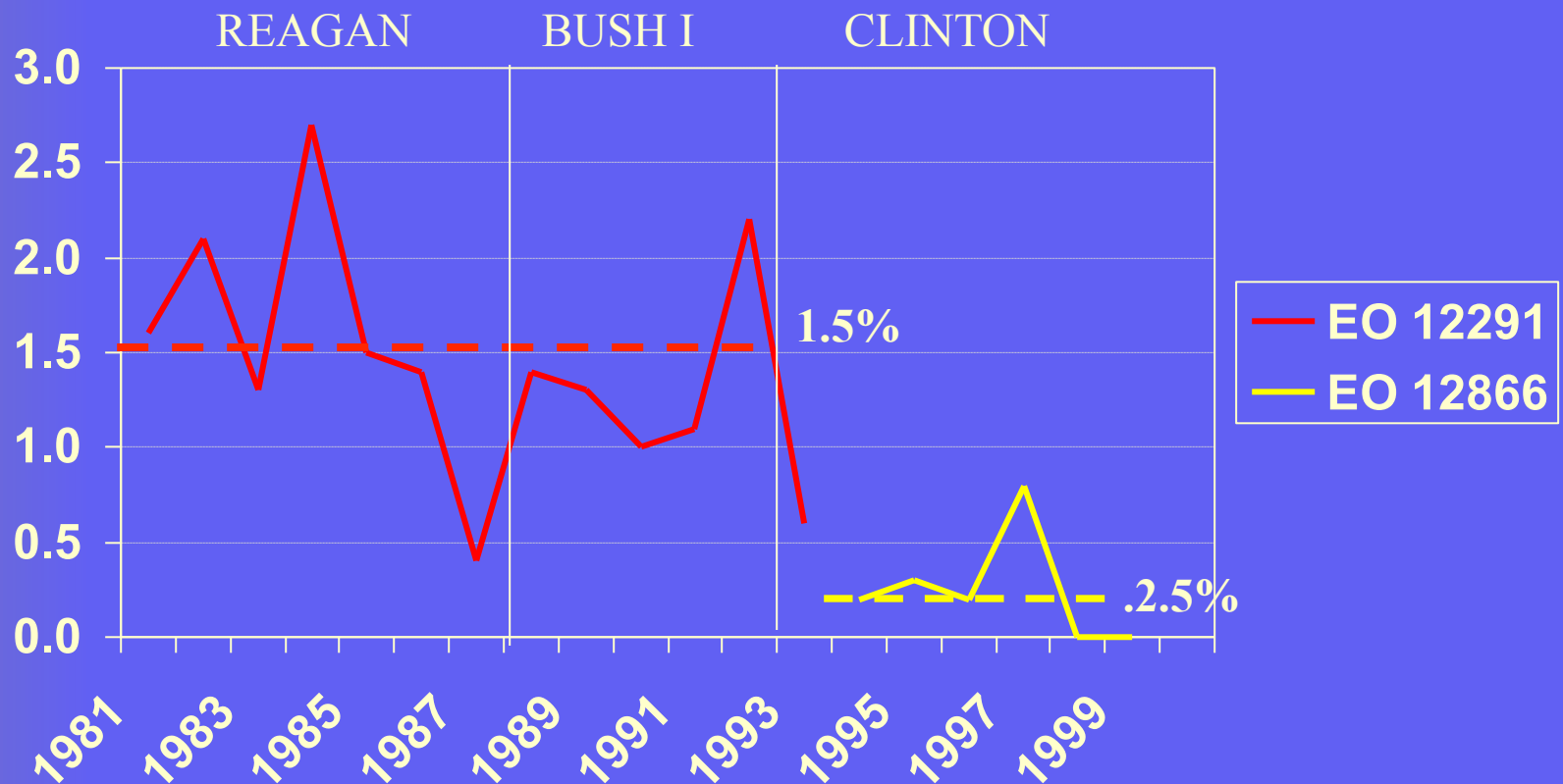
<b>OIRA Transaction Code</b>	<b>N = 583</b>
Consistent without Change	191
Consistent with Change	357
Withdrawn	26
Statutory/Judicial Deadline	5
Returned/Sent Improperly	3
Emergency	1
Returned for further consideration	0

## Interpreting the Data

- What does it mean to have zero rules “returned”?
  - No actions were inconsistent with EO principles; or
  - Actions that were inconsistent with EO principles were not subject to EO’s enforcement provisions.
- What does “consistent with change” mean?
  - Changes made at OIRA’s suggestion reconciled actions with EO principles; or
  - Changes could have been made at OIRA’s suggestion to reconcile actions with EO principles, but weren’t.



# Percent Rules “Returned for Reconsideration,” 1981-99

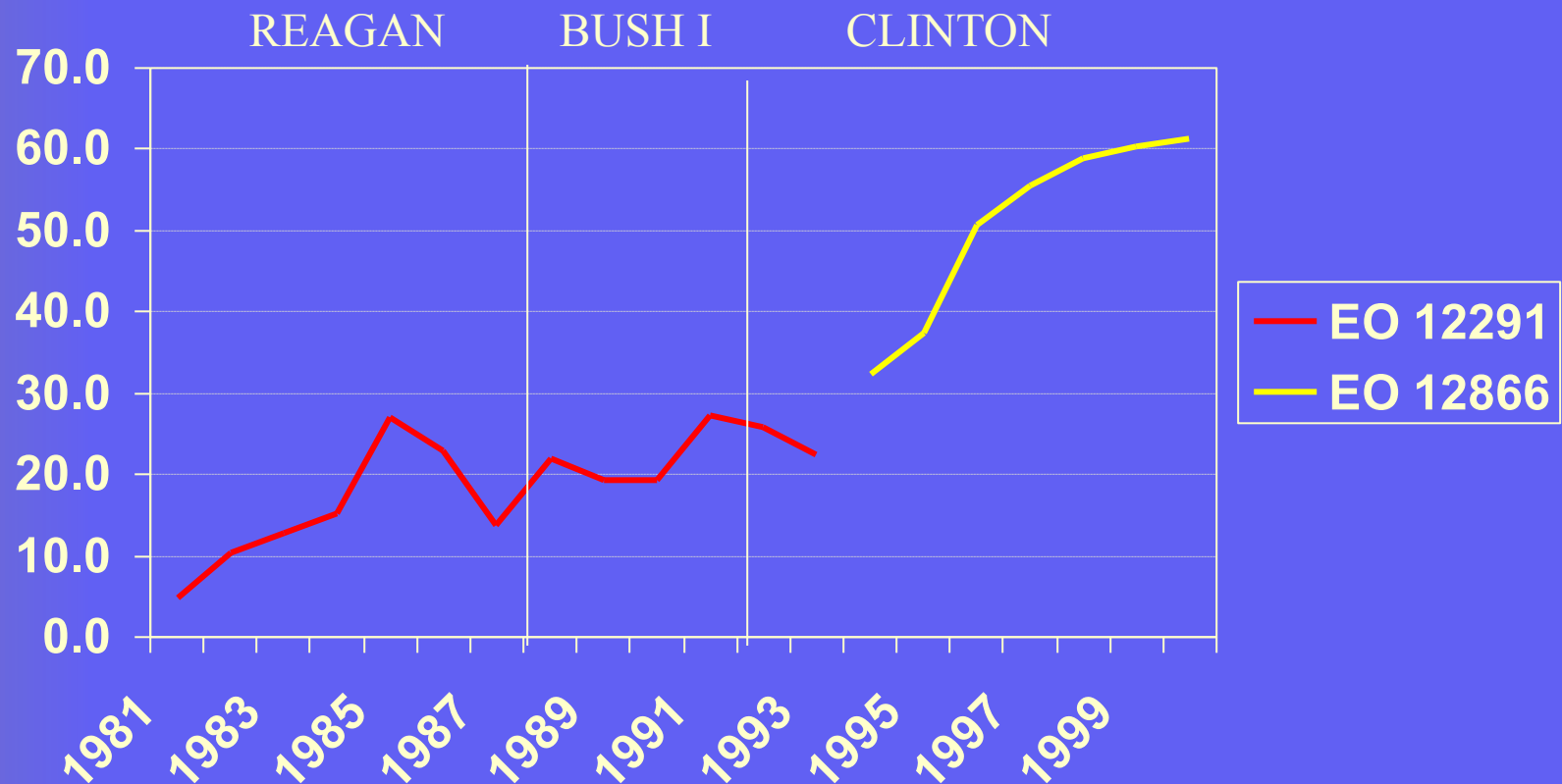




## Interpreting the Data

- Very few rules have ever been returned for reconsideration
  - Peaks in 1984 (2.7%) and 1992 (2.2%) reflect most aggressive and controversial periods
- Decline under EO 12866 greater than it appears
  - Average percent returned declined by 80%
  - Base for new percentage is 80% lower
  - OMB's only stated enforcement tool used only in token cases

# Percent Rules “Consistent with Change,” 1981-99





# Interpreting the Data

- Depends on what “consistent with change” means
- “Changes made at OIRA’s suggestion reconciled action with EO principles”
  - Number of rules requiring OIRA intervention has increased and continues to increase
  - Agencies have not incorporated EO principles into their analysis and decision-making
- “Changes could have been made at OIRA’s suggestion to reconcile action with EO principles”
  - Agencies have not incorporated EO principles and practices into their analysis and decision-making
  - Coding reflects staff response to lack of political support



# Has Executive Review Been a Serious Enterprise?

- Under EO 12866
  - Almost always inconsistent with regulatory principles
  - Regulatory principles clashed with other objectives
  - Served unstated purposes?
    - Potemkin Village to placate “industry,” deter legislation?
    - Co-opt the rhetoric of economic efficiency?
- Under EO 12291
  - Sometimes consistent with regulatory principles
  - Regulatory principles clashed with other objectives
  - No other motives apparent



# No Model Has Proved Successful in Establishing Presidential Authority

- Executive review relies on ability to change course at the end of the process
- This rarely works
  - Agency interests are not presidential interests
  - Agencies behave strategically as well as bureaucratically
- When it works it is embarrassing to the Administration
  - High stakes poker or Regulatory Oversight Death Match?
  - Black hole consumes vast political capital
  - Choose battles very carefully



# The Status of Risk- and Benefit-Cost Analysis After 20 Years' Experience

- Agency risk analysis still fails to meet minimum requirements
  - Science and policy remain interwoven and biased toward government intervention
  - Revealed priorities conflict with expert risk rankings
    - Priorities are not “worst-first”
    - Priorities do not achieve cost-effective risk reduction
- Agency economic analysis still fails to meet minimum professional standards
  - Analyses justify decisions, rarely inform them
  - Few analyses would pass muster under “market standards” (i.e., costs and benefits accrue to a unitary actor)
  - Presidents are still blindsided by their subordinates



# What Problems Have to Be Solved to Achieve an Effective Process?

- Manage principal-agent conflicts
  - between agencies and White House
  - between bureaucracy and political management within agencies
  - between advocates and analysts within agency programs
- Overcome structural flaws in review procedures
  - Review occurs too late to be effective
    - Decisions have already been made
    - Maximizes potential for controversy, engenders distrust and ill-will
    - OMB plays only defense, never plays offense
  - OMB's powers are incompatible with its responsibilities
    - Powers are too extreme to be exercised frequently
    - Powers are too limited to be exercised effectively






## What Are the Options?

1. Give up
2. Retain existing system unchanged
3. Retain existing system, but work to improve compliance
4. Noodle at the margins
5. Start over from scratch



# Regulatory Principles of EO 12866 (Clinton)

1. Promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need.
2. Select approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.
3. 12+ additional “good government” principles posing little controversy.



# Regulatory Principles of EO 12291 (Reagan)

1. Decisions shall be based on adequate information concerning need and consequences.
2. Potential benefits to society shall outweigh potential costs.
3. Objectives shall be chosen to maximize net benefits.
4. Given any fixed regulatory objective, choose the alternative with the least net cost.

# Comparing Major Principles in EOs 12866 and 12291

<b>Issue</b>	<b>EO 12866</b>	<b>EO 12291</b>
Role of economic efficiency		
Performance standards		
Best available information		
Economic incentives		
Equity and other factors		

# Comparing Major Principles in EOs 12866 and 12291

<b>Issue</b>	<b>EO 12866</b>	<b>EO 12291</b>
Role of economic efficiency	Primary	
Performance standards	Explicit	
Best available information	Explicit	
Economic incentives	Explicit	
Equity and other factors	Explicit	

# Comparing Major Principles in EOs 12866 and 12291

<b>Issue</b>	<b>EO 12866</b>	<b>EO 12291</b>
Role of economic efficiency	Primary	Primary
Performance standards	Explicit	Guidance
Best available information	Explicit	Implied
Economic incentives	Explicit	Guidance
Equity and other factors	Explicit	Guidance
Sound science	Guidance	Silent

# 1. Give Up

- The legend of Don Quixote



*virtuous madness*

# 1. Give Up

- The myth of Sisyphus



*joyous torment*



# 1. Give Up

- The Borg Collective



*Resistance is futile.*



## 2. Retain Existing System Unchanged

- Agencies pretend to comply, and OMB pretends that they do
- The “beer analogy” (and double entendre)
  - “It doesn’ t get any better than this.”
  - Successes are rare, require heroic efforts and serendipitous facts



### 3. Retain Existing System, but Work to Improve Compliance

- Existing procedural and analytic requirements are widely understood
- Agencies should need no new resources
- Political support in White House is essential



# Better Compliance Requires Earlier OMB Involvement

- Pollution prevention metaphor
  - The EPA waste hierarchy (source reduction, reuse, recycling and disposal)
  - End-of-pipe treatment misses opportunities to prevent damage
  - “An ounce of prevention is better than a pound of cure.”
- Making early involvement transparent
  - Before work begins, negotiate RIA protocols with OMB
  - Publish commitments
  - Establish a process for public participation in the development of RIA protocols



## 4. Noodle at the Margins

- Supplement existing requirements
  - EO 13211 “Statement of Energy Effects”
  - Statutory regulatory accounting requirement
  - Risk analysis?
- Streamline existing requirements
- Change oversight procedures
  - Establish a new procedure for RIA protocols
  - Integrate with Paperwork Reduction Act
  - Monitor compliance with protocols



## 5. Start Over: Procedural Issues

- Are agencies properly structured and staffed?
- Is OIRA properly structured and staffed?
- Do OIRA and the agencies interact at effective times?



## 5. Start Over: Analytic Issues

- Which requirements to keep, which to discard?
  - Requires comprehensive study of Executive review
  - Comprehensive study requires comprehensive data
- Which new requirements to add?
  - Energy
  - Risk analysis
    - OMB's 1996 Guidance requires risk analyses to generate inputs consistent with needs of benefit-cost analysis
    - Agency practices are highly diverse
    - Omenn Commission noted problems, called for reconciliation of methods but suggested no mechanism to accomplish this
- Integrating Executive review and PRA



## 5. Start Over: Implementation Issues

- The need for a powerful and persistent champion
- The need for accountability measures
- The problem of delay
  - Bureaucracies are slow to respond
  - Regulatory development process can take years
  - What to do about regulations in the pipeline?





# Signals from the Appointments Process

- Paralyzing staffing problems
  - 33% announced, 28% nominated, 19% confirmed
  - Many PAS positions have no nominations
    - USDA (7/15), DOC (12/25), EdD (9/16), DOE (9/17), HHS (5/16), HUD (9/16), DOI (11/17), DOJ(18/34), DOL (10/19), DOT (11/18), EPA (9/14), OMB (2), Other EOP (5)
  - Some PAS positions have nominees not yet confirmed
    - USDA (2), DOC (3), EdD (2), DOE (2), HHS (6), HUD (2), DOI (5), DOJ (10), DOL (1), DOT (3), EPA (3), OMB (1)
- OIRA is key, Graham's confirmation lingers
  - Disagreement with his policy views
  - Fear of his technical competence



# Signals from the Bush II Administration: Process

- Process for managing “midnight regulations”
  - *Ad hoc* and *ad lib* processes unavoidable given limited time
  - Misplaced focus on substance instead of procedure
  - Communications strategy MIA
- Process for managing new regulations
  - Momentum, inertia, and well-organized opposition
  - *Ad hoc* and *ad lib* processes retained
  - Internal contests between policy and political sides
  - Communications strategy still MIA
- Commitment to Executive review under a process TBA



# Signals from the Bush II Administration: Substance

- Risk management principles evident in “midnight regulations”
  - Reluctance to make dramatic changes (e.g., roadless areas, low sulfur diesel, lead reporting, energy efficiency standards, mercury)
  - Moderation when making changes (arsenic, energy efficiency standards)
- Risk management principles evident for new regulations
  - Moderation (energy plan, Kyoto)
  - Departures from conventional wisdom (CAFÉ, mercury)
  - Policy trumps politics sometimes (Kyoto, electricity price caps)



# Organoleptic Inspection as Analogy for Executive Review

- Meat and poultry inspection system
  - See, smell and touch, but can't test
  - End of process review
  - Single and extreme enforcement tool:
    - shutting down the line
    - returning rules for further consideration



# HACCP as Analogy for Executive Review

- Hazard Analysis and Critical Control Points
  - Performance standards are infeasible
    - Testing destroys product
    - Requires huge sample sizes
    - Results not available in time to affect decisions
  - Quality control through process control
    - Increases average quality
    - Reduces variance in variance
  - HACCP applied to Executive review
    - Performance standards are difficult or impossible to enforce
    - CCPs are not monitored for compliance



# Unsolicited Recommendations for Executive Review

- Focus on process, not outcomes
  - Legitimacy of outcomes rests on legitimacy of process
  - Legitimacy of process depends on its transparency
  - Increase public participation in Executive review given legitimate need for privileged communications
  - Reconcile conflicts between Executive review and PRA
  - Outcomes will take care of themselves
- Effective leadership requires committed followers
  - Restore OIRA staff capacity in economics
  - Build OIRA staff capacity in science
  - Establish short list of objectively measurable regulatory principles
  - Enable OIRA to enforce the short list