rounds of ammunition. It also was modified to carry one Sidewinder missile under each wing, Snakeye bombs, fire bombs, rocket packages and cluster bombs.

The OV–10D can carry a 20mm gun turret with 1,500 rounds of ammunition.

During the Vietnam War, two OV–10Ds were used for a variety of missions during a six-week period and flew more than 200 missions in which they were credited with killing 300 enemy troops and saving beleaguered outposts from being overrun by the communists.

TRIBUTE TO BEULAH G. VARNELL

Mr. HEFLIN. Mr. President, I want to commend and congratulate an outstanding employee of the Department of Agriculture in Alabama, Beulah G. Varnell. She has been working in various capacities for the Department there for over 50 consecutive years.

Prior to joining the Department of Agriculture's Consolidated Farm Service Agency [CFSA], Mrs. Varnell worked at the Red Stone Arsenal in Huntsville, AL, for a short period of time. In 1945, she began work as Assistant Clerk of Conservation Materials and the next year became Principal Conservation Material Clerk. She progressed steadily over the next few years to Senior Clerk in 1949.

Beulah Varnell has demonstrated exceptional ability to assuming and carrying out many programs, with primary responsibilities for administrative, price support, conservation, wool and mohair, and feed grain. She became Chief Program Assistant in 1966 and is known across the State for her knowledge of CFSA programs and her extraordinary ability to get the job done and done well. This is reflected by her willingness to help out with all other programs in the county office.

She has worked for four different CEO's during her 50 years with the agency. She has always donated annual leave to the leave transfer recipients and maintains 240 hours of annual leave at the end of each year as indicated by all available records. She currently has accumulated 4,103 hours of sick leave, and has never been off work for any extended period of time. There is a familiar anecdote that Beulah once had a wreck while on her way to work and asked that her typewriter be brought to her home so that she could continue her duties uninterrupted. That is dedication.

Beulah married Royce Varnell, who is retired from the Tennessee Valley Authority, in 1950. She is very close to her family, including her brother, 3 sisters, nieces, and nephews. The Varnell's have two farms in Rogersville, AL, one planted with soybeans, the other maintaining several head of cattle. Beulah has lived on a farm in Rogersville all her life and has been associated with all aspects of farming through personal experiences and her job with CFSA.

She is an active member of the Rogersville Church of Christ where she teaches a class. Beulah and Royce have a garden every year and also maintain a numerous assortment of flowers around their home. In her spare time, she enjoys crocheting and quilting. She also enjoys spending time at the camphouse on the Tennessee River, visiting with friends and family.

In short, Beulah Varnell enjoys life to its fullest, and is happiest when helping others. She is a great asset to CFSA and the Department of Agriculture, having always remained totally dedicated to the needs of county producers. I congratulate her and salute her as one of the best examples of public service our Nation has to offer.

IS CONGRESS IRRESPONSIBLE? LOOK AT THE ARITHMETIC

Mr. HELMS. Mr. President, the impression will not go away: The $4.9 trillion Federal debt stands today as a sort of grotesque parallel to television's Energizer bunny that appears and appears and appears in much this same way that the Federal debt keeps going and going and going—up, of course.

A lot of politicians talk a good game—and talk is the operative word—about reducing the Federal deficit and bringing the Federal debt under control.

Control, Mr. President? As of yesterday, Monday, July 17, at the close of business, the total Federal debt stood at exactly $4,927,653,309,340.54, or $18,705.46 per man, woman, and child on a per capita basis. Res ipsa loquitur. Some control.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Under the previous order, morning business is closed.

COMPREHENSIVE REGULATORY REFORM ACT

The PRESIDING OFFICER. The Senate will now resume consideration of S. 343, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 343) to reform the regulatory process and for other purposes.

The Senate resumed consideration of the bill.

Pending:

Dole amendment No. 1487, in the nature of a substitute.

Levin (for Glenn) amendment No. 1581 (to amendment No. 1487), in the nature of a substitute.

Ashcroft amendment No. 1786 (to amendment No. 1487), to provide for the designation of distressed areas within qualifying cities as Regulatory Relief Zones and for the selective waiver of Federal regulations within such zones.

The PRESIDING OFFICER. The Senator from Missouri [Mr. Ashcroft].

AMENDMENT NO. 1786

Mr. ASHCROFT. Mr. President, throughout the current debate on S. 343, regulatory reform, little has been said about the devastating effects of regulations on America's urban core inner-city centers. Yet it is precisely our Nation's most distressed urban areas which are really threatened as a result of the onerous implications of some of the regulations on the city center. I believe it is time for us to look at those regulations as they relate to the cities and the potential for job growth and development in those cities. And it is time for us to have a look at whether or not we can mitigate the impacts of regulation against some of the areas where job development and growth are most challenging.

So I have submitted an amendment which is called the Urban Regulatory Relief Zone Act of 1995, an amendment to Senate bill 343, which is designed to try to provide that kind of relief. I believe it is in the best interests of our urban centers to be able to develop waivers so when we really find the regulations are hurting the health, the safety, the well-being, the security of our citizens, that, in fact, those regulatory provisions can be waived in cooperation with the Federal Government to provide an opportunity for jobs.

Mrs. HUTCHISON addressed the Chair.

The PRESIDING OFFICER. The Senator from Texas.

Mrs. HUTCHISON. Mr. President, will the Senator yield?

The PRESIDING OFFICER. The Senator from Texas [Mrs. HUTCHISON] is recognized.

AMENDMENT NO. 1789 TO AMENDMENT NO. 1786

(Purpose: To provide for the designation of distressed areas within qualifying cities as regulatory relief zones and for the selective waiver of Federal regulations within such zones)

Mrs. HUTCHISON. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Texas [Mrs. HUTCHISON], for herself and Mr. ASHCROFT, proposes an amendment numbered 1789 to amendment No. 1786.

Mrs. HUTCHISON. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

In lieu of the matter proposed to be added, add the following:

''TITLE II—URBAN REGULATORY RELIEF ZONES

SECTION 201. SHORT TITLE.

This Act may be cited as the ''Urban Regulatory Relief Zone Act of 1995''.

SEC. 202. FINDINGS.

The Congress finds that—

(1) the likelihood that a proposed business site will comply with many government regulations is inversely related to the length of time over which a site has been utilized for commercial and/or industrial purposes in the past, thus rendering older sites in urban areas the sites most unlikely to be chosen for new development and thereby forcing new development away from the areas most

in need of economic growth and job creation; and

(2) broad Federal regulations often have unintended social and economic consequences in urban areas where such regulations, among other things—

(A) offend basic notions of common sense, particularly when applied to individual sites;

(B) adversely impact economic stability;

(C) result in the unnecessary loss of existing jobs and businesses;

(D) undermine new economic development, especially in previously used sites;

(E) create undue economic hardships while failing significantly to protect human health, particularly in areas where economic development is urgently needed in order to improve the health and welfare of residents over the long term; and

(F) contribute to social deterioration to a such degree that high unemployment, crime, and other economic and social problems create the greatest risk to the health and well-being of urban residents.

SEC. 203. PURPOSES.

The purposes of this title are to—

(1) enable qualifying cites to provide for the general well-being, health, safety and security for their residents living in distressed areas by empowering such cities to obtain selective relief from Federal regulations that undermine economic stability and development in distressed areas within the city; and

(2) authorize Federal agencies to waive the application of specific Federal regulations in distressed urban areas designated as Urban Regulatory Relief Zones by an Economic Development Commission—

(A) upon application through the Office of Management and Budget by an Economic Development Commission established by a qualifying city pursuant to section 205; and

(B) upon a determination by the appropriate Federal agency that granting such a waiver will not substantially endanger health or safety.

SEC. 204. ELIGIBILITY FOR WAIVERS.

(a) ELIGIBLE CITIES.—The mayor or chief executive officer of a city may establish an Economic Development Commission to carry out the purposes of section 205 if the city has a population greater than 200,000 according to:

(1) the U.S. Census Bureau's 1992 estimate for city populations; or

(2) beginning six months after the enactment of this title, the U.S. Census Bureau's latest estimate for city populations.

(b) DISTRESSED AREA.—Any census tract within a city shall qualify as distressed area if—

(1) 33 percent or more of the resident population in the census tract is below the poverty line; or

(2) 45 percent or more of out-of-school males aged 16 and over in the census tract worked less than 26 weeks in the preceding year; or

(3) 36 percent or more families with children under age 18 in the census tract have an unmarried parent as head of the household; or

(4) 17 percent or more of the resident families in the census tract received public assistance income in the preceding year.

SEC. 205. ECONOMIC DEVELOPMENT COMMISSIONS.

(a) PURPOSE.—The mayor or chief executive officer of a qualifying city under section 204 may appoint an Economic Development Commission for the purpose of—

(1) designating distressed areas, or a combination of distressed areas with one another or with adjacent industrial or commercial areas, within the city as Urban Regulatory Relief Zones; and

(2) making application through the Office of Management and Budget to waive the application of specific Federal regulations within such Urban Regulatory Relief Zones.

(b) COMPOSITION.—To the greatest extent practicable, an Economic Development Commission shall include—

(1) residents representing a demographic cross section of the city population; and

(2) members of the business community, private civic organizations, employers, employees, elected officials, and State and local regulatory authorities.

(c) LIMITATION.—No more than one Economic Development Commission shall be established or designated within a qualifying city.

SEC. 206. LOCAL PARTICIPATION.

(a) PUBLIC HEARINGS.—Before designating an area as an Urban Regulatory Relief Zone, an Economic Development Commission established pursuant to section 205 shall hold a public hearing, after giving adequate public notice, for the purpose of soliciting the opinions and suggestions of those persons who will be affected by such designation.

(b) INDIVIDUAL REQUESTS.—The Economic Development Commission shall establish a process by which individuals may submit requests to the Economic Development Commission to include specific Federal regulations in the Commission's application to the Office of Management and Budget seeking waivers of Federal regulations.

(c) AVAILABILITY OF COMMISSION DECISIONS.—After holding a hearing under paragraph (a) and before submitting any waiver applications to the Office of Management and Budget pursuant to section 207, the Economic Development Commission shall make publicly available—

(1) a list of all areas within the city to be designated as Urban Regulatory Relief Zones, if any;

(2) a list of all regulations for which the Economic Development Commission will request a waiver from a Federal agency; and

(3) the basis for the city's findings that the waiver of a regulation would improve the health and safety and economic well-being of the city's residents and the data supporting such a determination.

SEC. 207. WAIVER OF FEDERAL REGULATIONS.

(a) SELECTION OF REGULATIONS.—An Economic Development Commission may select for waiver, within an Urban Regulatory Relief Zone, Federal regulations that—

(1)(A) are unduly burdensome to business concerns located within an area designated as an Urban Regulatory Relief Zone; or

(B) discourages new economic development within the zone; or

(C) creates undue economic hardships in the zone; or

(D) contributes to the social deterioration of the zone; and

(2) if waived, will not substantially endanger health or safety.

(b) REQUEST FOR WAIVER.—(1) An Economic Development Commission shall submit a request for the waiver of Federal regulations to the Office of Management and Budget.

(2) Such request shall—

(A) identify the area designated as an Urban Regulatory Relief Zone by the Economic Development Commission;

(B) identify all regulations for which the Economic Development Commission seeks a waiver; and

(C) explain the reasons that waiver of the regulations would economically benefit the Urban Regulatory Relief Zone and the data supporting such determination.

(c) REVIEW OF WAIVER REQUEST.—No later than 60 days after receiving the request for waiver, the Office of Management and Budget shall—

(1) review the request for waiver;

(2) determine whether the request for waiver is complete and in compliance with this title, using the most recent census data available at the time each applicant is submitted; and

(3) after making a determination under paragraph (2)—

(A) submit the request for waiver to the Federal agency that promulgated the regulation and notify the requesting Economic Development Commission of the date on which the request was submitted to such agency; or

(B) notify the requesting Economic Development Commission that the request is not in compliance with this Act with an explanation of the basis for such determination.

(d) MODIFICATION OF WAIVER REQUESTS.—An Economic Development Commission may submit modifications to a waiver request. The provisions of subsection (c) shall apply to a modified waiver as of the date such modification is received by the Office of Management and Budget.

(e) WAIVER DETERMINATION.—(1) No later than 120 days after receiving a request for waiver under subsection (c) from the Office of Management and Budget, a Federal agency shall—

(A) make a determination of whether to waiver a regulation in whole or in part; and

(B) provide written notice to the requesting Economic Development Commission of such determination.

(2) Subject to subsection (g), a Federal agency shall deny a request for a waiver only if the waiver substantially endangers health or safety.

(3) If a Federal agency grants a waiver under this subsection, the agency shall provide a written statement to the requesting Economic Development Commission that—

(A) describes the extent of the waiver in whole or in part; and

(B) explains the application of the waiver, including guidance for the use of the waiver by business concerns, within the Urban Regulatory Relief Zone.

(4) If a Federal agency denies a waiver under this subsection, the agency shall provide a written statement to the requesting Economic Development Commission that—

(A) explains the reasons that the waiver substantially endangers health or safety; and

(B) provides a scientific basis in writing for such determination.

(f) AUTOMATIC WAIVER.—If a Federal agency does not provide the written notice required under subsection (e) within the 120-day period as required under such subsection, the waiver shall be deemed to be granted by the Federal agency.

(g) LIMITATION.—No provision of this Act shall be construed to authorize any Federal agency to waive any regulation or Executive order that prohibits, or the purpose of which is to protect persons against, discrimination on the basis of race, color, religion, gender, or national origin.

(h) APPLICABLE PROCEDURES.—A waiver of a regulation under subsection (e) shall not be considered to be a rule, rulemaking, or regulation under chapter 5 of title 5, United States Code. The Federal agency shall publish a notice in the Federal Register stating any waiver of a regulation under this section.

(i) EFFECT OF SUBSEQUENT ADMINISTRATION OF REGULATIONS.—If a Federal agency amends a regulation for which a waiver under this section is in effect, the agency shall not change the waiver to impose additional requirements.

(j) EXPIRATION OF WAIVERS.—No waiver of a regulation under this section shall expire unless the Federal agency determines that a continuation of the waiver substantially endangers health or safety.

SEC. 208. DEFINITIONS.

For purposes of this Act, the term—

(1) ''regulation'' means—

(A) any rule as defined under section 551(4) of title 5, United States Code; or

(B) any rulemaking conducted on the record after opportunity for an agency hearing under sections 556 and 557 of such title;

(2) ''Urban Regulatory Relief Zone'' means an area designated under section 205;

(3) ''qualifying city'' means a city which is eligible to establish an Economic Development Commission under section 204;

(4) ''industrial or commercial area'' means any part of a census tract zoned for industrial or commercial use which is adjacent to a census tract which is a distressed area pursuant to section 205(b); and

(5) ''poverty line'' has the same meaning as such term is defined under section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)).

SEC. 209. EFFECTIVE DATE.

The provisions of this title shall become effective one day after the date of enactment.''.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mrs. HUTCHISON. Mr. President, I sent an amendment to the amendment to the desk because I think Senator ASHCROFT is doing a very important thing for the urban areas of our country. It is clear that we need to do everything we can to create jobs in our urban areas, and particularly in the distressed parts of our urban areas.

I did make a minor amendment in the change of the effective date, but I support Senator ASHCROFT's amendment wholeheartedly and appreciate his yielding the floor to me for this short time.

Several Senators addressed the Chair.

The PRESIDING OFFICER. The Senator from Michigan [Mr. LEVIN], is recognized.

AMENDMENT NO. 1581

Mr. LEVIN. Mr. President, we all want significant and meaningful regulatory reform. No one wants rules that do not make sense. Nobody wants regulatory requirements that exceed real needs. We want Government to be smart, effective, reasonable, and practical.

There are plenty of regulatory horror stories. Some are accurate and some are not. There is more than enough evidence for us to be convinced of the fact that the regulatory process is broken and needs fixing. We spent several months in Governmental Affairs earlier this year considering a bill introduced by Senators ROTH and GLENN which, with a few important amendments, we reported to the full Senate for its consideration. It was passed by a unanimous, bipartisan vote of 15 to 0. It has cost-benefit analysis, risk assessment, legislative review, and a procedure for the review of existing rulings. With a few modifications this is the Glenn-Chafee substitute that is now before us. It is tough medicine that is designed to cure and not to kill the regulatory process.

The Glenn-Chafee substitute is tough because it would require, by law, that every major rule be subject to a cost-benefit analysis and, for key agencies, a risk assessment. It would require that each agency assess whether the benefits of the rule that it is proposing or promulgating will justify the costs of implementing it; and whether the rule is the most cost-effective rule among the various alternative proposals.

These two elements are key to rational rulemaking. It is tough because, by statute, it resolves once and for all the role of the President in overseeing the regulatory process. The bill gives the President the authority to oversee the cost-benefit analysis and risk assessment requirements, and recognizes the significant contribution that the President can make to rational rulemaking.

It gives Congress the right to stop a rule before it takes effect. It is tough because it allows for judicial review of an agency's determination as to whether or not a rule meets the $100 million economic impact test, and because a rule can be remanded to an agency for the failure of the agency to do the cost-benefit analysis or risk assessment.

It is tough because it requires rules scheduled for review to be subject to repeal, should the agency fail to review them in 10 years, according to the schedule and requirements of this legislation.

The Glenn-Chafee substitute also reflects some common sense, because it recognizes that decisions about benefits and costs are, by necessity, not an exact science but an exercise of judgment. It reflects common sense because it does not subject all rules to congressional review, but only the major rules. It reflects common sense because it uses information as a tool for assessing agency performance and makes that information available for everyone to judge and to challenge.

The Dole-Johnston amendment goes too far. In its zeal for reform, it overreaches and damages the very process that it sets out to repair.

It is not reform. It is overload. It is like throwing a bucket of water to a drowning person. It is as if a doctor is tripling the prescribed dosage in order to get a better effect. It ends up actually harming the patient instead of helping.

While the Dole-Johnston substitute is an improvement over S. 334, as introduced, and has been improved in some way, it still falls far short of the goal that we need for regulatory reform, which is to improve the regulatory process so that it works better, results in rules that make sense, and at the same time we maintain the important health, safety and environmental protections that Americans expect and deserve. The Dole-Johnston substitute would bog down—rather than clean up—the regulatory process, and would put important health, safety, and environmental protections needlessly at risk.

The Cabinet officials of this administration have issued a statement of policy stating that they would recommend that the President veto S. 343 in its present form, as of July 10, 1995, when the policy statement was written. The summary states that the cumulative effect of S. 343 would burden the regulatory system with additional paperwork, unnecessary cost, significant delay, and excessive litigation, and then states in a very unusual document that the Secretaries of Labor, Agriculture, Health and Human Services, Housing and Urban Development, Transportation, Treasury, Interior, EPA, and the Director of OMB all would make that recommendation for a veto.

This document has been put in the RECORD. It sets forth paragraph by paragraph, issue by issue, and item by item why the Dole-Johnston approach represents overload, why it would drown the system instead of repairing it.

The Glenn-Chafee substitute would fundamentally change, as we should, the way that Federal regulatory agencies do business. At the same time, it would keep a system that would allow us to preserve critically needed health, safety, and environmental approaches. The Glenn-Chafee substitute would help prevent regulatory agencies from issuing rules that are not based on good common sense or on good science, or that would impose costs that are not justified by the benefits of the rule. But it would not inhibit or prevent agencies from taking the necessary steps that the American public wants to take to protect their health and their environment and their safety.

The question here is the balance that we are going to set. That is really the issue. And it is an incredibly detailed and arcane bunch of issues that we must deal with. But if we make a big mistake and go way too far and bog down a system in a whole series of new approaches subject to litigation, we will end up doing a tremendous disfavor, not just to the American people but to the business community itself, which also needs the regulatory system to work.

Glenn-Chafee strikes a good balance in a number of ways. First, all Federal agencies would be required to perform and publish cost-benefit analyses before issuing major rules. The agencies would be required to compare the costs and benefits of not only the proposed rule but of reasonable alternatives as well, including non-regulatory, market-based approaches. The agencies would be required to explain whether the expected benefits of the rule justify the cost and whether the rule will achieve the benefits in a more cost-effective manner than the alternatives. The cost-benefit analysis would be reviewed by a panel of independent experts, and the agencies would be required to respond to peer reviewers' concerns.

Under Glenn-Chafee, the major regulatory agencies would be required to perform and publish risk assessment before issuing major rules regulating

risks to the environment, health, and safety. The risk assessments would be required to be based on reliable scientific data, and would disclose and explain any assumptions and value judgments. The risk assessment would have to be reviewed by a panel of independent experts, and agencies would have to respond to peer reviewers' concerns. Federal agencies would be required to review important regulations, eliminate unnecessary regulations, and reform any that do not meet the new standards that this bill would create. If an agency fails to conduct a review within the time required by the schedule, it would be required to issue a notice of proposed rulemaking to repeal the rule rather than to have the rule automatically sunset. That rulemaking would have to be completed in 2 years. That is one of the key differences between the two approaches that we will be deciding a little later on today.

Congress would have under Glenn-Chafee 45 days before issuance of any major rule to review the rule, to prevent it from taking effect by passing expedited procedures in a joint resolution of disapproval. That finally would put elected representatives in a position to assure that agencies' rules are consistent with Congress' intent. And this is the power that I have fought to create as long as I have been in this body.

Under Glenn-Chafee, covered agencies would be required to set regulatory priorities, to address the risks that are most serious and can be addressed in a cost-effective manner. Agencies would be required to explain and reflect these priorities in their budget requests.

Every 2 years the President would be required to report to Congress the cost and the benefits of all regulatory programs and recommendations for reform. The OMB would be required by law to oversee compliance with the bill, and would be required to review all major rules before issuance. This would strengthen Presidential control over regulatory agencies, particularly the independent agencies.

The Glenn-Chafee substitute includes all of the provisions that we need to produce lasting and meaningful regulatory reform. In a number of respects Glenn-Chafee goes farther than the regulatory reform bill passed by the House of Representatives, H.R. 9, which does not provide for the review of existing regulations or congressional review, or the integration of comparative risk analysis into agency priority setting and budget.

Glenn-Chafee goes past S. 1080, the Omnibus Regulatory Reform bill that passed the Senate overwhelmingly in the 1980's. And no one can seriously dispute the fact that the GLENN-CHAFEE substitute is a strong regulatory reform bill. Again, it passed the Governmental Affairs Committee with statements of just how strong it was just a few months ago by a unanimous bipartisan vote.

How does that compare to Dole-Johnston? Dole-Johnston would impose new and sometimes conflicting decisional criteria, essentially displacing standards in existing laws by forbidding issuance of any rule unless the criteria are met. This is one of the most troubling features of the proposal. And one of my concerns about Dole-Johnston is that it would so encumber agencies that it would swamp the regulatory process rather than reform it, making it a greater burden rather than a lesser one.

No one can disagree—I do not think anyone is arguing against this—that we should only have rules where the benefits justify the cost. The GLENN-CHAFEE substitute has that standard. It requires every agency to certify that the benefits justify the costs, and if it cannot so certify, to explain why.

The way that the Glenn-Chafee bill works is that since all major rules are presented to Congress 45 days before they take effect, if there is a rule which the agency head says is appropriate for whatever reasons but that the benefits do not justify the cost, we in Congress will then have an opportunity to decide whether or not such a regulation whose benefits do not justify its costs should take effect. There will be times where we will decide it should, for whatever reason. It may be that the underlying law requires it. But where an agency head, as part of the cost-benefit analysis, tells us that the benefits do not justify the cost, we then are in the position to decide whether or not it is still our intention that the rule go into effect. That is the real power of the legislative review process.

An agency may also not be able to certify that the benefits justify the cost because the underlying statute may have required that the agency regulate without regard to the cost effect.

Congress may have decided that an agency should issue a rule establishing the safe level of a toxic element in the air and that we want that level achieved regardless of what the cost implications might be. So assessing the cost and the benefits may simply not be an option for that agency. Well, we want the agency to tell us that so that we, elected officials, accountable to the people, can decide: Do we really want to impose a rule that has costs which cannot be justified by the benefits? We may pass laws that say that, but when it comes to the rulemaking, we should have an opportunity and be forced to consider the actual costs that we are imposing on this society. We have that in the Glenn-Chafee substitute.

Now, the Dole-Johnston substitute has a different approach. It says specifically that an agency cannot regulate unless it finds that the benefits justify the costs, or if the rule cannot satisfy that criteria, the rule must meet three other tests including that it adopts the least cost alternative and that it results in a significant reduction in risk.

Last week, we adopted an amendment that reaffirmed what the sponsors of the bill had been saying in this Chamber, that the decisional criteria of their bill do not override any existing statute—and that was an important issue to clarify—that where there is a conflict between an underlying health, safety or environmental law and the decisional criteria of Dole-Johnston, it is intended that the underlying statute govern. But the problem is that probably in most cases there will not be a direct conflict. And in those cases the Dole-Johnston decisional criteria could be interpreted as governing. So now let us look at the criteria.

Least cost of the Dole-Johnston decisional criteria would require that an agency pick the least cost alternative in choosing how to regulate. Now, on the surface that may sound right, going with the least expensive, but once the surface is scratched, this approach not only fails the commonsense test, it is inconsistent with the cost-benefit test.

Why would we want to restrict Federal agencies to picking the cheapest way to regulate when in many cases it will not be the best way to regulate and will not be the most cost effective way to regulate? Why would we want to deny agencies from getting the biggest bang for the buck out of the regulatory scheme? If going with the cheapest were always the best approach, we would all be driving Yugos.

Now, if, for $100 million in costs, we can save 1,000 lives, but for $110 million in costs, we can save 2,000 lives, ought we not be able to go with the slightly more expensive approach for double the savings in lives even though the lower cost-smaller savings in lives approach might meet the minimal statutory criteria?

Statutes usually have a range. They usually describe things in terms of minimal safety and allow discretion for the agency. Do we want to tell an agency that you cannot spend that extra 10 percent to double the savings in lives? Is that really what we want to do? Then why do the cost-benefit analysis? There is an inconsistency.

Mr. JOHNSTON. Mr. President, will the Senator yield?

Mr. LEVIN. I will be happy to yield for a question. But before I do yield, let me say this. I am going to get to the issue which the Senator and I have discussed over the last few days, which is whether or not there is an exception then to the least-cost approach. I am going to address that issue immediately and then perhaps he could ask a question after I address the exception which the Senator from Louisiana has pointed to as to why we are not driven always to least cost. I know that is the Senator's position. However, the language is quite clear. And I will be addressing what he calls an exception to show that it is not an exception. But I would be happy to get into that issue.

Mr. JOHNSTON. Is the Senator seriously saying that if you can save, what

was it, 10,000 lives for $1 million, that for an extra $100,000 you could not save another 1,000 lives—is the Senator really saying that he believes that about our bill?

Mr. LEVIN. I do, because that is clearly quantifiable. I just quantified it. And that is the way the agencies read the Dole-Johnston bill, and that is why the agencies have written a statement, and that is why the bill should be amended, and that is why we have discussed an amendment, one of a number of amendments to the Senator's bill. Since I have just quantified it, it is not eligible for the exception. The exception only applies where it is not quantifiable, and I have just given a quantified exception.

I have just said for $100 million you can save 1,000 lives, but for $110 million you can save 2,000 lives. Now, the Senator is going to say and has said, well, that is nonquantifiable and therefore it is subject to this exception, to the least cost approach because the value of a life cannot be quantified.

First of all, agencies do quantify it, but, second, in my hypothetical I have quantified it precisely and that is the way the agencies read this language. So we can sit here all day and debate as to whether or not, when you have 1,000 lives as a quantified benefit, that is quantified or nonquantified since for many of us the value of a life cannot be quantified.

Mr. ASHCROFT. Will the Senator yield?

Mr. LEVIN. But the agencies read it this way, and I think it should be clarified.

I will be happy to yield for a question.

Mr. ASHCROFT. Will the Senator say that the benefit is the same benefit if 100,000 lives are saved or if 200,000 lives are saved?

Mr. LEVIN. No.

Mr. ASHCROFT. It is a different benefit.

Mr. LEVIN. I would say a different benefit, both quantified but they are different.

Mr. ASHCROFT. Both quantified. And the cheapest 200,000 lives would be a separate calculation.

It seems to me, if those are different benefits, the agency would not be required then to employ the so-called cheapest but could employ, it could employ the benefit for the greater savings because it is a different benefit and the calculation would be the cheapest for that different benefit.

Mr. LEVIN. I would think the agency should be able to do it, but under this language the only exception, certain exception to the requirement is to take the least costly approach. And you can only do it where it is a nonquantifiable benefit, and I think the Senator would agree with me this is a quantifiable benefit.

Mr. ASHCROFT. That is right. But since it is a different benefit, it is a different calculation. It seems to me that if the benefit is different, that if the extra lives mean it is a different benefit——

Mr. LEVIN. It is the same rule.

Mr. ASHCROFT. It is the same rule. But if it is a different benefit, then it is a different cost-benefit ratio and the cheapest for the different benefit is the superior one for which the Senator has argued.

Mr. LEVIN. You would think that the agency in applying that rule ought to be able to spend the extra 10 percent to double the number of lives.

Mr. ASHCROFT. My view is and my question was——

Mr. LEVIN. Would the Senator agree with that?

Mr. ASHCROFT. I would agree that for a nickel more you can go first class is the old way of saying that, and if first class means that you get more lives saved per value committed, I think we would want to be able to do that.

Mr. LEVIN. I think so, too.

Mr. ASHCROFT. My sense is that if it is a different benefit——

Mr. LEVIN. The number is different. If the Senator says a different benefit, the number is different. It is twice as large.

Mr. ASHCROFT. That is correct. And it seems to me that means this bill should be driving that—that if the number is different, it is a different benefit, and we should get to that number the cheapest way possible. In getting to any other number, the cheapest way possible should be our objective. If we decide to save 120,000 lives, there is a cheapest way to get there. And if we want to save 100,000 lives, there is a cheapest way to get there. And it seems to me, since those are different benefits, the Dole-Johnston proposal would allow us to get to those benefits by the cheapest strategy.

Mr. LEVIN. I think I would agree with the Senator that we ought to try to have a cost-benefit in what we do. The problem is that when we legislate, we do not say save 1,000 lives or we do not say save 2,000 lives. What we say is that the agency should regulate emission of a certain element going into the air in order to achieve a safe level. And then we give to the agencies typically, because we do not know here precisely what that safe level is frequently, some discretion. And then the agency is told to do a cost-benefit analysis.

That is our requirement in this bill, to do a cost-benefit analysis. Now the agency says—and this is my hypothetical—the agency cost-benefit analysis says, for 100 million bucks, you are going to save 1,000 lives. If you want to spend $110 million, you are going to save 2,000 lives.

Mr. ASHCROFT. You are doing something else; you are doing something different.

Mr. LEVIN. If the Senator will yield, that is what the cost-benefit analysis describes to the agency doing that analysis. The point is, will you allow the agency, using that cost-benefit analysis, to go to the $110 million instead of $100 million, even though the $100 million may meet the minimum threshold, since there is a range allowed by definition, or else you would not be doing the cost-benefit analysis? You would not need to. It would not be as relevant as it otherwise should be. You are doing a cost-benefit analysis most of the time because a range is permitted, and if a range is permitted under the statute, the question is then, will you allow the agency discretion to implement something more expensive than the least costly, if you can, for a small incremental amount to significantly increase the benefit?

I think the intention of the sponsors is to allow the agency to do so. However, we have pointed out over and over again that the language of the bill does not permit the agency to do it, because it says that unless the benefit is nonquantifiable—nonquantifiable—you cannot go to anything but the least costly.

Mr. JOHNSTON. Will the Senator yield on that point?

Mr. LEVIN. So we have urged the sponsors to strike the word ''nonquantifiable'' before ''benefit.'' When the word ''benefit'' is defined earlier in the statute, it says ''quantifiable or nonquantifiable.'' But in this exception to the requirement for least cost, the limitation of nonquantifiable is before the word ''benefit.'' In my hypothetical, I have given a quantifiable benefit, 1,000 versus 2,000 and $100 million versus $110 million. Then the agencies read this and I read this as being a quantifiable benefit, thereby not subject to the exception.

The Senator from Louisiana has argued that that is a nonquantifiable benefit because you cannot quantify the value of a human life. Even if that were conceded, the problem is that the benefit that we are quantifying here is the number of human lives, and agencies read that as a quantifiable benefit. I happen to think the intention of the sponsors is that you are or should be allowed to go to something more expensive than the least costly. That is what they keep telling us. But the language remains restricted in that way, and that is what I am addressing.

Mr. JOHNSTON. Will the Senator yield?

Mr. LEVIN. I will be happy to.

Mr. JOHNSTON. If we struck that word ''nonquantifiable,'' I take it, it would solve the Senator's problem?

Mr. LEVIN. It would solve that particular problem in the criteria. That is one of three problems, and it would solve that problem.

Mr. JOHNSTON. If the Senator will yield the floor, I am prepared to offer such an amendment.

Mr. LEVIN. I am not prepared to yield the floor. I will yield in about 10 minutes.

Mr. JOHNSTON. All right. I have an amendment prepared to that effect.

Mr. LEVIN. I would like to finish my statement, and then I will be happy to yield. I want to commend the Senator

for that change which has been the subject of about a day's debate here.

There is another criterion, so-called decisional criterion, in Dole-Johnston which is that the regulation must result in a significant reduction in risk. That is another hurdle that the agency has to go through before an agency is allowed to regulate. This one does not make sense either.

What if an agency can reduce the risk for very little money but cannot prove that it is a significant reduction in the risk? Should an agency be able to regulate if there is a reduction in the risk to our safety or our food or the environment which may be not a significant reduction but is a reduction and is worth doing on a cost-benefit basis because the cost is so slight that even though the benefit is not major, nonetheless it is justified?

Dole-Johnston would establish a whole new standard and would require the agencies to show that the reduction in risk is significant, even though the cost might be minimal.

The Department of Transportation has informed us that if they had to meet this test when regulating for shoulder belts or for lap belts for the back seat, that they may not have been able to have met that test. The shoulder belt lessens the risk by 10 percent over the reduction in the risk for the lap belt, and they are not confident that would meet the test for significant. But the cost may be so nominal that they may decide it is worth doing anyway, although the benefit is not a major benefit.

So there is another problem with the decisional criteria which can be addressed by striking that word so that the cost-benefit analysis will be driving this, even if the benefit is modest, where the cost is far more modest.

Another problem with Dole-Johnston is that each of the decisional criteria that they set forth—and we have discussed two of them here—establishes another basis for legal challenge. Each of these criteria forms the basis for judicial review and judicial second-guessing of the agency's rulemaking decision.

For instance, if the agency decides benefits justify the cost, did the agency pick a rule that provides for market-based and performance-based standards? Did the agency pick a rule that was least costly? Were there any other alternatives slightly less costly? Does the rule provide for significant reduction in risk? What is significant? Was the agency right in valuing the risk reduction as significant?

The litigation that is possible with these decisional criteria is almost endless. The whole judicial review problem with Dole-Johnston is another major issue of concern, and we have spent some time discussing this with the sponsors, both on and off the floor.

We believe, based on what agencies tell us, that courts would be asked to interpret over 100 different issues. One massive golden opportunity for litigation is the requirement in the bill that an agency consider and do a cost-benefit analysis on every reasonable alternative presented to them. This is not limited to a significant number of reasonable alternatives. The agency is required to respond and do a cost-benefit analysis for every reasonable alternative for regulation, and this is all subject to judicial review.

What does that mean? Say an agency is issuing a rule to establish a health or safety standard for a toxic substance in drinking water. They are looking at—I am making up a substance, a number here—the agency is looking in the range of 12 parts per billion of a certain substance. What happens if somebody suggests 11½ parts per billion; someone else suggests 12½ parts per billion; someone else suggests 11 parts per billion; someone else 13 parts per billion? Each of these, let us assume, the agency considers to be a reasonable alternative. Under Dole-Johnston, that requires the agency to consider and do a cost-benefit analysis on each of these possibilities. That analysis would then be subject to judicial review to see why the agency did not pick one of those other reasonable alternatives. It is endless.

Another aspect, a judicial review problem of Dole-Johnston is the fact that the bill allows for interlocutory appeals of an agency's determination as to whether or not a rule is major, whether or not it should be subject to a risk assessment, whether or not it should be subject to a regulatory flexibility analysis.

This is unprecedented in 50 years of the Administrative Procedure Act. We have not had interlocutory appeals under the Administrative Procedure Act. This is the opportunity to go to the court and have judicial review of an agency action before the action is taken, before it is finalized.

In this case, that means that after an agency has issued a notice of proposed rulemaking, a party—it is not clear what level of standing would be required by a party in order to bring an interlocutory appeal—but a party to the notice of rulemaking may take the agency to court within 60 days to challenge the agency's preliminary decision that a rule is not major, does not need a risk assessment, does not need a regulatory flexibility analysis.

When a rulemaking is at its early stages, the public is expected to make comments to the agency about the impact of the rule. It may be that during the rulemaking process, the agency is presented with new and sufficient evidence for the agency to decide that indeed the rule is a major rule, or is one that does require a risk assessment, or one that does require regulatory flexibility analysis. But with the interlocutory appeal, if a party did not challenge the agency at the beginning of a rulemaking, it is foreclosed from raising a challenge at the end of the rulemaking, regardless of what is learned during the actual rulemaking process. And that is why, when we were considering the Nunn-Coverdell amendment, I noticed that I thought this was going to hurt small businesses and small governments because they are going to lose the opportunity of learning about the impact of a rule from rulemaking so that they can challenge those critical issues after the final rule is adopted.

They are given an opportunity to challenge it early when there is a preliminary notice, but unless they take that interlocutory approach, they are then foreclosed from appealing at the end of the process, after they know the facts upon which they can make the appeal. We are not doing a favor to small businesses when we are doing that.

On the other hand, if we allow them both at the beginning and the end, then you are going to have excessive litigation and two bites at the apple. So the alternative that the Administrative Procedure Act used all these years is to say you can appeal these decisions at the end of the rulemaking process. But what this bill does for the first time is creates this interlocutory appeal early in the rulemaking process, thinking we are doing a favor for small businesses and small governments and, in fact, we are not doing so at all.

Now, another consideration is the strong concern by the Justice Department that the court will entertain requests by a party bringing an interlocutory appeal to suspend the rulemaking during the court's consideration of the appeal. That is a logical request; we are making an interlocutory appeal early in the rulemaking and suspending the rulemaking pending the appeal. Although it is not expressly permitted by the legislation, it is not expressly prohibited either. Should the courts begin granting these delays, months, and perhaps years, would be added to the rulemaking process.

The Glenn-Chafee substitute permits judicial review of an agency's determination as to whether or not a rule is major, but that occurs after the final rule is issued. The knowledge that a rule can be challenged at the end on that basis will make an agency proceed with its determination very carefully. It is an important deterrent, knowing that its decision on that issue and a number of other issues are subject to appeal at the end of the process.

Another problem with the judicial review in the Dole-Johnston substitute is the change that it makes to section 706 of the Administrative Procedure Act. That is another big difference in these two pieces of legislation. The Dole-Johnston bill not only establishes requirements for cost-benefit analysis, risk assessment, and for major rulemaking, but it also rewrites the Administrative Procedure Act, which applies to all rulemaking, and, in doing so, rewrites almost 50 years of case law.

With respect to judicial review, the Dole-Johnston substitute adds a new standard for judicial review of an agency's rulemaking. For 50 years, the standard has been arbitrary and capricious for informal rulemaking and substantial evidence for formal rulemaking. The Dole-Johnston substitute adds a third—substantial support in the rulemaking file for the factual basis of an informal rulemaking.

Now, I do not know the difference between substantial support and substantial evidence. But I do know it will be a greatly litigated issue. It may make great business for the legal community, but otherwise, it is going to be doing nothing but producing mischief.

I have been advised that some judges have stated there is very little difference between the substantial evidence and the arbitrary and capricious test. Other courts have articulated a difference, concluding that the arbitrary and capricious test is more deferential to agency decisionmaking.

Now, the Dole-Johnston substitute would add a whole new test, and briefs will be filed and cases developed, splitting the hairs between substantial support and substantial evidence. Of course, the difference between both is arbitrary and capricious. We should not do it. There is no reason given here to do it. We are adding a new test without any clarity. It is the difference between that test and the one currently applied in the Administrative Procedure Act. We are not doing anybody who has to live in that regulatory process a favor by doing that.

Now, another serious problem with the Dole-Johnston substitute is the provision on how existing rules are to be reviewed, or lookback, as many of us call it. Now, lookback is important. It is important because we want rules that have been in existence for years and which have gone unchallenged, but which may be causing serious problems, to be reviewed under the new standards and the requirements of regulatory reform. But how we do that is very important.

The Dole-Johnston substitute establishes a process by which, every 5 years, each agency reissues a schedule for the review of rules. A rule, once put on the schedule, is to be reviewed within 10 years. However, Dole-Johnston permits a private party to petition to have a major rule added to the schedule for review, and if it is, then that major rule must be reviewed within 3 years. The 10-year review cycle for these added rules is telescoped to within the next 3 years.

S. 343, as originally introduced, was severely criticized because, through the use of multiple petitions—that is, request the agencies to take certain actions—outside parties would be able to control the priorities of a Federal agency and divert and direct Federal resources. While an attempt has been made to address that problem, it still remains.

By allowing persons to petition to get major rules added to the schedule and then reviewed within 3 years, we are right back where we were when the original S. 343 was introduced, by having agency priorities dictated by outside parties. Moreover, the bill allows an outside party to petition to place a major rule on the schedule of rules to be reviewed, even if the agency is already included in the schedule. So even though the agency has included a rule on the schedule to be reviewed, an outside party could petition the agency to include it on the schedule to be reviewed. Why? Because that way it gets an earlier review. The agency may have said we are going to review it in the fourth, fifth, or seventh year, and a party not satisfied with that, even though the rule it is worried about is already on the petition, is nonetheless going to ask that it be put it on the schedule anyway, because when it wins—and it will win because, by definition, the agency would concur with it—this time the party will get its rule reviewed within 3 years.

Now, what that means is hundreds of people in each agency, having an interest in rules, every 5 years is going to be jockeying for where on a schedule of review its rule is going to be, and that is judicially reviewable.

Now, mind you, it can take up to 10 years to review the rules on that schedule. But every 5 years every agency—many of them with hundreds of rules and thousands of petitioners—is going to have to adopt a schedule, and the schedule is judicially reviewable. It probably would take 5 years just to review the petition and the judicial appeals of people jockeying for support for where on a schedule their rule is going to be reviewed.

Finally, we get through all the appeals, if the courts can figure all this out. Hundreds of petitioners, hundreds of rules, each agency, the 5 years comes and what happens? Presumably, you would think the agency would have 10 years in which to find and implement the schedule. No, every 5 years they have to issue a new schedule. Right in the middle of a 10-year review period they have to issue a new schedule which is subject to judicial review.

This is a prescription for regulatory hash. This is going to be nothing but a litigious mess with this kind of a system.

We are not doing people a favor who are now bedeviled by a regulatory process, who are now wasting a fortune in complying with rules that we should not have adopted; that now we are in court all the time challenging agencies, by adopting a system which says that we will review rules, where on the schedule they go. It is all subject to litigation. Anybody can challenge it. If it is not on the schedule, that is subject to litigation.

Every agency has its own schedule. There could be hundreds of rules that an agency is implementing. That is not an unusual number. There could be thousands of people who are interested in those rules who would have standing to challenge that schedule.

Finally, if you can get through that, if you can get through that whole bunch of roadblocks and hurdles, when you are ready to start to implement the schedule, a new 5-year trigger begins. You have to start all over again.

This is one of the reasons why we say that this approach is too cumbersome and that we will swamp the regulatory process instead of simplify it, and instead of eliminating the pieces of it which are driving folks nuts.

There is broad agreement in this body that we have overregulated, that too often we have imposed costs without adequate benefits, that we ought to require cost-benefit analysis and risk assessment, that we ought to look back at existing rules. I do not think there are two Members of this body that do not agree with those principles.

The problem is whether or not we can implement this in a way which will allow agencies to breathe, so they can carry on their functions of preserving the health, safety and welfare of this Nation, where we want them to do it. Can we strip away from them the excess, without dumping on them such impossible tasks that we are going to tangle up the process so that nothing can get done, and benefit nobody.

We have businesses that want these rules to be reviewed. I think most Members in this body want to review existing rules according to new standards, but we have to do it in a way that works; otherwise we can vote aye and think we are doing something good for our society, and end up creating a monster.

Every denial of a petition to be on the schedule is subject to judicial review. Then we have 60 days after publication of a final schedule to sue, to have the court review the appropriateness of the schedules as a whole, or the denial of an individual petition to place a major rule on the schedule.

All of these cases, in all of these agencies, are supposed to be heard in a circuit court of appeals for the District of Columbia, and they all have to be filed in the same timeframe. The court of appeals will have to review all these schedules and all these petition denials in about the same time.

Now, additionally, Mr. President—and I am almost done—there are serious problems with the multiple petitions that are permitted by this legislation. The Dole-Johnston bill adds several new things that you can ask an agency to do within a certain time period and have a denial subject to judicial review. Current law allows petitions to an agency at any time for the issuance, amendment, or repeal of a rule. That is under current law.

So if you ask an agency to issue a rule, amend a rule or repeal a rule, you can file a petition, but there is no deadline in current law by which an agency has to respond. If an agency does not respond to that request, a petitioner

can go to court and force the agency to respond to the petition, if the agency fails to do so.

Now, that is current law. So there is an opportunity to go to court in that narrow area where an agency fails to respond to a petition for the issuance, amendment, or repeal of a rule.

The Dole-Johnston substitute expands current law on petitions by adding to the Administrative Procedure Act two additional purposes for which an interested person can petition an agency. You can ask for the amendment or repeal of an interpretive rule, or the amendment or repeal of a general statement of policy or guidance. You can ask for the interpretation regarding the meaning of a rule or the meaning of an interpretive rule or general statement of policy or guidance.

Whereas, under current law if you ask for the issuance, amendment, or repeal of a rule, and the failure to respond is subject to a court intervention, under the Dole-Johnston substitute, if you ask an agency to amend or repeal or interpret an interpretive rule, general statement of policy or guidance, that also, now, becomes subject to judicial review.

Agencies do a lot more than issue rules. They issue guidance all the time, interpretations all the time, statements of policy all the time, probably by the thousands, in order to help people understand and work through a complicated regulatory system.

Under Dole-Johnston all of that—I do not know and no one knows how many thousands, tens of thousands, or hundreds of thousands of requests there are for interpretation and guidance that are filed with these agencies each year; we do not know—will now be subject to deadlines and to judicial review. That is the block that we are superimposing on this regulatory process.

The agency can either deny or grant those requests for all of that material within 18 months. Judicial review is immediate upon a denial. This, again, is going to dramatically change an agency's control over its priorities and its resources. Agencies can just simply be overwhelmed—and I emphasize, this is new. The ability to submit a request is not new. They have been asked for a decade. What is new is that now all these requests for guidance and interpretation are now going to be subject to deadlines and court review. That is what is new, massively new, overwhelmingly new.

We should be trying to downsize Government, not swamp it. We should not let the agencies become total victims of random and multiple tugs and pulls from either individuals or interests that have special axes to grind.

Agencies also have a national purpose to be achieved. They have not done an adequate job of responding to individuals. Everyone in our office spends too much time trying to force agencies to respond to our constituents—sometimes just to respond, much less to respond fairly or in an appropriate way.

They have to do a much better job. This will overwhelm an agency by providing court appeals, following deadlines, even where there is a response, because the response is subject to judicial review.

Now, there are two additional opportunities, in addition to what I have just said, that Dole-Johnston makes available to people who are making requests of rulemaking agencies.

Any interested person can petition an agency under Dole-Johnston to review a risk assessment, other than a risk assessment that is used for a major rule. The agency must act within 180 days under that petition and the agency denial of the petition would be judicially reviewable as a final agency action.

Also, any person subject to a major rule can petition an agency to modify or waive specific requirements of the major rule and authorize such person to demonstrate compliance through alternative means not otherwise permitted by the major rule. The agency must act on that petition within 180 days.

Now, while there appears to be no judicial review of any agency action with respect to this latter petition process, nonetheless, given the number of people who are subject to major rules, an agency could be flooded with petitions for alternative means of compliance, each of which would have to be responded to within 180 days.

A big part of the legislation which all of us are working on, and some of us are struggling with, is to get agencies to prioritize their regulatory activity so that we are putting Government resources on the most important risks, the most important dangers, and not spending excessive time and effort with less significant matters. Opening each and every agency to their responsibility to not only respond but to defend against hundreds, probably thousands of new kinds of petitions for specific regulatory actions, takes us in the opposite direction. The Dole-Johnston substitute tries to address it by providing for a consolidation of some of the petitions that are permitted in the bill, and for the judicial review of those petitions. But that is only for petitions relating to major rules. Petitions related to nonmajor rules are treated the same as the original Dole bill and can be made at any time and as often as people like.

Dole-Johnston provides a procedure for the review of existing rules. Each agency would be required to issue a proposed schedule for the review of rules which can contain major and nonmajor rules. Those schedules would be subject to public notice and comment. Private persons can also petition an agency to add a major rule to the schedule. A petitioner has to show that the rule is major and that there is a substantial likelihood that it does not meet the decisional criteria in the bill. All the petitions must be filed within a limited time period while the schedule for the review of rules is being considered. The schedule is issued every 5 years, and rules on the schedule are to be reviewed within 10 years, as we have said, with the possibility of a couple of years' extension.

However, if a petitioner is successful, the Dole-Johnston substitute provides that the review of the petitioned rule gets bumped up to the first 3 years of the 10-year period. So any rule that is added to the schedule by petition must be reviewed, not within 10 years, but within 3 years. And, if it succeeds, it then bumps a rule that was already within that 3-year period, presumably, since there are a finite number of rules that can be reviewed within a 3-year period.

So you are going to have all the jockeying and all the petitions filed in the court in order to try to get a position on the schedule which is high up. And if one fails, then there is a petition to get on the schedule so that you can get a higher position. Once the final schedule for each agency is published, again, parties will have 60 days to file suit and suit can be brought to challenge the denial of being on the schedule. Or even in the event that you are on the schedule, again, you can bring a suit in order to improve your position.

Mr. President, let me conclude by saying this. The Dole-Johnston substitute simply goes too far. In its effort to reform it will swamp the very process that it sets out to repair. It is not reform, it is bureaucratic overload. It is like throwing a bucket of water to a drowning person instead of a rope. The Glenn-Chafee proposal, that we will be considering later on today and voting on, embodies the bill passed by the Governmental Affairs Committee. It is reform, it is not overload. We simply must do two things and can do two things. We can have reform of the regulatory process, but we can do it in a way that does not jeopardize important health, safety, and environmental protections which have improved our lives in America.

We want to be able to trust the water we drink and the food that we eat and the air that we breathe and the planes that we fly and the bridges that we cross. And we can have that. We can avoid regulatory excess. And the way to do that is to adopt the Glenn-Chafee substitute.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. INHOFE). The Senator from Rhode Island.

Mr. CHAFEE. Mr. President, the amendment I am offering with Senator GLENN and many of our other colleagues is a solid proposal for regulatory reform. The purpose of regulatory reform legislation is to improve the quality of the regulations that are issued by the Federal agencies. That is what we are trying for. What we want to do is to weed out the bad rules, the rules that do not make sense. We want

the science and the economics used to design rules to be of the best quality. And we want rules with flexibility built in, to make the compliance burden as small as possible.

I believe the Glenn-Chafee substitute accomplishes many reforms. Let us tick a few off. It requires a cost-benefit analysis for every major rule. It requires agencies to select the most cost effective option that achieves the goals establish by the law. It requires agencies to select regulatory options that provide the greatest flexibility for compliance and recognize the compliance difficulties faced by small businesses and towns, small towns. It requires rules with costs that are greater than the benefits to be identified before they are promulgated. It requires OMB to review the cost-benefit studies in an open process that gives access to all those with an interest. It establishes expedited procedures for Congress to review major rules before they become effective, so that poorly drawn rules with unjustified costs can be stopped. That is the 60-day review process that we have. It includes clear principles for risk assessment. It requires each agency to establish a peer review process, ensuring that the science used to make important determinations is the best available. It requires agencies to develop an agenda to review existing rules and to repeal rules that are no longer needed or that cost too much.

It gives courts authority to enforce the review requirements of the Regulatory Flexibility Act, ensuring that rules affecting small businesses and small towns recognize their compliance problems. And it requires agencies to reexamine budgetary and enforcement priorities and to modify programs to maximize the reduction in risks to health and to the environment.

OK, it does all of those things. These are important steps that will improve the quality and reduce the compliance burden of Federal regulations. Some people have said, ''Oh, the Glenn-Chafee bill is just status quo. It just repeats what we have now.'' That is absolutely not so, as he have delineated in the prior points. Now, these are important steps that will improve the quality and reduce the compliance burden of Federal regulations. I am confident that these steps can be taken without undermining our environmental or health laws.

But there are several other things, so-called reforms, that this bill does not have. And they are not reforms at all, they are steps backward.

It does not include extensive special interest petitions to force endless rounds of review for every new and existing rule, risk assessment, and enforcement action taken by an agency. That is what Senator LEVIN was talking about.

It does not direct agencies to pick the least costly action a statute allows. Under the least cost approach an agency can not go for a slightly more expensive approach that will produce many more benefits. You are locked in at the lowest cost, and that is not good.

It does not allow Federal judges to second-guess the complex data, assumptions, and calculations that are developed through risk assessment to support a rule. The judges cannot go fishing back into all of that.

It does not automatically sunset existing rules because an agency did not have the resources to carry out a review ordered by a court.

It does not waste millions and millions of taxpayers' dollars on studies and assessments and lawsuits for minor rules.

And it does not delay for months, even years, needed and justifiable rules to protect health and safety and the environment while endless rounds of review are conducted to ensure that rules meet a standard of near perfection.

Senator GLENN has many times suggested a two-part test for the Senate to use in comparing these two bills. I recommend to my colleagues that they pay attention to these two points.

First, would the bill produce better rules, rules that are more cost effective and have a foundation in good science and economics?

Second, does the bill threaten to undermine the health, safety and environmental protection that has been achieved by the laws we have enacted over the past 25 years?

We want reform without a rollback. That is the test.

The Glenn-Chafee amendment passes that test. It incorporates all the significant reforms that the Senate adopted in 1982 when we considered, on this floor, S. 1080. That was a splendid piece of legislation. It was acclaimed by all as a thoroughgoing reform. In addition to the provisions of cost-benefit analysis and congressional veto that were included in S. 1080, the Glenn-Chafee amendment has new principles for risk assessment, an agenda to review existing regulations and steps to realign priorities based on risk. It goes well beyond S. 1080.

S. 1080 was adopted on the floor of this Senate 93 to nothing. I suspect the distinguished senior Senator from Louisiana voted for it. He certainly did not vote against it. Maybe he was not present, but he has a good attendance record so I suspect he voted for that bill. It was good enough in 1982.

The Glenn-Chafee amendment would catch poorly drawn or costly rules. Cost-benefit analysis is required of major rules. Courts can enforce this requirement. OMB is to oversee the preparation of these cost-benefit studies. The information on the costs and benefits of each rule will be sent to Congress, lay over there for 60 days before a rule becomes effective. Congress can veto the rule.

From the debate on this issue it appears that Congress may well receive between 500 and 1,000 rules every year under this congressional review process. If even a small minority of the Members of this body want reconsideration of a particular rule, it will be easy enough to ensure that a vote on the resolution occurs.

Now, I am currently serving as chairman of the Environment and Public Works Committee, and I have some concern about the workload that this so-called reform will create, having coming before us between 500 and 1,000 rules every year. But this is real reform. I expect we will be voting on many resolutions and many times will force agencies to reconsider their rules. If a bad rule gets through, we will have no one to blame but ourselves here in Congress; we let it happen. We can stop bad rules under the reform provisions that are contained in the Glenn-Chafee amendment. Once Congress has this veto mechanism in place, judicial review will become less important as a method to weed out bad rules. Courts will be reluctant to overturn a rule that has been issued by the executive branch and cleared in an expedited fashion in Congress.

The Glenn-Chafee amendment will bring significant changes to the regulatory process.

I do not think the underlying Johnston substitute passes the two-part test that Senator GLENN has outlined. I am concerned that it may prevent timely action to protect human health and safety and the environment. I know that is not what the authors intended, but I believe it will have this result.

The reforms are so far-reaching they could paralyze the Federal agencies. That is what Senator LEVIN has been talking about. It is very difficult to issue a significant rule to protect human health or the environment even under the procedures in place today. With the new hurdles erected by the substitute, S. 343, it could well become impossible to get a rule enacted.

Now, Mr. President, last week the senior Senator from Illinois described the experience his State had with cost-benefit analysis. Illinois passed a law in 1978 with cost-benefit provisions similar to those in this Johnston substitute. The Illinois law did not work. It was repealed. Everybody in Illinois that had any experience with their cost-benefit law will tell you it just plain does not work.

You do not have to go to Illinois to learn about the experience with cost-benefit analysis. We had that experience here with the Federal law. We have one environmental law, the Toxic Substances Control Act. This is called TSCA. That contains many of the same procedures that are set forth in the underlying substitute.

So we have been down this road before. Now, Yogi Berra said you can see a lot by looking, and you can see a lot by looking. We can learn a lot from this so-called TSCA experience. The lawyers who wrote this bill that is before us now, the Johnston substitute, must have used this TSCA experience and the TSCA law as a model. TSCA is

a cost-benefit statute. To issue a rule under TSCA, EPA must determine that the benefits of the rule justify the costs.

Under TSCA, EPA is required to impose the least burdensome regulation, just like the Johnston bill does. TSCA requires that all of the available regulatory options be considered to determine which is the least burdensome.

Now, this is an important illustration, Mr. President. We have been down this road before. We have something actually before us that is nearly exactly the same as the Johnston substitute, the so-called Toxic Substances Control Act. How did it work?

EPA, under this TSCA bill, is required to produce substantial evidence in the record to support its rulemaking determination. That is what the Johnston substitute requires.

Now, when it was enacted in 1976, many in Congress claimed that TSCA would become the most powerful of all the environmental statutes. It appears to authorize EPA to regulate virtually any chemical in commerce, for any adverse effect, in any environmental medium, in products and in the workplace. TSCA was to be the law that integrated all our environmental goals under one umbrella.

However, TSCA has been a disaster. EPA has only attempted one major regulatory action since TSCA was passed nearly 20 years ago. EPA worked on that one rule for 10 years. It reviewed hundreds of health studies, spent millions of dollars reviewing the comments and the data from the industries to be regulated. The rule was issued after 10 years, and it was immediately challenged in court under the special judicial review standards that apply to TSCA, which are the same standards that would be imposed on all laws under the Johnston amendment. So we have been down this track. Now, what happens? The rule was overturned by the Fifth Circuit Court of Appeals.

I ask unanimous consent, Mr. President, that the opinion of the court be printed in the RECORD after my comments this morning.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. CHAFEE. The reason the court gave for vacating the rule was the failure of EPA to provide substantial evidence in the record to support its actions. You did not do enough, they said.

The substantial evidence test does not apply to any other environmental laws, only to TSCA, and the only rule ever attempted under TSCA was overturned by the courts because EPA did not meet a test, a test that under the Johnston amendment would apply to all our environmental laws.

Reading the decision, one gets the impression that even if EPA had passed the substantial evidence test, the rule would have been thrown out on other grounds. The court said that EPA had not considered a sufficient number of regulatory alternatives because it only did cost estimates on five options, not all of the possible options. The court said EPA had not satisfied the requirement that it impose the least burdensome option because it had not presented any evidence the least burdensome option was among the five considered.

One could almost conclude that those who drafted the regulatory reform bill before the Senate—in other words, the Johnston substitute—did so with the Fifth Circuit Court's ruling in mind. Every hurdle that has made TSCA a useless law to protect health and environment is rolled up in this bill before us today. It applies across all of our health and our safety and our environmental statutes. No wonder the administration says it will veto the Johnston bill if it passes.

Mr. President, if the Senate will be guided by the two questions Senator GLENN set out—first; will real reform occur; and, second; will environmental laws be protected or will they be undermined—only one of the two proposals before us today passes that muster. The Glenn-Chafee amendment contains a series of steps that will improve the quality and reduce the burden of Federal regulations. It does so without threatening to undermine our environmental and safety laws.

The other bill may be described by Senator JOHNSTON as a tougher reform bill. No doubt more rules will be blocked by that bill. Under that bill, it could well result that Federal regulatory agencies would be brought to a virtual standstill. That is what I am confident will happen if this bill should ever become law, which fortunately has a slim chance of occurring.

But that is not the goal of regulatory reform, to have the whole regulatory process of our Federal Government brought to a halt. I am sure Senator JOHNSTON and proponents of his bill believe setting high standards for regulations will get better rules. But in making the hurdle too high, so high that needed rules, rules that are fully justified by their benefits, can never reach the level of perfection that is demanded, they are blocked by endless rounds of review.

While those on the other side may charge that the Glenn-Chafee amendment achieves only modest improvement in regulations, I fear that the underlying substitute may result in no health and environmental regulations at all. If that is the objective, fine. If the objective is we do not want any rules, and apparently we are going to pass everything in infinite detail in the laws that we pass, that is one thing, but certainly, in my judgment, that is not the best course for our Nation.

I thank the Chair.

EXHIBIT 1

CORROSION PROOF FITTINGS, ET AL., PETITIONERS, *v.* THE ENVIRONMENTAL PROTECTION AGENCY AND WILLIAM K. REILLY, ADMINISTRATOR, RESPONDENTS

No. 89–4596.

United States Court of Appeals, Fifth Circuit, Oct. 18, 1991.

On Motion for Clarification Nov. 15, 1991.

Rehearing Denied Nov. 27, 1991.

Petition was filed for review of final rule promulgated by Environmental Protection Agency (EPA) under Toxic Substances Control Act section prohibiting future manufacture, importation, processing, and distribution of asbestos in almost all products. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) foreign entities lacked standing under Act to challenge rule; (2) EPA failed to give required notice to public, before conclusion of hearings, that it intended to use ''analogous exposure'' data to calculate expected benefits of product bans; and (3) EPA failed to give adequate weight to statutory language requiring it to promulgate least burdensome, reasonable regulation required to protect environment adequately.

The Environmental Protection Agency (EPA) issued a final rule under section 6 of the Toxic Substances Control Act (TSCA) to prohibit the future manufacture, importation, processing, and distribution of asbestos in almost all products. Petitioners claim that the EPA's rulemaking procedure was flawed and that the rule was not promulgated on the basis of substantial evidence. Certain petitioners and amici curiae contend that the EPA rule is invalid because it conflicts with international trade agreements and may have adverse economic effects on Canada and other foreign countries. Because the EPA failed to muster substantial evidence to support its rule, we remand this matter to the EPA for further consideration in light of this opinion.

I

Facts and Procedural History

Asbestos is a naturally occurring fibrous material that resists fire and most solvents. Its major uses include heat-resistant insulators, cements, building materials, fireproof gloves and clothing, and motor vehicle brake linings. Asbestos is a toxic material, and occupational exposure to asbestos dust can result in mesothelioma, asbestosis, and lung cancer.

The EPA began these proceedings in 1979, when it issued an Advanced Notice of Proposed Rulemaking announcing its intent to explore the use of TSCA ''to reduce the risk to human health posed by exposure to asbestos.'' *See* 54 Fed. Reg. 29,460 (1989). While these proceedings were pending, other agencies continued their regulations of asbestos uses, in particular the Occupational Safety and Health Administration (OSHA), which in 1983 and 1984 involved itself with lowering standards for workplace asbestos exposure.[1]

An EPA-appointed panel reviewed over one hundred studies of asbestos and conducted several public meetings. Based upon its studies and the public comments, the EPA concluded that asbestos is a potential carcinogen at all levels of exposure, regardless of the type of asbestos or the size of the fiber. The EPA concluded in 1986 that exposure to asbestos ''poses an unreasonable risk to human health'' and thus proposed at least four regulatory options for prohibiting or restricting the use of asbestos, including a mixed ban and phase-out of asbestos over ten years; a two-stage ban of asbestos, depending upon product usage; a three-stage ban on all asbestos products leading to a total ban in ten years; and labeling of all products containing asbestos. *Id* at 29,460–61.

Over the next two years, the EPA updated its data, receiving further comments, and allowed cross-examination on the updated documents. In 1989, the EPA issued a final rule prohibiting the manufacture, importation, processing, and distribution in commerce of most asbestos-containing products. Finding that asbestos constituted an unreasonable risk to health and the environment, the EPA promulgated a staged ban of most commercial uses of asbestos. The EPA estimates that this rule will save either 202 or 148 lives, depending upon whether the benefits are discounted, at a cost of approximately $450–800 million, depending upon the price of substitutes. *Id.* at 29,468.

The rule is to take effect in three stages, depending upon the EPA's assessment of how toxic each substance is and how soon adequate substitutes will be available.[2] The rule allows affected persons one more year at each stage to sell existing stocks of prohibited products. The rule also imposes labeling requirements on stage 2 or stage 3 products and allows for exemptions from the rule in certain cases.

Section 19(a) of TSCA, 15 U.S.C. §2618(a), grants interested parties the right to appeal a final rule promulgated under section 6(a) directly to this or any other regional circuit court of appeals. Pursuant to this section, petitioners challenge the EPA's final rule, claiming that the EPA's rulemaking procedure was flawed and that the rule was not promulgated based upon substantial evidence. Some amici curiae also contend that the rule is invalid because it conflicts with international trade agreements and may have adverse economic effects on Canada and other foreign countries. We deal with each of these contentions *seriatim*.

II

Standing

A

Issues Raised Solely by Amici Curiae

[1] The EPA argues that the briefs of two of the amici curiae, Quebec and Canada, should be stricken because they improperly raise arguments not mentioned by any petitioner. To the extent that these briefs raise new issues, such as the EPA's decision not to consider the adverse impacts of the asbestos ban on the development of the economies of third-world countries, we disregard these arguments.[3] At times, however, the briefs raise variations of arguments also raised by petitioners. We thus draw on these briefs where helpful in our consideration of other issues properly brought before this court by the parties.

[2] The EPA also asserts that we cannot consider arguments raised by the two amici that relate to the differences in fiber types, sizes, and manufacturing processes because these differences only are raised by the petitioners within the context of prohibiting specific friction products, such as sheet gaskets and roof coating. This is, however, a role that amici are intended to fill: to bridge gaps in issues initially and properly raised by parties. Because various petitioners urge arguments similar to these, we properly can consider these specific issues articulated in the amici briefs.[4]

B

Standing of Foreign Entities Under TSCA

The EPA also contends that certain foreign petitioners and amici do not have standing to contest the EPA's final rule. In its final rulemaking, the EPA decided to exclude foreign effects from its analysis. Cassiar Mining Corporation, a Canadian mining company that operates an asbestos mine, and the other Canadian petitioners believe that the EPA erred by not considering the effects of the ban on foreign countries and workers.

[3] At issue in this case is a question of prudential standing, which is of less than constitutional dimensions. The touchstone of the analysis, therefore, is the statutory language used by Congress in conferring standing upon the general public. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).

[4] Only those who come within the ''zone of interests to be protected or regulated by the statute'' have prudential standing to bring challenges to regulations under the statute at issue.[5] Indeed, when a party's interests are ''inconsistent with the purposes implicit in the statute,'' it can ''reasonably be assumed that Congress [did not] intend[ ] to permit the suit.'' *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757.

The Canadian petitioners believe that Congress, by granting the right of judicial review to ''any person,'' 15 U.S.C.A. §2618(a)(1)(A) (West Supp.1991), meant to confer standing on anyone who could arrange transportation to the courthouse door. The actual language of TSCA, however, belies the broad meaning the petitioners attempt to impart to the act, for the EPA was not required to consider the effects on people or entities outside the United States. TSCA provides a laundry list of factors to consider when promulgating a rule under section 6, including ''the effect [of the rule] on the *national* economy.'' *Id.* §2605(c)(1)(D) (emphasis added). International concerns are conspicuously absent from the statute.

[5] Under the ''zone of interests'' test, we liberally construe Congressional acts to favor a plaintiff's standing to challenge administrative actions. *Warth*, 422 U.S. at 501, 95 S.Ct. at 2206. This is not to say, however, that all plaintiffs affected by a regulation or order have standing to sue; ''[i]n cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'' *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757.

[6] The Canadian petitioners do not have standing to contest the EPA's actions. Nothing in the statute requires the EPA to consider the effects of its actions in areas outside the scope of section 6. TSCA speaks of the necessity of cleaning up the national environment and protecting United States workers but largely is silent concerning the international effects of agency action. Because of this national emphasis, we are reluctant to ascribe international standing rights to foreign workers affected by the loss of economic sales within this country. We note that the Supreme Court, using similar analysis, recently denied standing rights to workers only incidentally affected by a postal regulation. *Air Courier Conference of Am. v. American Postal Workers Union*, — U.S. ——, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991). Indeed, to ''proceed[] at the behest of interests that coincide only accidentally with [the statutory] goals'' of TSCA actually may work to defeat those goals. *Hazardous Waste Treatment Council*, 861 F.2d at 283. We therefore do not consider the arguments raised by the Canadian petitioners.

[7] Cassiar separately asserts even closer contacts with the United States and believes that its status as a vendor to an American vendee gives it the right to contest administrative decisions that affect the economic well-being of the vendee. Some courts recognize that vendors can stand as third parties in the shoes of their vendees in order to contest administrative decisions.[6]

Even if we were to accept this line of reasoning, however, the result would be unavailing. Cassiar's vendee is an independent entity, fully capable of asserting its own rights. Given the purely national scope of TSCA, Cassiar cannot, bootstrap from its vendee simply because it sells asbestos to an American company. Merely inserting a product into the stream of commerce is not sufficient to confer standing under TSCA. If the rule were otherwise, the concept of standing would lose all meaning, for the only parties who would not have standing would be those who sell nothing in the United States and thus are indifferent to federal government actions. There is no indication that Congress intended to enact so loose a concept of standing, and we do not import that intent into the act today.[7]

Hence, Cassiar does not have prudential standing to bring this claim, because TSCA expressly concerns itself with national economic concerns. Cassiar brings forth no evidence that it actually controls, and does not just deal with, the American vendee. We thus conclude, along the lines of *Moses*, 778 F.2d at 271–72, that parties that Congress specifically did not intend to participate in, or benefit from, an administrative decision have no right to challenge the legitimacy of that decision.

[8] We draw support for our holding from the decision of the EPA to give a similar construction to TSCA. ''It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.'' *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626–27, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971). ''Thus, only where congressional intent is pellucide are we entitled to reject reasonable administrative construction of a statute.'' *National Grain & Feed Ass'n v. OSHA*, 886 F.2d 717, 733 (5th Cir. 1989).

[9] We find the EPA's decision to ignore the international effects of its decision to be a rational construction of the statute. *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125, 134, 105 S.Ct. 1102, 1107, 1112, 84 L.Ed.2d 90 (1985). Because it is unlikely that these foreign entities were ''intended [by Congress] to be relied upon to challenge agency disregard of the law,'' *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757 (citations omitted), we hold that they are outside the zone of interests encompassed by TSCA and thus lack standing to protest the EPA's rulemaking.[8]

III

Rulemaking Defects

[10–12] The petitioners allege that the EPA's rulemaking procedure was flawed. Specifically, the petitioners contend that the EPA erred by not cross-examining petitioner's witnesses, by not assembling a panel of experts on asbestos disease risks, by designating a hearing officer, rather than an administrative law judge (ALJ), to preside at the hearings on the rule, and by not swearing in witnesses who testified. Petitioners also complain that the EPA did not allow cross-examination of some of its witnesses and did not notify anyone until after the hearings were over that it intended to use ''analogous exposure'' estimates and a substitute pricing assumption to support its rule. Most of these contentions lack merit and are part of the petitioners' ''protest everything'' approach,[9] but we address specifically the two EPA actions of most concern to us, the failure of the EPA to afford cross-examination of its own witnesses and its failure to provide notice of the analogous exposure estimates.

[13] Administrative agencies acting under TSCA are not required to adhere to all of the procedural requirements were might require of an adjudicative body. See 15 U.S.C. §2605(c)(3). In evaluating petitioners' claims, we are guided by our long-held view that an

agency's choices concerning its rulemaking procedures are entitled to great deference, as the agencies are ''best situated to determine how they should allocate their finite resources.'' *Superior Oil Co.* v. *FERC*, 563 F.2d 191, 201 (5th Cir. 1977).

[14] Section 19(c)(1)(B)(ii) of TSCA requires that we hold unlawful any rule promulgated where EPA restrictions on cross-examination ''precluded disclosure of disputed material facts which [were] necessary to a fair determination by the Administrator.'' 15 U.S.C. §2618(c)(1)(B)(ii). In promulgating this rule, the EPA allowed substantial cross-examination of most, but not all, of its witnesses. Considering the importance TSCA accords to cross-examination, the EPA should have afforded interested parties full cross-examination on all of its major witnesses. We are mindful of the length of the asbestos regulatory process in this case, but Congress, in enacting the rules governing the informal hearing process under TSCA, specifically reserved a place for proper cross-examination on issues of disputed material fact. *See id.* §§2605(c)(3), 2618(c)(1)(B)(ii). Precluding cross-examination of EPA witnesses—even a minority of them—is not the proper way to expedite the finish of a lengthy rulemaking procedure.

The EPA's general failure to accord the petitioners adequate cross-examination, however, is not sufficient by itself to mandate overturning the rule. The ''foundational question is whether any procedural flaw so subverts the process of judicial review that invalidation of the regulation is warranted.'' *Superior Oil Co.*, 563 F.2d at 201 (quoting *Alabama Ass'n of Ins. Agents v. Board of Governors of the Fed. Reserve Sys.*, 533 F.2d 224, 236–237 (5th Cir. 1976)). Under this standard, the EPA's denial of cross-examination, by itself, is insufficient to force us to overturn the EPA's asbestos regulation.

[15] We cannot reach the same conclusion in another area, however. The EPA failed to give notice to the public, before the conclusion of the hearings, that it intended to use ''analogous exposure'' data to calculate the expected benefits of certain product bans. In general, the EPA should give notice as to its intended methodology while the public still has an opportunity to analyze, comment, and influence the proceedings. The EPA's use of the analogous exposure estimates, apart from their merits, thus should have been subjected to public scrutiny *before* the record was closed. While it is true that ''[t]he public need not have an opportunity to comment on every bit of information influencing an agency's decision,'' *Texan v. Lyng*, 868 F.2d 795, 799 (5th Cir. 1989), this cannot be used as a defense to the late adoption of the analogous exposure estimates, as they are used to support a substantial part of the regulation finally promulgated by the EPA.[10]

We draw support for this conclusion from *Aqua Slide 'N' Dive v. CPSC*, 569 F.2d 831 (5th Cir.1978), in which the CPSC decided, without granting interested parties the opportunity to comment, that its proposed regulation merely would slow the industry's rate of growth rather than actually cut sales. We rejected the CPSC's rule, and our reasons there are similar to those that require us to reject the EPA's reliance upon the analogous exposure data today:

[T]he evidence on which the Commission relies was only made public after the period for public comment on the standard had closed. Consequently, critics had no realistic chance to rebut it. . . . It matters not that the late submission probably did not violate the notice requirement of 5 U.S.C.A. §553. . . . *The statute requires that the Commission's findings be supported by substantial evidence, and that requirement is not met when the only evidence on a crucial finding is alleged to be unreliable and the Commission has not exposed it to the full scrutiny which would encourage confidence in its accuracy.*

Id. at 842–43 (citations omitted) (emphasis added).

In short, the EPA should not hold critical analysis in reserve and then use it to justify its regulation despite the lack of public comment on the validity of its basis. Failure to seek public comment on such an important part of the EPA's analysis deprived its rule of the substantial evidence required to survive judicial scrutiny, as in *Aqua Slide*.

[16] We reach this conclusion despite the relatively lenient standard by which we judge administrative rulemaking proceedings. E.g., *Superior Oil Co.*, 563 F.2d at 201. The EPA seeks to avert this result by contending that the petitioners had constructive notice that the EPA might adopt the analogous exposure theory because it included, among its published data, certain information that might be manipulated to support such an analysis. We hold, however, that considering that for some products the analogous exposure estimates constituted the bulk of the EPA's analysis, constructive notice was insufficient notice.[11] In summary, on an issue of this import, the EPA should have announced during the years in which the hearings were ongoing, rather than in the subsequent weeks after which they were closed, that it intended to use the analogous exposure estimates. On reconsideration, the EPA should open to public comment the validity of its analogous exposure estimates and methodology.

IV

The Language of TSCA

A

Standard of Review

Our inquiry into the legitimacy of the EPA rulemaking begins with a discussion of the standard of review governing this case. EPA's phase-out ban of most commercial uses of asbestos is a TSCA §6(a) rulemaking. TSCA provides that a reviewing court ''shall hold unlawful and set aside'' a final rule promulgated under §6(a) ''if the court finds that the rule is not supported by substantial evidence in the rulemaking record . . . taken as a whole.'' 15 U.S.C. §2618(c)(1)(B)(i).

[17] Substantial evidence requires ''something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'' *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966). This standard requires (1) that the agency's decision be based upon the entire record,[12] taking into account whatever in the record detracts from the weight of the agency's decision; and (2) that the agency's decision be what '' 'a reasonable mind might accept as adequate to support [its] conclusion.' '' *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 522, 101 S.Ct. 2478, 2497, 69 L.Ed.2d 185 (1981) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951)). Thus, even if there is enough evidence in the record to support the petitioners; assertions, we will not reverse if there is substantial evidence to support the agency's decision. *See, e.g., Villa v. Sullivan*, 895 F.2d 1019, 1021–22 (5th Cir. 1990); *Singletary v. Bowen*, 798 F.2d 818, 822–23 (5th Cir.1986); *accord Fort Valley State College v. Bennett*, 853 F.2d 862, 864 (11th Cir. 1988) (reviewing court examines the entire record but defers to the agency's choice between two conflicting views).

[18, 19] Contrary to the EPA's assertions, the arbitrary and capricious standard found in the APA and the substantial evidence standard found in TSCA are different standards, even in the context of an informal rulemaking.[13] Congress specifically went out of its way to provide that ''the standard of review prescribed by paragraph (2)(E) of section 706 [of the APA] shall not apply and the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record . . . taken as a whole.'' 15 U.S.C. §2618(c)(1)(B)(i). ''The substantial evidence standard mandated by [TSCA] is generally considered to be more rigorous than the arbitrary and capricious standard normally applied to informal rulemaking,'' *Environmental Defense Funds v. EPA*, 636 F.2d 1267, 1277 (D.C.Cir.1980), and ''afford[s] a considerably more generous judicial review'' than the arbitrary and capricious test. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 143, 87 S.Ct. 1507, 1512, 18 L.Ed.2d 681 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). The test ''imposes a considerable burden on the agency and limits its discretion in arriving at a factual predicate.'' *Mobile Oil Corp. v. FPC*, 483 F.2d 1238, 1258 (D.C.Cir.1973).

[20] ''Under the substantial evidence standard, a reviewing court must give careful scrutiny to agency findings and, at the same time, accord appropriate deference to administrative decisions that are based on agency experience and expertise.'' *Environmental Defense Fund*, 636 F.2d at 1277. As with consumer product legislation, ''Congress put the substantial evidence test in the statute because it wanted the courts to scrutinize the Commission's actions more closely than an 'arbitrary and capricious' standard would allow.'' *Aqua Slide*, 569 F.2d at 837.

[21, 22] The recent case of *Chemical Mfrs. Ass'n v. EPA*, 899 F.2d 344 (5thCir.1990), provides our basic framework for reviewing the EPA's actions. In evaluating whether the EPA has presented substantial evidence, we examine (1) whether the quantities of the regulated chemical entering into the environment are ''substantial'' and (2) whether human exposure to the chemical is ''substantial'' or ''significant.'' *Id.* at 359. An agency may exercise its judgment without strictly relying upon quantifiable risks, costs, and benefits, but it must ''cogently explain why it has exercised its discretion in a given manner'' and ''must offer a 'rational connection between the facts found and the choice made.' '' *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

[23,24] We note that in undertaking our review, we give all agency rules a presumption of validity, and it is up to the challenger to any rule to show that the agency action is invalid. *Alabama Nursing Home Ass'n v. Harris*, 617 F.2d 388, 393–94 (5th Cir. 1980). The burden remains on the EPA, however, to justify that the products it bans present an unreasonable risk, no matter how regulated. *See Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 662, 100 S.Ct. 2844, 2874, 65 L.Ed.2d 1010 (1980); *cf. National Lime Ass'n v. EPA*, 627 F.2d 416, 433 (D.C.Cir. 1980) (''an initial burden of promulgating and explaining a non-arbitrary, non-capricious rule rests with the Agency''). Finally, as we discuss in detail *infra*, because TSCA instructs the EPA to undertake the least burdensome regulation sufficient to regulate the substance at issue, the agency bears a heavier burden when it seeks a partial or total ban of a substance than when it merely seeks to regulate that product. *See* 15 U.S.C. §2605(a).

B

The EPA's Burden Under TSCA

TSCA provides, in pertinent part, as follows:

(a) Scope of regulation.—If the Administrator finds that there is a *reasonable basis* to

conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an *unreasonable risk of injury* to health or the environment, the Administrator shall by rule apply one or more of the following requirements to such substance or mixture to the extent necessary to *protect adequately* against such risk using the *least burdensome* requirements. *Id.* (emphasis added). As the highlighted language shows, Congress did not enact TSCA as a zero-risk statute.[14] The EPA, rather, was required to consider both alternatives to a ban and the costs of any proposed actions and to ''carry out this chapter in a reasonable and prudent manner [after considering] the environmental, economic and social impact of any action.'' 15 U.S.C. §2601(c).

[25] We conclude that the EPA has presented insufficient evidence to justify its asbestos ban. We base this conclusion upon two grounds: the failure of the EPA to consider all necessary evidence and its failure to give adequate weight to statutory language requiring it to promulgate the least burdensome, reasonable regulation required to protect the environment adequately. Because the EPA failed to address these concerns, and because the EPA is required to articulate a ''reasoned basis'' for its rules, we are compelled to return the regulation to the agency for reconsideration.

1. Least Burdensome and Reasonable.

[26] TSCA requires that the EPA use the least burdensome regulation to achieve its goal of minimum reasonable risk. This statutory requirement can create problems in evaluating just what is a ''reasonable risk.'' Congress's rejection of a no-risk policy, however, also means that in certain cases, the least burdensome yet still adequate solution may entail somewhat more risk than would other, known regulations that are far more burdensome on the industry and the economy. The very language of TSCA requires that the EPA once it has determined what an acceptable level of non-zero risk is, chose the least burdensome method of reaching that level.

In this case, the EPA banned, for all practical purposes, all present and future use of asbestos—a position the petitioners characterize as the ''death penalty alternative,'' as this is the *most* burdensome of all possible alternatives listed as open to the EPA under TSCA. TSCA not only provides the EPA with a list of alternative actions but also provides those alternatives in order of how burdensome they are.[15] The regulations thus provide for EPA regulation ranging from labeling the least toxic chemicals an industry may use. Total bans head the list as the most burdensome regulatory option.

By choosing the harshest remedy given to it under TSCA, the EPA assigned to itself the toughest burden in satisfying TSCA's requirement that its alternative be the least burdensome of all those offered to it. Since, both by definition and by the terms of TSCA, the complete ban of manufacturing is the most burdensome alternative—for even stringent regulation at least allows a manufacturer the chance to invest and meet the new, higher standard—the EPA's regulation cannot stand if there is any other regulation that would achieve an acceptable level of risk as mandated by TSCA.

We reserve until a later part of the opinion a product-by-product review of the regulation. Before reaching this analysis, however, we lay down the inquiry that the EPA should undertake whenever it seeks total ban of a product.

The EPA considered, and rejected, such options as labeling asbestos products, thereby warning users and workers involved in the manufacture of asbestos-containing products of the chemical's dangers, and stricter workplace rules. EPA also rejected controlled use of asbestos in the workplace and deferral to other government agencies charged with worker and consumer exposure to industrial and product hazards, such as OSHA, the CPSC, and the MSHA. The EPA determined that deferral to these other agencies was inappropriate because no one other authority could address all the risks posed ''throughout the life cycle'' by asbestos, and any action by one or more of the other agencies still would leave an unacceptable residual risk.[16]

Much of the EPA's analysis is correct, and the EPA's basic decision to use TSCA as a comprehensive statute designed to fight a multi-industry problem was a proper one that we uphold today on review. What concerns us, however, is the manner in which the EPA conducted some of its analysis. TSCA requires the EPA to consider, along with the effects of toxic substances on human health and the environment, ''the benefits of such substance[s] or mixture[s] for various uses and the availability of substitutes for such uses,'' as well as ''the reasonably ascertainable economic consequences of the rule, after consideration for the effect on the national economy, small business, technological innovation, the environment, and public health.'' *Id.* §2605(c)(1)(C–D).

The EPA presented two comparisons in the record: a world with no further regulation under TSCA, and a world in which no manufacture of asbestos takes place. The EPA rejected calculating how many lives a less burdensome regulation would save, and at what cost. Furthermore the EPA, when calculating the benefits of its ban, explicitly refused to compare it to an improved workplace in which currently available control technology is utilized. *See* 54 Fed.Reg. at 29,474. This decision artificially inflated the purported benefits of the rule by using a baseline comparison substantially lower than what currently available technology could yield.

[27] Under TSCA, the EPA was required to evaluate, rather than ignore, less burdensome regulatory alternatives. TSCA imposes a least-to-most-burdensome hierarchy. In order to impose a regulation at the top of the hierarchy—a total ban of asbestos—the EPA must show not only that its proposed action reduces the risk of the product to an adequate level, but also that the actions Congress identified as less burdensome also would not do the job.[17] The failure of the EPA to do this constitutes a failure to meet its burden of showing that its actions not only reduce the risk but do so in the Congressionally-mandated *least burdensome* fashion.

Thus it was not enough for the EPA to show, as it did in this case, that banning some asbestos products might reduce the harm that could occur from the use of these products. If that were the standard, it would be no standard at all, for few indeed are the products that are so safe that a complete ban of them would not make the world still safer.

This comparison of two static worlds is insufficient to satisfy the dictates of TSCA. While the EPA may have shown that a world with a complete ban of asbestos might be preferable to one in which there is only the current amount of regulation, the EPA has failed to show that there is not some intermediate state of regulation that would be superior to both the currently-regulated and the completely-banned world. Without showing that asbestos regulation would be ineffective, the EPA cannot discharge its TSCA burden of showing that its regulation is the least burdensome available to it.

Upon an initial showing of product danger, the proper course for the EPA to follow is to consider each regulatory option, beginning with the least burdensome, and the costs and benefits of regulation under each option. The EPA cannot simply skip several rungs, as it did in this case, for in doing so, it may skip a less-burdensome alternative mandated by TSCA. Here, although the EPA mentions the problems posed by intermediate levels of regulation, it takes no steps to calculate the costs and benefits of these intermediate levels. *See* 54 Fed.Reg. at 29,462, 29,474. Without doing this it is impossible, both for the EPA and for this court on review, to know that none of these alternatives was less burdensome than the ban in fact chosen by the agency.

The EPA's offhand rejection of these intermediate regulatory steps is ''not the stuff of which substantial evidence is made.'' *Aqua Slide*, 569 F.2d at 843. While it is true that the EPA considered five different ban options, these differed solely with respect to their effective dates. The EPA did not calculate the risk levels for intermediate levels of regulation, as it believed that there was no asbestos exposure level for which the risk of injury or death was zero. Reducing risk to zero, however, was not the task that Congress set for the EPA in enacting TSCA. The EPA thus has failed ''cogently [to] explain why it has exercised its discretion in a given manner,'' *Chemical Mfrs. Ass'n*, 899 F.2d at 349, by failing to explore in more than a cursory way the less burdensome alternatives to a total ban.

2. The EPA's Calculations.

Furthmore, we are concerned about some of the methodology employed by the EPA in making various of the calculations that it did perform. In order to aid the EPA's reconsideration of this and other cases, we present our concerns here.

[28] First, we note that there was some dispute in the record regarding the appropriateness of discounting the perceived benefits of the EPA's rule. In choosing between the calculated costs and benefits, the EPA presented variations in which it discounted only the costs, and counter-variations in which it discounted about the costs and the benefits, measured in both monetary and human injury terms. As between these two variations, we choose to evaluate the EPA's work using its discounted benefits calculations.

Although various commentators dispute whether it ever is appropriate to discount benefits when they are measured in human lives, we note that it would skew the results to discount only costs without according similar treatment to the benefits side of the equation. Adopting the position of the commentators who advocate not discounting benefits would force the EPA similarly not to calculate costs in present discounted real terms, making comparisons difficult. Furthermore, in evaluating situations in which different options incur costs at varying time intervals, the EPA would not be able to take into account that soon-to-be incurred costs are more harmful than postponable costs. Because the EPA must discount costs to perform its evaluations properly, the EPA also should discount benefits to preserve an apples-to-apples comparison, even if this entails discounting benefits of a non-monetary nature. *See What Price Posterity?*, The Economist, March 23, 1991, at 73 (explaining use of discount rates for non-monetary goods).

When the EPA does discount costs of benefits, however, it cannot choose an unreasonable time upon which to base its discount calculation. Instead of using the time of injury as the appropriate time from which to discount, as one might expect, the EPA instead used the time of exposure.

The difficulties inherent in the EPA's approach can be illustrated by an example. Suppose two workers will be exposed to asbestos in 1995, with worker *X* subjected to a tiny amount of asbestos that will have no adverse health effects, and worker *Y* exposed to massive amounts of asbestos that quickly will lead to an asbestos-related disease. Under the EPA's approach, which takes into account only the time of exposure rather than the time at which any injury manifests itself, both examples would be treated the same. The EPA's approach implicitly assumes that the day on which the risk of injury occurs is the same day the injury actually occurs.[18] Such an approach might be proper when the exposure and injury are one and the same, such as when a person is exposed to an immediately fatal poison, but is inappropiate for discounting toxins in which exposure often is followed by a substantial lag time before manifestation of injuries.[19]

Of more concern to us is the failure of the EPA to compute the costs and benefits of its proposed rule past the year 2000, and its double-counting of the costs of asbestos use. In performing its calculus, the EPA only included the number of lives saved over the next thirteen years, and counted any additional lives saved as simply ''unquantified benefits.'' 54 Fed. Reg. at 29,486. The EPA and intervenors now seek to use these unquantified lives saved to justify calculations as to which the benefits seem far outweighed by the astronomical costs. For example, the EPA plans to save about three lives with its ban of asbestos pipe, at a cost of $128–227 million (*i.e.*, approximately $43–76 million per life saved). Although the EPA admits that the lives saved past the year 2000 justify the price. *See generally id.* at 29,473 (explaining use of unquantified benefits).

Such calculations not only lessen the value of the EPA's cost analysis, but also make any meaningful judicial review impossible. While TSCA contemplates a useful place for unquantified benefits beyond the EPA's calculation, unquantified benefits never were intended as a trump card allowing the EPA to justify any cost calculus, no matter how high.

The concept of unquantified benefits, rather, is intended to allow the EPA to provide a rightful place for any remaining benefits that are impossible to quantify after the EPA's best attempt, but which still are of some concern. But the allowance for unquantified costs is not intended to allow the EPA to perform its calculations over an arbitrarily short period so as to preserve a large unquantified portion.

Unquantified benefits can, at times, permissibly tip the balance in close cases. They cannot, however, be used to effect a wholesale shift on the balance beam. Such a use makes a mockery of the requirements of TSCA that the EPA weigh the costs of its actions before it chooses the least burdensome alternative.[20]

[29] Most problematical to us is the EPA's ban of products for which no substitutes presently are available. In these cases, the EPA bears a tough burden indeed to show that under TSCA a ban is the least burdensome alternative, as TSCA explicitly instructs the EPA to consider ''the benefits of such substance or mixture for various uses and the availability of substitutes for such uses.'' *Id.* §2605(c)(1)(C). These words are particularly appropriate where the EPA actually has decided to ban a product, rather than simply restrict is use, for it is in these cases that the lack of an adequate substitute is most troubling under TSCA.

As the EPA itself states, ''[w]hen no information is available for a product indicating that cost-effective substitutes exist, the estimated cost of a product ban is very high.'' 54 Fed.Reg. at 29,468. Because of this, the EPA did not ban certain uses of asbestos, such as its use in rocket engines and battery separators. The EPA, however, in several other instances, ignores its own arguments and attempts to justify its ban by stating that the ban itself will cause the development of low-cost, adequate substitute products.

[30] As a general matter, we agree with the EPA that a product ban can lead to great innovation, and it is true that an agency under TSCA, as under other regulatory statutes, ''is empowered to issue safety standards which require improvements in existing technology or which require the development of new technology.'' *Chrysler Corp. v. Department of Transp.*, 472 F.2d 659, 673 (6th Cit.1972). As even the EPA acknowledges, however, when no adequate substitutes currently exist, the EPA cannot fail to consider this lack when formulating its own guidelines. Under TSCA, therefore, the EPA must present a stronger case to justify the ban, as opposed to regulation, of products with no substitutes.

We note that the EPA does provide a waiver provision for industries where the hoped-for substitutes fail to materialize in time. *See* 54 Fed. Reg. at 29,464. Under this provision, if no adequate substitutes develop, the EPA temporarily may extend the planned phase-out.

The EPA uses this provision to argue that it can ban any product, regardless of whether it has an adequate substitute, because inventive companies soon will develop good substitutes. The EPA contends that if they do not, the waiver provision will allow the continued use of asbestos in these areas, just as if the ban had not occurred at all.

The EPA errs, however, in asserting that the waiver provision will allow a continuation of the status quo in those cases in which no substitutes materialize. By its own terms, the exemption shifts the burden onto the waiver proponent to convince the EPA that the waiver is justified. *See id.* As even the EPA acknowledges, the wavier only ''may be granted by [the] EPA in very limited circumstances.'' *Id.* at 29,460.

The EPA thus cannot use the waiver provision to lessen its burden when justifying banning products without existing substitutes. While TSCA gives the EPA the power to ban such products, the EPA must bear its heavier burden of justifying its total ban in the face of inadequate substitutes. Thus, the agency cannot use its waiver provision to argue that the ban of products with no substitutes should be treated the same as the ban of those for which adequate substitutes are available now.

[31] We also are concerned with the EPA's evaluation of substitutes even in those instances in which the record shows that they are available. The EPA explicitly rejects considering the harm that may flow from the increased use of products designed to substitute for asbestos, even where the probable substitutes themselves are known carcinogens. *Id.* at 29,481–83. The EPA justifies this by stating that it has ''more concern about the continued use and exposure to asbestos than it has for the future replacement of asbestos in the products subject to this rule with other fibrous substitutes.'' *Id.* at 29,481. The agency thus concludes that any ''[r]egulatory decisions about asbestos which poses well-recognized, serious risks should not be delayed until the risk of all replacement materials are fully quantified.'' *Id.* at 29,483.

This presents two problems. First, TSCA instructs the EPA to consider the relative merits of its ban, as compared to the economic effects of its actions. The EPA cannot make this calculation if it fails to consider the effects that alternate substitutes will pose after a ban.

Second, the EPA cannot say with any assurance that its regulation will increase workplace safety when it refuses to evaluate the harm that will result from the increased use of substitute products. While the EPA may be correct in its conclusion that the alternate materials pose less risk than asbestos, we cannot say with any more assurance than that flowing from an educated guess that this conclusion is true.

Considering that many of the substitutes that the EPA itself concedes will be used in the place of asbestos have known carcinogenic effects, the EPA not only cannot assure this court that it has taken the least burdensome alternative, but cannot even prove that its regulations will increase workplace safety. Eager to douse the dangers of asbestos, the agency inadvertently actually may increase the risk of injury Americans face. The EPA's explicit failure to consider the toxicity of likely substitutes thus deprives its order of a reasonable basis. *Cf. American Petroleum Inst. v. OSHA*, 581 F. 2d 493, 504 (5th Cir. 1978) (An agency is required to ''regulate on the basis of knowledge rather than the unknown.'').

Our opinion should not be construed to state that the EPA has an affirmative duty to seek out and test every workplace substitute for any product it seeks to regulate. TSCA does not place such a burden upon the agency. We do not think it unreasonable, however, once interested parties introduce credible studies and evidence showing the toxicity of workplace substitutes, or the decreased effectiveness of safety alternatives such as non-asbestos brakes, that the EPA then consider whether its regulations are even increasing workplace safety, and whether the increased risk occasioned by dangerous substitutes makes the proposed regulation no longer reasonable. In the words of the EPA's own release that initiated the asbestos rulemaking, we direct that the agency consider the adverse health effects of asbestos substitute ''for comparison with the known hazards of asbestos,'' so that it can conduct, as it promised in 1979, a ''balanced consideration of the environmental, economic, and social impact of any action taken by the agency.'' 44 Fed. Reg. at 60,065 (1979).

[32] In short, a death is a death, whether occasioned by asbestos or by a toxic substitute product, and the EPA's decision not to evaluate the toxicity of known carcinogenic substitutes is not a reasonable action under TSCA. Once an interested party brings forth credible evidence suggesting the toxicity of the probable or only alternatives to a substance, the EPA must consider the comparative toxic costs of each.[21] Its failure to do so in this case thus deprived its regulation of a reasonable basis, at least in regard to those products as to which petitioners introduced credible evidence of the dangers of the likely substitutes.[22]

4. Unreasonable Risk of Injury.

The final requirement the EPA must satisfy before engaging in any TSCA rulemaking is that it only take steps designed to prevent ''unreasonable'' risks. In evaluating what is ''unreasonable,'' the EPA is required to consider the costs of any proposed actions and to ''carry out this chapter in a reasonable and prudent manner [after considering] the environmental, economic, and social impact of any action.'' 15 U.S.C. §2601(c).

[33] As the District of Columbia Circuit stated when evaluating similar language governing the Federal Hazardous Substances Act, ''[t]he requirement that the risk be 'unreasonable' necessarily involves a balancing test like that familiar in tort law: The regulation may issue if the severity of the injury

that may result from the product, factored by the likelihood of the injury, offsets the harm the regulation itself imposes upon manufacturers and consumers,'' *Forester v. CPSC,* 559 F.2d 774, 789 (D.C.Cir. 1977). We have quoted this language approvingly when evaluating other statutes using similar language. *See, e.g., Aqua Slide,* 569 F.2d at 839.

That the EPA must balance the costs of its regulations against their benefits further is reinforced by the requirement that it seek the least burdensome regulation. While Congress did not dictate that the EPA engage in an exhaustive, full-scale cost-benefit analysis, it did require the EPA to consider both sides of the regulatory equation, and it rejected the notion that the EPA should pursue the reduction of workplace risk at any cost. *See American Textile Mfrs. Inst.,* 452 U.S. at 510 n. 30, 101 S.Ct. at 2491 n. 30 (''unreasonable risk'' statutes require ''a generalized balancing of costs and benefits'' (citing *Aqua Slide,* 569 F.2d at 839)). Thus, ''Congress also plainly intended the EPA to consider the economic impact of *any* actions taken by it under . . . TSCA.'' *Chemical Mfrs. Ass'n* 899 F.2d at 348.

Even taking all of the EPA's figures as true, and evaluating them in the light most favorable to the agency's decision (non-discounted benefits, discounted costs, analogous exposure estimates included), the agency's analysis results in figures as high as $74 million per life saved. For example, the EPA states that its ban of asbestos pipe will save three lives over the next thirteen years, at a cost of $128–227 million ($43–76 million per life saved), depending upon the price of substitutes; that it ban of asbestos shingles will cost $23–34 million to save 0.32 statistical lives ($72–106 million per life saved); that its ban of asbestos coatings will cost $46–181 million to save 3.33 lives ($14–54 million per life saved); and that its ban of asbestos paper products will save 0.60 lives at a cost of $4–5 million ($7–8 million per life saved). *See* Fed. Reg. at 29,484–85. Were the analogous exposure estimates not included, the cancer risks from substitutes such as ductile iron pipe factored in, and the benefits of the ban appropriately discounted from the time of the manifestation of an injury rather than the time of exposure, the costs would shift even more sharply against the EPA's position.

While we do not sit as a regulatory agency that must make the difficult decision as to what an appropriate expenditure is to prevent someone from incurring the risk of an asbestos-related death, we do note that the EPA, in its zeal to ban any and all asbestos products, basically ignored the cost side of the TSCA equation. The EPA would have this court believe that Congress, when it enacted its requirement that the EPA consider the economic impacts of its regulations, thought that spending $200–300 million to save approximately seven lives (approximately $30–40 million per life) over thirteen years is reasonable.

As we stated in the OSHA context, until an agency ''can provide substantial evidence that the benefits to be achieved by [a regulation] bear a reasonable relationship to the costs imposed by the reduction, it cannot show that the standard is reasonably necessary to provide safe or healthful workplaces.'' *American Petroleum Inst.,* 581 F.2d at 504. Although the OSHA statute differs in major respects from TSCA, the statute does require substantial evidence to support the EPA's contentions that its regulations both have a reasonable basis and are the least burdensome means to a reasonably safe workplace.

The EPA's willingness to argue that spending $23.7 million to save less than one-third of a life reveals that its economic review of its regulations, as required by TSCA, was meaningless. As the petitioners' brief and our review of EPA caselaw reveals, such high costs are rarely, if ever, used to support a safety regulation. If we were to allow such cavalier treatment of the EPA's duty to consider the economic effects of its decisions, we would have to excise entire sections and phrases from the language of TSCA. Because we are judges, not surgeons, we decline to do so.[23]

V

Substantial Evidence Regarding Least Burdensome, Adequate Regulation

TSCA provides that a reviewing court ''shall hold unlawful and set aside'' a final rule promulgated under section 6(a) ''if the court finds that the rule is not supported by substantial evidence in the rulemaking record . . . taken as a whole.'' 15 U.S.C. § 2618(c)(1)(B)(i). The substantial evidence standard ''afford[s] a considerably more generous judicial review'' than the arbitrary or capricious test, *Abbott Laboratories,* 387 U.S. at 143, 87 S.Ct. at 1513, and ''imposes a considerable burden on the agency and limits its discretion in arriving at a factual predicate.'' *Mobil Oil Corp.* v. *FPC, 483 F.2d 1238, 1258 (D.C.Cir.1973).*

[34] We have declared that the EPA must articulate an ''understandable basis'' to support its TSCA action with respect to each substance or application of the substance banned. *Chemical Mfrs. Ass'n,* 899 F.2d at 357. To make a finding of unreasonable risk based upon this assessment, the ''EPA must balance the probability that harm will occur from the activities against the effects of the proposed regulatory action on the availability to society of the benefits of asbestos.'' 54 Fed.Reg. at 29, 467. With these edicts in mind, we now examine each product against the TSCA criteria.[24]

A

Friction Products

[35] We begin our analysis with the EPA's ban of friction products, which constitutes the lion's share of the proposed benefits of the asbestos regulation—nearly three-fourths of the anticipated asbestos deaths. The friction products in question, although primarily made up of drum and disk brakes, also include brake blocks and other friction products.

Workers are exposed to asbestos during the manufacture, use, repair, and disposal of these products. The EPA banned most of these products with a stage 2 ban, which would require companies to cease manufacturing or importing the products by August 25, 1993, with distribution to end one year later. The final stage 3 ban would ban any remaining friction products on August 26, 1996, with distribution again ceasing one year later. *See id.* at 29,461–62.

We note that of all the asbestos bans, the EPA did the most impressive job in this area, both in conducting its studies and in supporting its contention that banning asbestos products would save over 102 discounted lives. *Id.* at 29,485. Furthermore, the EPA demonstrates that the population exposure to asbestos in this area is great, while the estimated cost of the measure is low, at least in comparison to the cost-per-life of its other bans. Were the petitioners only questioning the EPA's decision to ban friction products based upon disputing these figures, we would be tempted to uphold the EPA, even in the fact of petitioner's arguments that workplace exposure to friction product asbestos could be decreased by as much as ninety percent using stricter workplace controls and in light of studies supporting the conclusion that some forms of asbestos present less danger. Decisions such as these are better left to the agency's expertise.

Such expertise, however, is not a universal talisman affording the EPA unbridled latitude to act as it chooses under TSCA. What we cannot ignore is that the EPA failed to study the effect of non-asbestos brakes on automotive safety, despite credible evidence that non-asbestos brakes could increase significantly the number of highway fatalities, and that the EPA failed to evaluate the toxicity of likely brake substitutes. As we already mentioned, the EPA, in its zeal to ban asbestos, cannot overlook, with only cursory study, credible contentions that substitute products actually might increase fatalities.

The EPA commissioned an American Society of Mechanical Engineers (ASME) study that concluded that while more research was needed, it appeared that many of the proposed substitutes for friction products are not, and will not soon be available, especially in the replacement brake market, and that the substitutes may or may not assure safety.[25] Despite this credible record evidence, by a study specifically commissioned by the EPA, that substitute products actually might cause more deaths than those asbestos deaths predicted by the EPA, the agency did not evaluate the dangers posed by the substitutes, including cancer deaths from the others fibers used and highway deaths occasioned by less effective, non-asbestos brakes. This failure to examine the likely consequence of the EPA's regulation renders the ban of asbestos friction products unreasonable.

This failure would be of little moment, were the relevant market confined to original equipment disk brakes and pads. For these original equipment brakes, it appears that manufacturers already have developed safe substitutes for asbestos, considering that nearly all new vehicles come with non-asbestos disk brakes, with non-asbestos drum brakes apparently soon to follow. *See id.* at 29,493. The ASME Report concluded that ''at the present rate of technological progress, most new passenger cars could be equipped with totally non-asbestos frictional systems by 1991, and most light trucks and heavy trucks with S-cam brakes, by 1992.'' *See id.* at 29,494.

Although the petitioners dispute the evidence, we find particularly telling the fact that manufacturers already are producing most vehicles with newly designed, non-asbestos brakes. The ban of asbestos brakes for these uses here appears reasonable and, had the EPA taken the proper steps to consider and reject the less burdensome alternatives, we might find the ban of these products supported by substantial evidence.

With respect to the aftermarket replacement market, however, the EPA's failure to consider the safety ramifications of its decisions is problematic. Original equipment, non-asbestos brakes are designed from the start to work without the superior insulating properties of asbestos. The replacement market brakes, on the other hand, were designed with asbestos, rather than substitutes, in mind. As the EPA itself states, ''[c]ommenters generally agreed that it is easier to develop replace ment asbestos-free friction materials for use in vehicles that are intentionally designed to use such materials that it is to develop asbestos-free friction materials for use as after-market replacement products in vehicles currently in use that have brake systems designed to use asbestos.'' *Id.* Because of these difficulties, the EPA decided to use a stage 3 ban for replacement brakes.

Despite acknowledging the difficulty of retrofitting current asbestos brakes, however, the EPA decided that the problem with non-asbestos brakes was not that they are inferior, but that they are less safe because the government does not regulate them.

Based upon this conclusion, the EPA decided that is need not consider the safety of alternative brakes because, after consultation with the National Highway Traffic Safety Administration, (NNTSA), the EPA concluded that regulation of non-asbestos brakes soon would be forthcoming. *Id.*

This determination is insufficient to discharge the EPA's duties under TSCA. The EPA failed to settle whether alternative brakes will be as safe as current brakes, even though, by its own admission, the ''EPA also acknowledges that a ban on asbestos in the brake friction product categories may increase the uncertainty about brake performance.'' *Id.* at 29,495. The EPA contends that it can rely upon NHTSA to discharge its regulatory burdens, but it ignores the fact that the problem with non-asbestos brakes may be technical, rather than regulatory, in nature.

Future consideration by the NHTSA cannot support a present ban by the EPA when the record contains conflicting and non-conclusive evidence regarding the safety of non-asbestos brake replacement parts. After being presented with credible evidence ''that a ban on asbestos use in the aftermarket for brake systems designed for asbestos friction products will compromise the performance of braking systems designed for asbestos brakes,'' *id.* at 29,494, the EPA under TSCA had to consider whether its proposed ban not only was reasonable, but also whether the increased deaths caused by less efficient brakes made the ban of asbestos in the replacement brake market unreasonable.

In short, while it is apparent that non-asbestos brake products either are available or soon will be available on new vehicles, there is no evidence indicating that forcing consumers to replace their asbestos brakes with new non-asbestos brakes as they wear out on their present vehicles will decrease fatalities or that such a ban will produce other benefits that outweigh its costs. Furthermore, many of the EPA's own witnesses conceded on cross-examination that the non-asbestos fibrous substitutes also pose a cancer risk upon inhalation, yet the EPA failed to examine in more than a cursory fashion the toxicity of these alternatives. Under these circumstances, the EPA has failed to support its ban with the substantial evidence needed to provide it with a reasonable basis.

Finally, as we already have noted, the structure of TSCA requires the EPA to consider, and reject, the less burdensome alternatives in the TSCA hierarchy before it can invoke its power to ban a product completely. It may well be true, as the EPA contends, that workplace controls are insufficient measures under TSCA and that only a ban will discharge the EPA's TSCA-imposed duty to seek the safest, reasonable environment. The EPA's failure to consider the regulatory alternatives, however, cannot be substantiated by conclusory statements that regulation would be insufficient. *See Texas Indep. Ginners Ass'n v. Marshall*, 630 F.2d 398, 411–12 (5th Cir. 1980); *Aqua Slide*, 569 F.2d at 843. We thus concede that while the EPA may have presented sufficient evidence to underpin the dangers of asbestos brakes, its failure to consider whether the ban is the least burdensome alternative, and its refusal to consider the toxicity and danger of substitute brake products, in regard to both highway and workplace safety, deprived its regulation of the reasonable basis required by TSCA.

B

Asbestos-Cement Pipe Products

[36] The EPA's analysis supporting its ban of asbestos-cement (''A/C'') pipe is more troublesome than its action in regard to friction products. Asbestos pipe primarily is used to convey water in mains, sewage under pressure, and materials in various industrial process lines. Unlike most uses of asbestos, asbestos pipe is valued primarily for its strength and resistance to corrosion, rather than for its heat-resistant qualities. The EPA imposed a stage 3 ban on asbestos pipe. 54 Fed. Reg. at 29,462.

Petitioners question EPA's cost/benefit balancing, noting that by the EPA's own predictions, the ban of asbestos pipe will save only 3–4 discounted lives, at a cost ranging from $128–227 million ($43–76 million per life saved), depending upon the price of substitutes. *Id.* at 29,484. Furthermore, much of EPA's data regarding this product and others depends upon data received from exposures observed during activities similar to the ones to be regulated—the ''analogous exposure'' analysis that the EPA adopted subsequent to the public comment period, which thus was not subjected to cross-examination or other critical testing.[26] Finally, the petitioners protest that the EPA acted unreasonably because the most likely substitutes for the asbestos pipe, PVC and ductile iron pipe, also contain known carcinogens.

Once again we are troubled by the EPA's methodology and its evaluation of the substitute products. Many of the objections raised by the asbestos cement pipe producers are general protests about the EPA's studies and other similar complaints. We will not disturb such agency inquiries, as it is not our role to delve into matters better left for agency expertise. We do, however, examine the EPA's methodology in places to determine whether it has presented substantial evidence to support its regulation.

As with friction products, the EPA refused to assess the risks of substitutes to asbestos pipe. *Id.* at 29,497–98. Unlike non-asbestos brakes, which the EPA contends are safe, the EPA here admits that vinyl chloride, used in PVC, is a human carcinogen that is especially potent during the manufacture of PVC pipe. As for the EPA's defense of the ductile iron pipe substitute, the EPA also acknowledges evidence that it will cause cancer deaths but rejects these deaths as overestimated, even though it can present no more support for this assumption than its own *ipse dixit*.

The EPA presented several plausible, albeit untested, reasons why PVC and ductile iron pipe might be less of a health risk than asbestos pipe. It did not, however, actually evaluate the health risk flowing from these substitute products, even though the ''EPA acknowledges that the individual lifetime cancer risk associated with the production of PVC may be equivalent to that associated with the production of A/C pipe.'' *Id.* at 29,497. The agency concedes that ''[t]he population cancer risk for the production of ductile iron pipe could be comparable to the population cancer risk for production of A/C pipe.'' *Id.*

It was insufficient for the EPA to conclude that while its data showed that ''the number of cancer cases associated with production of equivalent amounts of ductile iron pipe and A/C pipe 'may be similar,' the estimate of cancer risk for ductile iron pipe 'is most likely an overestimate,''' *see* 54 Fed.Reg. at 29,498, unless the agency can present something more concrete than its own speculation to refute these earlier iron pipe cancer studies. Musings and conjecture are ''not the stuff of which substantial evidence is made,'' *Aqua Slide*, 569 F.2d at 843, and ''[u]narticulated reliance on Commission 'experience' may satisfy an 'arbitrary, capricious' standard of review, but it does not add one jot to the record evidence.'' *Id.* at 841–42 (citations omitted). ''While expert opinion deserves to be heeded, it must be based on more than casual observation and speculation, particularly where a risk of fatal injury is being evaluated.'' *Id.* These concerns are of special note where the increased carcinogen risk occasioned by the EPA's proposed substitutes is both credible and known.

This conclusion only is strengthened when we consider the EPA's failure to analyze the health risks of PVC pipe, the most likely substitute for asbestos pipe, which the EPA concedes poses a cancer risk similar to that presented by asbestos pipe. The failure of the EPA to make a record finding on the risks of PVC pipe is particularly inexplicable, as the EPA *already is studying* increasing the stringency of PVC regulation in separate rulemaking proceedings, an action that one of the very intervenors in the instant case has been urging for years. *See NRDC v. EPA,* 824 F.2d 1146, 1148–49 (D.C.Cir.1987) (en banc).

The EPA, in these separate proceedings, has estimated the cancer risk from PVC plants to be as high as twenty deaths *per year,* a death rate that stringent controls might be able to reduce to one *per year, see id.* at 1149, *far in excess of the fractions of a life that the asbestos pipe ban may save each year, by the EPA's own calculations.* Considering that the EPA concedes that there is no evidence showing that *ingested,* as opposed to *inhaled,* asbestos is a health risk, while the EPA's own studies show that ingested vinyl chloride is a significant cancer risk that could cause up to 260 cancer deaths over the next thirteen years, *see id.;* 54 Fed.Reg. at 29, 498, the EPA's failure to consider the risks of substitute products in the asbestos pipe area is particularly troublesome. The agency cannot simply choose to note the similar cancer risks of asbestos and iron pipe and then reject the data underpinning the iron and PVC pipe without more than its own conclusory statements.

We also express concern with the EPA's cavalier attitude toward the use of its own data. The asbestos pipe industry argues that the exposure times the EPA used to calculate its figures are much higher than experience would warrant, a contention that the EPA now basically concedes. Rather than recalculate its figures, however, based upon the best data available to it, the EPA merely responds that while the one figure may be too high, it undoubtedly underestimated the exposure levels, because contractors seldom comply with OSHA regulations. In the words of its brief, ''[t]hus, EPA concluded that its estimates contain both over and underestimates, but nevertheless represented a reasonable picture of aggregate exposure.''

The EPA is required to support its analysis with substantial evidence under TSCA. When one figure is challenged, it cannot back up its position by changing an unrelated figure to yield the same result. Allowing such behavior would require us only to focus on the final numbers provided by an agency, and to ignore how it arrives at that number. Because a conclusion is no better than the methodology used to reach it, such a result cannot survive the substantial evidence test.

Finally, we once again note that the EPA failed to discharge its TSCA-mandated burden that it consider and reject less burdensome alternatives before it impose a more burdensome alternative such as a complete ban. The EPA instead jumped immediately to the ban provision, without calculating whether a less burdensome alternative might accomplish TSCA's goals. *See* 54 Fed. Reg. at 29,489. We therefore conclude that the EPA failed to present substantial evidence to support its ban of asbestos pipe.

C

Gaskets, Roofing, Shingles, and Paper Products

We here deal with the remaining products affected by the EPA ban. Petitioners challenge the basis for the EPA's finding that

beater-add and sheet gaskets, primarily used in automotive parts, should be banned. The agency estimated its ban would save thirty-two lives over a thirteen-year time span, at an overall cost of $207–263 million ($6–8 million per life saved). *Id*. at 29,484.

We have little to add in this area, beyond our general discussion and comments on other products apart from a brief highlight of the EPA's use of analogous exposure data to support its gasket ban. For these products, the analogous exposure estimate constituted almost eighty percent of the anticipated total benefits—a proportion so large that the EPA's duty to give interested parties notice that it intended to use analogous exposure estimate was particularly acute.[27] Considering some of the EPA's support for its analogous exposure estimates—such as its assumption that *none* of the same workers who install beater-add and sheet gaskets *ever* is involved in repairing or disposing of them, and the unexplained discrepancy between its present conclusion that over 50,000 workers are involved in this area and its 1984 estimate that only 768 workers are in volved in ''gasket removal and installation,'' *see* 51 Fed.Reg. 22,612, 22,665 (1986)—the petitioners' complaint that they never were afforded the opportunity to comment publicly upon these figures, or to cross-examine any EPA witnesses regarding them, is particularly telling.

[37] The EPA also banned roof coatings, roof shingles, non-roof coatings, and asbestos paper products. Again, we have little to add beyond our discussions already concluded, especially regarding TSCA's requirement that the EPA always choose the least burdensome alternative, whether it be workplace regulation, labeling, or only a partial ban. We note, however, that in those cases in which a complete ban would save less than one statistical life, such as those affecting asbestos paper products and certain roofing materials, the EPA has a particular need to examine the less burdensome alternatives to a complete ban.

Where appropriate, the EPA should consider our preceding discussion as applicable to their bans of these products. By following the dictates of *Chemical Mfrs. Ass'n*, 899 F.2d at 359, that the quantities of the regulated chemical entering into the environment be ''substantial,'' and that the human exposure to the chemical also must be ''substantial'' or ''significant,'' as well as our concerns expressed in this opinion, the EPA should be able to determine the proper procedures to follow on its reconsideration of its rule and present the cogent explanation of its actions as required under *Chemical Manufacturers Association*.

D

Ban of Products Not Being Produced in the United States

Petitioners also contend that the EPA overstepped TSCA's bounds by seeking to ban products that once were, but no longer are, being produced in the United States. We find little merit to this claim, considering that sections 5 and 6 of TSCA allow the EPA to ban a product ''that presents *or will present*'' a significant risk. (Emphasis added.)

Although petitioners correctly point out that the value of a product not being produced is not zero, as it may find some future use, and that the EPA here has banned items where the estimated risk is zero, this was not error on the part of the EPA. The numbers appear to favor petitioners only because even products with known high risks temporarily show no risk because they are not part of this country's present stream of commerce. This would soon change if the produce returned, which is precisely what the EPA is trying to avoid.

Should some unlikely future use arise for these products, the manufacturers and importers have access to the waiver provision established by the EPA for just these contingencies. Under such circumstances, we will not disturb the agency's decision to ban products that no longer are being produced in or imported into the United States.

[38] Similarly, we also decide that the EPA properly can attempt to promulgate a ''clean up'' ban under TSCA, providing it takes the proper steps in doing so. A clean-up ban, like the asbestos ban in this case, seeks to ban all uses of a certain toxic substance, including unknown, future uses of the substance. Although there is some merit to petitioners' argument that the EPA cannot possibly evaluate the costs and benefits of banning unknown, uninvented products, we hold that the nebulousness of these future products, combined with TSCA's language authorizing the EPA to ban products that ''will'' create a public risk, allows the EPA to ban future uses of asbestos even in products not yet on the market.

E

Fundamental EPA Choices

Finally, we note that there are many other issues raised by petitioners, such as the EPA's decision to treat all types of asbestos the same, its conclusion that various lengths of fibers present similar toxic risks, and its decision that asbestos presents similar risks even in different industries. *See generally* 54 Fed.Reg. at 29,470–71 (detailing differences in potency of chrysotile and other forms of asbestos and toxicity of various fiber lengths). We mention these concerns now only to reject them.

Of these, any many similar points, the petitioners merely seek to have us reevaluate the EPA's initial evaluation of the evidence. While we can, and in this opinion do, question the agency's reliance upon flawed methodology and its failure to consider factors and alternatives that TSCA explicitly requires it to consider, we do not sit as a regulatory agency ourselves. Decisions such as the EPA's decision to treat various types of asbestos as presenting similar health risks properly are better left for agency determination and, while the EPA is free to reconsider its data should it so choose when it revisits this area, it also is free to adopt similar reasoning in the future.

VI

Conclusion

In summary, of most concern to us is that the EPA has failed to implement the dictates of TSCA and the prior decisions of this and other courts that, before it impose a ban on a product, it first evaluate and then reject the less burdensome alternatives laid out for it by Congress. While the EPA spend much time and care crafting its asbestos regulation, its explicit failure to consider the alternatives required of it by Congress deprived its final rule of the reasonable basis it needed to survive judicial scrutiny.

Furthermore, the EPA's adoption of the analogous exposure estimates during the final weeks of its rulemaking process, after public comment was concluded, rather than during the ten years during which it was considering the asbestos ban, was unreasonable and deprived the petitioners of the notice that they required in order to present their own evidence on the validity of the estimates and its data bases. By depriving the petitioners of their right to cross-examine EPA witnesses on methodology and data used to support as much as eighty percent of the proposed benefits in some areas, the EPA also violated the dictates of TSCA.

Finally, the EPA failed to provide a reasonable basis for the purported benefits of its proposed rule by refusing to evaluate the toxicity of likely substitute products that will be used to replace asbestos goods. While the EPA does not have the duty under TSCA of affirmatively seeking out and testing all possible substitutes, when an interested party comes forward with credible evidence that the planned substitutes present a significant, or even greater, toxic risk than the substance in question, the agency must make a formal finding on the record that its proposed action still is both reasonable and warranted under TSCA.

We regret that this matter must continue to take up the valuable time of the agency, parties and undoubtedly, future courts. The requirements of TSCA, however, are plain, and the EPA cannot deviate from them to reach its desired result. We therefore GRANT the petition for review, VACATE the EPA's proposed regulation, and REMAND to the EPA for further proceedings in light of this opinion.[28]

On Petition for Review of a Rule of the Environmental Protection Agency.

ON MOTION FOR CLARIFICATION

Before BROWN, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

[39] Respondents, the Environmental Protection Agency (EPA) and William K. Reilly, seek a clarification of the status of the phase 1, or stage 1, provisions in the challenged rule, which provisions ban, effective August 27, 1990, the manufacture, importation, and processing of asbestos containing corrugated and flat sheet, asbestos clothing, flooring felt, pipeline wrap, roofing felt, and vinyl/asbestos floor tile, and any new uses of asbestos. See 40 C.F.R. §§763.165(a)–.167(a). The rule also requires labeling of phase 1 products after August 27, 1990, *see id*. §763.171(a), and prohibits the distribution in commerce of such products after August 27, 1992, *see id*. §763.169(a). *See Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1208 & n. 2 (5th Cir. 1991).

Respondents assert that the clarification is needed because, in part V.D of our opinion, *id*. at 1228–29, we have held that the EPA may ''ban products that once were, but no longer are, being produced in the United States.'' Thus, the motion seeks clarification of the status of any products that still were being manufactured, imported, or processed on July 12, 1989, which is the date on which the final rule was issued, *see* 54 Fed. Reg. 29,459 (1989), but which no longer were being manufactured, imported, or processed, as a result of the phase 1 ban, on the date of our opinion, which is October 18, 1991.

The motion for clarification is GRANTED. The holding in part V.D of our opinion applies only to products that were not being manufactured, imported, or processed on July 12, 1989, the date of the rule's promulgation. To the extent, if any, that there is doubt as to whether particular products are in that category, the EPA may resolve the factual dispute on remand.

1. OSHA began to regulate asbestos in the workplace in 1971. At that time, the permissible exposure limit was 12 fibers per cubic centimeter (f/cc), which OSHA lowered several times until today it stands at 0.2 f/cc. OSHA currently is considering lowering the limit to 0.1 f/cc, following a challenge to the regulation in *Building & Constr. Trades Dep't v. Brock*, 838 F.2d 1258, 1267–69 (D.C. Cir. 1988). The Mine Safety and Health Administration (MSHA) since 1976 has limited mine worker asbestos exposure to 2 f/cc. *See* 30 C.F.R. §71.702 (1990).

The Consumer Product Safety Commission (CPSC) has banned consumer patching compounds containing respirable asbestos, *see* 16 C.F.R. §§1304–05 (1990), and also requires labeling for other products containing respirable asbestos. Similarly, the Food and

Drug Administration has banned general-use garments containing asbestos unless used for protection against fire. *See* 16 C.F.R. §1500.17 (1990).

2. The main products covered by each ban stage are as follows:

(1) Stage 1: August 27, 1990: ban on asbestos-containing floor materials, clothing, roofing felt, corrugated and flat sheet materials, pipeline wrap, and new asbestos uses;

(2) Stage 2: August 25, 1993: ban on asbestos-containing ''friction products'' and certain automotive products or uses;

(3) Stage 3: August 26, 1996: ban on other asbestos-containing automotive products or uses, asbestos-containing building materials including non-roof and roof coatings, and asbestos cement shingles.

See 54 Fed. Reg. at 29,461–62.

3. *See Bell v. Wolfish*, 441 U.S. 520, 531 n. 13, 99 S.Ct. 1861, 1870 n. 13, 60 L.Ed.2d 447 (1979). While it is true that the joint brief of petitioners Centrale des Syndicats Democratiques, Confederation des Syndicats Nationaux, and United Steel Workers of America (Canada) (collectively along with petitioner Cassiar Mining Corp. (Cassiar), the ''Canadian petitioners'') also deal with some of the same issues raised by amici, we hold in part II.B, *infra*, that these petitioners lack standing. The arguments of amici cannot be bootstrapped into this case based upon the arguments of petitioners who themselves lack standing.

4. The EPA also seeks to bar the brief of Grinnell College. That brief, however, presents arguments directly related to the arguments raised by the parties seeking to prevent the ban of asbestos shingles.

5. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970); *accord Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin., 847 F.2d 1168, 1173–74 (5th Cir. 1988); Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 282 (D.C.Cir. 1988) (per curiam), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3157, 104 L.Ed.2d 1020 (1989). We note that the zone of interest test is not one universally applied outside the context of the Administrative Procedure Act (APA), *see Clark v. Securities Indus. Ass'n*. 479 U.S. 388, 400, n. 16, 107 S.Ct. 750, 757 n. 16, 93 L.Ed.2d 757 (1987), but because it is the most useful factor in considering Congressional intent on the question of standing, we invoke it as an aid to our decisionmaking today, as we sometimes have in the past. *Cf. Moses v. Banco Mortgage Co.*, 778 F.2d 267, 271 (5th Cir. 1985).

6. *See, e.g., Carey v. Population Serv. Int'l.* 431 U.S. 678, 683–84 & n. 4, 97 S.Ct. 2010, 2015 & n. 4, 52 L.Ed.2d 675 (1977); *National Cottonseed Prods. Ass'n v. Brock*, 825 F.2d 482, 489–92 (D.C.Cir. 1987), *cert. denied*, 485 U.S. 1020, 108 S.Ct. 1573, 99 L.Ed.2d 889 (1988); *FAIC Sec. v. United States*, 768 F.2d 352, 357–61 (D.C.Cir. 1985). *Carey*, however, gives *jus tertii* standing to a party only if the party directly affected is incapable of asserting its own interests, which is not true in the instant case. *See Carey*, 431 U.S. at 683–84, 97 S.Ct. at 2015; *accord Craig v. Boren*, 429 U.S. 190, 195–96, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976). The cases from the District of Columbia Circuit, represented by *National Cottonseed* and *FAIC Securities*, appear to go too far in expanding the exception in the vendor-vendee relationship, at least when evaluating a statute so purely national in scope.

7. *See Warth*, 422 U.S. at 501, 95 S.Ct. at 2206 (noting that courts generally are relucant ''to extend judicial power when the plaintiff's claim to relief rests on the legal rights of third parties''). Cassiar mentions only one case, *Construction Civiles de Centroamerica, S.A. v. Hannah*, 459 F.2d 1183, 1190–91 (D.C.Cir. 1972), in which a foreign vendor was able to borrow its domestric vendee's standing rights to pursue its own claim. That case, however, involved the APA, which, unlike TSCA, does not confine itself to matters concerning national economic interests.

8. The Canadian petitioners also allege that United States treaty obligations, such as the provisions of the General Agreement on Tariffs and Trade (GATT), award them the right to protest the EPA's actions. GATT requires nations to indicate that their environmental decisions meet international standards, thus preventing countries from using arbitrary environmental rulings as *de facto* trade barriers. GATT, however, establishes trade dispute procedures of its own. These Canadian parties therefore have no standing here to challenge the EPA's decision.

9. These complaints include the failure of the EPA to cross-examine petitioners' witnesses, which it was not required to do, and the EPA's decision not to designate an AIJ, which also was within its discretion under 40 C.F.R. §§750.7 and 750.8 (1990). Similarly, the EPA's failure to issue subpoenas was of little moment, as the petitioners in fact suffered no injury from the lack of subpoenas. *See id.* §750.5.

We also note that while an independent panel of experts often might be needed, in this case the EPA was not required to assemble such a panel on asbestos disease risks, as it already possessed an abundance of information on the subject, including a report by the members of the Ontario Royal Commission, a study often cited by the petitioners themselves. Considering the number of studies available, the EPA was not required to assemble its own panel to duplicate them, except to fill in any gaps.

10. According to the EPA, if the analogous exposure estimates were not included, the benefits of the rule would decrease from 168 to 120 deaths avoided, discounted at 3%. 54 Fed. Reg. at 29,469, 29,485. The analogous exposure estimates, adopted after hearings were concluded, thus increase the purported benefits of the rule by more than one-third.

11. For some of the products, such as the beater-add and sheet gaskets, the analogous exposure analysis completely altered the EPA's calculus and multiplied four- or five-fold the anticipated benefits of the proposed regulation. This was a change sufficient to make the proceedings unfair to the petitioners and was of sufficient importance that the EPA's failure to afford any cross-examination on this issue was an abuse of discretion.

12. The term ''rulemaking record'' means (A) the rule being reviewed; (B) all commentary received in response to the (EPA) Administrator's notice of proposed rulemaking, and the Administrator's own published statement of the effects of exposure of the substance on health and the environment, the benefits of the substance for various uses and the availability of substitutes for such uses, and ''the reasonably ascertainable economic consequences of the rule'' on the national economy, small business, technological innovation, the environment, and public health; (C) transcripts of hearings on promulgation of the rule; (D) written submissions of interested parties; and (E) any other information the Administrator deems relevant. *See* 15 U.S.C. §2618(a)(3) (referring to §§2604(f) and 2605(c)(1) in regard to component (B) above).

13. The EPA cites *Superior Oil Co.*, 563 F.2d at 199, an APA case, for the proposition that in informal rulemaking, the arbitrary and capricious standard and the substantial evidence standard ''tend to converge.'' While it certainly is true that the requirement of substantial evidence within formal rulemaking is more strenuous, we acknowledged in *Superior Oil* that when comparing arbitrary and capricious to substantial evidence, ''[i]t is generally accepted that the latter standard allows for 'a considerably more generous judicial review' than does the former.'' *Id.* (quoting *Abbott Laboratories*, 387 U.S. at 143, 87 S.Ct. at 1512). Considering that Congress specifically rejected the arbitrary and capricious standard in the TSCA context, we will not act now to read that same standard back in by holding that the two standards are in fact one and the same.

14. *Cf. Southland Mower Co. v. CPSC*, 619 F.2d 499, 510 (5th Cir. 1980) (''It must be remembered that '[t]he statutory term ''unreasonable risk'' presupposes that a real, and not a speculative, risk be found to exist and that the Commission bear the burden of demonstrating the existence of such a risk before proceeding to regulate.' '' (Citation omitted.)).

15. The statute provides, in order, the possible regulatory schemes as follows:

(1) A requirement (A) prohibiting the manufacturing, processing, or distribution in commerce of such substance or mixture, or (B) limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce.

(2) A requirement—

(A) prohibiting the manufacture, processing, or distribution in commerce of such substance or mixture for (i) a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator in the rule imposing the requirement, or

(B) limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce for (i) a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator in the rule imposing the requirement.

(3) A requirement that such substance of mixture or any article containing such substance or mixture be marked with or accompanied by clear and adequate warnings and instructions with respect to its use, distribution in commerce, or disposal or with respect to any combination of such activities. The form and content of such warnings and instructions shall be prescribed by the Administrator.

(4) A requirement that manufacturers and processors of such substance or mixture make and retain records of the processes used to manufacture or process such substance or mixture and monitor or conduct tests which are reasonable and necessary to assure compliance with the requirements of any rule applicable under this subsection.

(5) A requirement prohibiting or otherwise regulating any manner or method of commercial use of such substance or mixture.

(6) (A) A requirement prohibiting or otherwise regulating any manner or method of disposal of such substance or mixture, or of any article containing such substance or mixture, by its manufacturer or processor or by any other person who uses, or disposes of, it for commercial purposes.

(B) A requirement under subparagraph (A) may not require any person to take any action which would be in violation of any law or requirement of, or in effect for, a State or political subdivision, and shall require each person subject to it to notify each State and political subdivision in which a required disposal may occur of such disposal.

(7) A requirement directing manufacturers or processors of such substance or mixture (A) to give notice of such unreasonable risk of injury to distributors in commerce of such substance or mixture and, to the extent reasonably ascertainable, to other persons in possession of such substance or mixture or exposed to such substance or mixture, (B) to give public notice of such risk of injury, and (C) to replace or repurchase such substance or mixture as elected by the person to which

the requirement is directed. 15 U.S.C. §2605(a). As is plain from the order in which they are listed, options at the top of the list are the most burdensome regulatory options, progressively declining to the least burdensome option.

16. EPA argues that OSHA can only deal with workplace exposures to asbestos and that the CPSC and MSHA cannot take up the slack, as the CPSC can impose safety standards for asbestos products based only upon the risk to consumers, and MSHA can protect against exposure only in the mining and milling process. These agencies leave unaddressed dangers posed by asbestos exposure through product repair, installation, wear and tear, and the like.

17. Although we, as always, rely mainly upon the language of the statute to determine Congress's intent, we also note that the legislative history of TSCA supports the notion of TSCA's least-to-most-burdensome hierarchy. As the Senate sponsor of the ''least burdensome'' requirement stated, Congress did ''not want to give the Administrator unlimited authority and let him say, 'I will impose this control, if there are other controls that are effective and are less burdensome on the industry.' '' 122 Cong. Rec. 8295 (1976) (statement of Sen. Cannon).

In addition, the EPA itself acknowledges this hierarchy when it states in its brief that ''TSCA authorizes and directs [the] EPA to impose that burden [of a total ban] *if the risks of a substance cannot be adequately addressed in another way.*'' (Emphasis added.) The EPA does not explain how it can determine that the risks of a substance cannot be addressed in another way if it refuses to make a finding that the alternatives will not discharge the EPA's TSCA burden. It cannot simply state that there is no level of zero risk asbestos use and then impose the most burdensome alternative on that sole basis.

We do not today determine what an appropriate period for the EPA's calculations would be, as this is a matter better left for agency discretion. *See Motor Vehicle Mfrs. Ass'n* 463 U.S. at 53, 103 S.Ct. at 2872. We do note, however, that the choice of a thirteen-year period is so short as to make the unquantified period so unreasonably large that any EPA reliance upon it must be displaced.

Under the EPA's calculations, a twenty-year-old worker entering employment today still would be at risk from workplace dangers for more than thirty years after the EPA's analysis period had ended. The true benefits of regulating asbestos under such calculations remain unknown. The EPA cannot choose to leave these benefits high and then use the high unknown benefits as a major factor justifying EPA action.

We also note that the EPA appears to place too great a reliance upon the concept of population exposure. While a high population exposure certainly is a factor that the EPA must consider in making its calculations, the agency cannot count such problems more than once. For example, in the case of asbestos brake products, the EPA used factors such as risk and exposure to calculate the probable harm of the brakes, and then used, as an *additional* reason to ban the products, he fact that the exposure levels were high. Considering that calculations of the probable harm level, when reduced to basics, simply are a calculation of population risk multiplied by population exposure, the EPA's redundant use of population exposure to justify its actions cannot stand.

3. Reasonable Basis.

In addition to showing that its regulation is the least burdensome one necessary to protect the environment adequately, the EPA also must show that it has a reasonable basis for the regulation. 15 U.S.C. §2605(a). To some extent, our inquiry in this area mirrors that used above, for many of the methodological problems we have noted also indicate that the EPA did not have a reasonable basis. We here take the opportunity to highlight some areas of additional concern.

18. Recently, in a different context, we observed the important distinction between present and future injury. *See Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1099–1100 & n. 20 (5th Cir.1991).

19. We also note that the EPA chose to use a real discount rate of 3%. Because historically the real rate of interest has tended to vary between 2% and 4%, this figure was not inaccurate.

The EPA also did not err by calculating that the price of substitute goods is likely to decline at a rate of 1% per year, resulting from economies of scale and increasing manufacturing prowess. Because the EPA properly limited the scope of these declines in its models so that the cost of substitutes would not decline so far as to make the price of the substitutes less than the cost of the asbestos they were forced to replace, this was not an unreasonable real rate of price decline to adopt.

20. We thus reject the arguments made by the Natural Resources Defense Council, Inc., and the Environmental Defense Fund, Inc., that the EPA's decision can be justified because the EPA ''relied on many serious risks that were understated or not quantified in the final rule,'' presented figures in which the ''benefits are calculated only for a limited time period,'' and undercounted the risks to the general population from low-level asbestos exposure. In addition, the intervenors argue that the EPA rejected using upper estimates, *see* 54 Fed.Reg. at 29,473, and that this court now should use the rejected limits as evidence to support the EPA. They thus would have us reject the upper limit concerns when they are not needed, but use them if necessary.

We agree that these all are valid concerns that the EPA legitimately should take into account when considering regulatory action. What we disagree with, however, is the manner in which the EPA incorporated these concerns. By not using such concerns in its quantitive analysis, even where doing so was not difficult, and reserving them as additional factors to buttress the ban, the EPA improperly transformed permissible considerations into determinative factors.

21. This is not to say that an interested party can introduce just any evidence of a suspected carcinogen or other toxin in its efforts to slow down a valid EPA regulation. The agency may, within its discretion, consider the probable merits of such dilatory tactics and act appropriately. *Cf. National Grain & Feed Ass'n*, 866 F.2d at 734 (''[W]e do not require the agency to respond in detail to every imaginable proposal for tighter standards.''). Where, however, the health risks of substitutes, such as non-asbestos brakes and polyvinyl chloride (PVC) pipe, are both plausible and known, the EPA must consider not only the probable costs of continued use of the product it is considering, but also the harm that would follow from its regulation and increased use of an alternate, harmful product.

22. We note that at least part of the EPA's arguments rest on the assumption that regulation will not work because the federal government will not adequately enforce any workplace standards that the EPA might promulgate. This is an improper assumption. The EPA should assume reasonable efforts by the government to implement its own regulations. A governmental agency cannot point to how poorly the government will implement regulations as a reason to reject regulation. Rather, the solution to poor enforcement of regulations is better enforcement, not more burdensome alternative solutions under TSCA.

23. *See Environmental Defense Fund*, 636 F.2d at 1275 n. 17 (''[W]e must construe the statute 'so that no provision will be inoperative or superfluous' '' (quoting *Motor & Equip. M[rs. Ass'n v. EPA*, 627 F.2d 1095, 1108 (D.C.Cir. 1979), *cert. denied*, 446 U.S. 952, 100 S.Ct. 2917, 64 L.Ed.2d 808 (1980))); *see also Old Colony R.R. v. Commissioner*, 284 U.S. 552, 560, 52 S.Ct. 211, 213, 76 L.Ed. 484 (1932) (in interpreting statutory language, ''the plain, obvious and rational meaning of a statute is to be preferred to any curious, narrow, hidden sense'').

As the petitioners point out, the EPA regularly rejects, as unjustified, regulations that would save more lives at less cost. For example, over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*—a death toll more than twice what the EPA predicts will flow from the quarter-billion-dollar bans of asbestos pipe, shingles, and roof coatings. *See* L. Budnick, *Toothpick-Related Injuries in the United States, 1979 Through 1982*, 252 J. Am. Med. Ass'n, Aug. 10, 1984, at 796 (study showing that toothpick-related deaths average approximately one per year).

24. In large part, our analysis draws upon our general discussion already concluded. Where necessary, however, we develop specific themes more appropriately addressed in the context of a specific product. The EPA on subsequent review should consider these specific comments as applicable to its procedures dealing with other products, where necessary. In other words, by presenting a concern in the context of one product, we do not mean to imply that it arises only in that area.

25. One of the study's authors, Mr. Anderson, submitted written testimony that the ''replacement/substitution of asbestos-based with nonasbestos brake linings will produce grave risks'' and that ''the expected increase of skid-related highway accidents and resultant traffic deaths would certainly be expected to overshadow any potential health-related benefits of fiber substitution.'' The ASME report itself concludes only that ''[i]f the eventual elimination of all asbestos in friction products is to be accomplished, additional future studies are required.'' This is an insufficient basis upon which to support the EPA's judgment that non-asbestos brakes are just as safe as asbestos brakes.

26. In this case, the EPA extrapolated data regarding asbestos exposure during installation of asbestos pipe products and estimated, by formula, how often workers would be exposed to asbestos during repair and disposal.

27. The EPA estimates drop from 32.24 discounted lives to 6.68 discounted lives without the analogous exposure data.

28. Pursuant to the Internal Operating Procedures accompanying Fifth Cir.Loc.R. 47, Judge Brown reserves the right to file a separate opinion.

Mr. GLENN addressed the Chair.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. GLENN. Mr. President, we will be having the vote on the Glenn-Chafee substitute after our respective conferences today at noon. I have several wrap-up remarks I want to make before we do break at 12:30.

The first thing I want to address is each day now we heard examples from proponents of Dole-Johnston about how silly some of these regulations are, and I agree with that. We have a lot that are very, very silly. I believe we have bureaucratic excess. We need regulatory reform, and there are plenty of

anecdotal stories to go around about what the problems are.

But I do not think we need to make our Government look any more stupid than it actually is, in some instances, and some of the things that have been stated as silly regulations have proven, upon investigation, to be not true. We do not need reform based on half truths and inaccuracies. Many of these stories have been shown to be not true or are, at least, serious exaggerations.

Let me give an example. The other day I believe the Senator from Utah said that if a company spills 1 pint of antifreeze, the Federal Government requires it to notify the Coast Guard in Washington. That is simply not true.

The main ingredient of antifreeze is ethylene glycol. It is covered by the Clean Air Act because of its high evaporation rate. According to EPA, you have to spill over 1,000 pounds of antifreeze to have to report an ethylene glycol spill; 1,000 pounds comes out to about 140-some gallons, 143 or 144 gallons, I believe. That would be almost three barrels of ethylene glycol that would have to be spilled.

If you did spill that much, you are supposed to report it to the National Response Center, which is staffed by Coast Guard personnel as part of a multiagency support for that Center. It is not just reporting to the Coast Guard. But the facts of the case are, it is 1,000 pounds and you report it to this Center, which is staffed by Coast Guard personnel as part of a multiagency support force.

There was also a claim made the other day that Federal rules prevent a farmer from diverting water from a river, even when the farm drains back into the same river, and this happened despite the involvement, I guess the story goes, even with the approval of the BLM, the Forest Service, and the State government.

I never saw any substantiation for this story, but I do believe that while the water diversion problem may have existed during past administrations when they allowed wetlands regulations to be divided among agencies with no coordination, that is not the case now. The Clinton administration uses an interagency memorandum of understanding that provides for coordination among agencies, that provides for farmers and ranchers to interact with only one agency, and provides a single set of guidelines coming out from the Government. Once again, there is a new approach to this being taken by this administration that makes the anecdotal information at, very best, an exaggeration.

Another example of distortion was the claim that EPA insists on regulating asbestos even when it says that the number of annual deaths from toothpick ingestion exceeds the number of deaths from asbestos exposure. This proves to be just flat wrong.

According to EPA, a 1984 American Medical Association study showed that toothpick-related deaths average about 1 per year for the whole Nation out of our 260 million people, or close to that many. In 1988, EPA released a report that estimated that 4,280 people have died over the past 130 years due to asbestos in the buildings in which they live. That averages out to more than 30 deaths a year.

According to EPA, this is actually a low estimate because many more asbestos-related deaths can be expected for building workers, such as custodians who are exposed at much higher levels. So here, again, we have the facts that show that the proponents are distorting the truth and relying on inaccurate anecdotal stories to create a false image of our Government.

Sure, we want reform. Yes, Government needs to work better, but let us be reasonable. Let us use common sense. We do not need to make up stories about the Government working against the public interest and then end up throwing out the baby with the bath water, as my colleague from California, Senator FEINSTEIN, put it yesterday. Let us not jeopardize public health and safety with scare stories of bureaucratic excess. Too much is at stake to justify such callous disregard for the public interest or the truth.

Mr. President, regulatory reform is one of the most important issues we are going to take up this whole Congress. There is clearly a need to reform the regulatory process. We can all tell the horror stories of regulations gone awry, but before we rush to fix a problem with even worse medicine, let us take a hard look at what balanced, fair, and effective regulatory reform is all about.

I believe that regulatory reform must not only alleviate unnecessary burdens on businesses and on States and on local governments and on individuals, but at the same time it must also ensure the Government's ability to protect the health, safety, and environment of the American people. That is my twofold test. That is a test of balance that is in the best interest of all the people of this country.

Today, we have an opportunity to vote for true regulatory reform, reform that focuses on the biggest regulations, that makes agencies weigh the costs and benefits of their actions, that makes agencies take a hard look at the regulations on the books. At the same time, we have the opportunity to vote for reform that maintains the ability of agencies to do their jobs. That is commonsense reform, and the Glenn-Chafee substitute to S. 343 is pure common sense.

Let me outline six major differences between the Glenn-Chafee substitute and the Dole-Johnston substitute. I hope those listening in their offices, those who may not have decided how they are going to vote yet after our noon break, will listen to these things and consider them very, very carefully, because these are major reasons why I feel you should support the Glenn-Chafee substitute.

First, the Glenn-Chafee substitute focuses on truly major rules. We require truly significant rules—it will be between 100 and 200 rules per year—to go through rigorous cost-benefit analyses and risk assessment requirements. Even though we voted to amend the threshold of a major rule to $100 million in the Dole-Johnston substitute, we also voted to require any rule that has a significant impact on small businesses to go through the rigorous cost-benefit analyses and risk assessment requirements.

Therefore, the Dole-Johnston substitute bill will still cover several hundred more rules than the Glenn-Chafee substitute and will tie up scarce agency resources with little added benefit. In fact, the estimate is this will run it up to somewhere between 500 and 800 regulations that would have to be reviewed per year. These are not cheap to do.

Alice Rivlin estimated that when it was at a $50 million estimate, that we would require an additional $1.3 billion and 4,500 additional full-time employees. Now this is run up several times over that, and I would presume that $1.3 billion per year is going to be exceeded by the requirements that we find in the Dole-Johnston substitute now.

That was not in the original bill, I realize, but it was voted on the floor, and as of now the small businesses going through the rigorous cost-benefit analyses and risk assessment requirements will run the cost and complexity of this way up.

Our goal should not be to swamp the agencies so they are unable to carry out their missions. Whether that mission be to protect the health, safety, or environment or another important public function, our goals should be to help them do their jobs more effectively. We should require these rigorous cost-benefit analyses and risk assessments for the rules that have a significant impact on the economy, not for all the rules now covered by S. 343. That is why a vote for the Glenn-Chafee substitute is a vote for commonsense reform.

Second, the Glenn-Chafee substitute requires cost-benefit analysis for all major rules, but does not make the agencies pass a least-cost, cost-benefit test. That is its decisional criteria, before issuing rules. Costs and benefits are often hard to quantify and cost-benefit analysis, while useful, is less than perfect. It is a developing science.

The Dole-Johnston substitute requires agencies to pass a set of four rigid tests before they can issue a major rule. Most troubling of these criteria is the least-cost test. The agency must pick the cheapest alternative, even if for a few more dollars it could save hundreds of more lives or reduce pollution by a much greater amount. In other words, common sense goes out the door on this approach. It has to be

least cost. Examples on the floor were given. If you had an additional cost of $2, and it would save an additional 200 lives, you could not put that into effect because you have to use least cost in the Dole-Johnston substitute as it is now constituted.

Dole-Johnston does allow agencies to use other more costly alternatives, but only in the case of ''scientific uncertainties,'' or ''nonquantifiable benefits.'' So if the agency is certain about a benefit or can quantify how much extra benefit they gain by using something other than the least-cost alternative, they are prohibited from doing it. That just does not make any sense at all.

Because these decisional criteria are tests that the agency must pass before promulgating a rule, the issue of whether the benefits really do justify the costs and whether the agency picked the least-cost alternative will certainly become matters for the lawyers to settle in court.

Agencies should absolutely be required to use cost-benefit analysis. I think we all agree on that. But they should not be forced to pass a rigid least-cost, cost-benefit test to issue every major rule. If an agency does not think a rule's benefits justify its costs, but still is required by law to issue that rule, the rule should come back to us in Congress. That is where the responsibility lies, and that is what we provide in this legislation. It can come back to Congress, and that is where it should be, because after all, as much as 80 percent of agency rules are strictly required by laws we have passed in the Congress. I keep coming back to this point, but the plain truth is that if we really want regulatory reform, we should start fixing the laws we have passed, not load up the agencies and the American people with more bureaucratic procedures and more litigation. That is what Dole-Johnston does.

Third, the Glenn-Chafee substitute provides for a review of current rules—in other words, laws, rules, regs, that are in effect now, maybe some have been in effect for many years—but with no automatic arbitrary sunset if agencies fail to review a rule.

We provide for review of existing rules, much like the Dole-Johnston bill, but we do not have an automatic immediate sunset of rules if an agency fails to review those rules according to schedule.

As the Senator from Louisiana points out, the agency may get up to a 2-year extension. True. However, it is still true that if the agency still does not complete its review by then, then at that point, the rule becomes immediately unenforceable; in other words, it is canceled. So it does still sunset after the extension. The Glenn-Chafee substitute, on the other hand, requires an agency that fails to review a rule according to schedule to issue a notice of proposed rulemaking to repeal the rule. And this process allows public comment on the rule and ensures that a rule does not sunset arbitrarily. The agency must then complete this rulemaking action within 2 years, and such action is judicially reviewable.

Also, an annual process is established for Congress to amend agency review schedules in cases where an agency does not schedule review of rules people think are in need of review. This process will lead to the review and elimination of outmoded rules. Dole-Johnston, with its review petition process, will lead to delay, waste of money, and lawsuits. Let me reemphasize these points and set the record straight from yesterday. All the charges that our agency review of existing rules has no teeth are just not true. Under Glenn-Chafee, agencies must review existing rules and solicit public comment on the review and on the schedule. Agencies just cannot sit back and do nothing about reviewing existing rules under the Glenn-Chafee substitute, as some of my colleagues said yesterday. Glenn-Chafee requires agencies to review existing rules, to set a schedule for that review, to solicit input from the public, and to complete that review within a time certain.

The Dole-Johnston substitute creates a petition process for interested parties to get a rule on the schedule for review. These petitions are all judicially reviewable and there is no limit on the number of petitions; there can be hundreds, there can be thousands. The agency has two options. If the agency grants the petition, it has to complete the review of that rule within 3 years, or the rule sunsets. If they deny the petition, they can get dragged to court. It seems to me that puts the agency between a rock and a hard place—3 years or the courthouse. It also seems to me that these petitions put interested parties, like the regulated businesses, not the agencies, in the driver's seat.

The Glenn-Chafee substitute has an enforcement mechanism to make sure agencies review rules, contrary to what we heard yesterday. Under Glenn-Chafee, agencies must publish a schedule to review rules. That is a requirement that is judicially reviewable. Agencies cannot just sit on their hands and not review rules. If an agency, upon review, decides to amend or repeal a rule, it must do so within 2 years, and that is judicially reviewable. If an agency does not complete its review of a rule within the allotted time, it must publish a notice of proposed rulemaking to repeal the rule. And it must complete that agency action within 2 years. And that is judicially reviewable. That is a real hammer.

We do not allow judicial review of what rules the agency decides to put on the list or of the deadlines for the review of those rules. But agencies must solicit and consider public input into this process. We just want to make sure the agencies spend their time and resources doing a review of rules, not defending their every action in court. We think, once again, that just makes common sense.

The Senator from Louisiana stated that the schedule for review of rules is in the sole discretion of the agency. This is misleading. We use the phrase ''sole discretion'' to stop industries and others from litigating what and when rules should be reviewed. If interested parties have complaints about rules not getting on the schedule, there is a specific process allowing annual amendments and additions to any schedule through Congress. If any groups of constituents feel that an important rule is being ignored by agencies, this is the politically accountable way to handle that problem. We should not add to the litigation explosion, the litigation burden that would otherwise be created through Dole-Johnston.

Fourth, the Glenn-Chafee substitute is not a lawyer's dream. We allow for judicial review of, one, the determination of a major rule and, two, whether a final rule is arbitrary and capricious in light of the whole rulemaking file. We do not allow separate challenges of the procedures of cost-benefit analysis or risk assessment.

The Dole-Johnston bill has much more judicial review which can be interpreted to allow a review of procedural compliance with analyses and assessments.

Senator JOHN KERRY of Massachusetts, yesterday, had a list of 88 different points of judicial review. That was taken from a longer list, as I understand it, of 144 that one of the agencies said, as they interpret the bill as now proposed under Dole-Johnston—they could find 144 separate areas where there could be judicial review. We have it here, and if I have time, I will read it. But under S. 343, this is one where OSHA has about 15 different places that they—more than that; it is about 30 different places where OSHA says they can see there would be judicial review, as they view it, unnecessarily, where things could just be tied up in court. I will get to that if I have time for it a little bit later.

I think it is important to remember that S. 343 has many more provisions for judicial review than what is found in section 625, the section the Senator from Louisiana kept coming back to yesterday. The Dole-Johnston substitute creates numerous new positions that are judicially reviewable. It changes the standards for review for the Administrative Procedure Act, and it makes fundamental changes in the use of consent decrees and burden of proof for industry compliance. All of these changes in Dole-Johnston, coupled with the judicial review language in section 625, mean one thing: more lawsuits, more money spent on lawyers, less money spent on the public's business of protecting the health, safety, and environment.

Fifth, the Glenn-Chafee substitute does not create brand new petitions by private persons that will eat up agency resources and will let special interests, not the agency or Congress, guide priorities. The Dole-Johnston bill creates

several new avenues for interested persons to petition agencies, including, one, issuance of amendment or repeal of a rule; two, amendment or repeal of an interpretive rule or general statement of policy or guidance; three, interpretation regarding meaning of a rule, interpretive rule, general statement of policy, or guidance; four, placing a rule on schedule for review; five, alternative methods of compliance; six, review of freestanding risk assessment. All petitions must be decided at a time certain, which ranges from 18 months to 180 days. Except for the petition for alternative method of compliance, all these petition decisions are judicially reviewable. That is a massive number of points of judicial reviewability.

Again, we see that the real effect of Dole-Johnston will be to create special avenues for special interests and more ways for lawyers to tie up agencies in court.

The Glenn-Chafee substitute has no special interest provisions. The Dole-Johnston bill, on the other hand, has very specific fixes for special interests. For example, it changes the Delaney clause and EPA's toxic release inventory. These provisions have no place in a Government-wide regulatory reform bill. Changes to these important laws—and I think some changes should be made—should be handled by the committees of jurisdiction in the context of full debate about the underlying laws. They should not be piggybacked on the larger process bill.

This way of lacing the process reform legislation with special interest fixes is not reform. It involves special pleadings for the special money few. The American people will pay a heavy price in the end if we go that route.

These are six important reasons why we should support the Glenn-Chafee substitute over the Dole-Johnston substitute. My colleague from Louisiana has tried to improve the underlying bill, S. 343. He has been out here on the floor every day, almost by himself, trying to make the case for his improvements. But I do not believe the improvements are enough. The bill is still too flawed to be supported. It endangered the public health and safety and the environment. It wastes Government resources. In enriches lawyers and bogs down the courts for the interests of a few. So I think we should enact the Glenn-Chafee substitute, which I feel is a commonsense reform.

I want to also set the record straight about two additional issues in Glenn-Chafee that the proponents of Dole-Johnston misrepresented yesterday. First is the issue of exemptions. Glenn-Chafee has been criticized for not having enough exemptions. There are several issues involved here. There is one question about general exemptions. Both Dole-Johnston and Glenn-Chafee exempt several categories of rules from the regulatory reform legislation by exempting them from the definitions of rule and/or major rule. The question is, how do the two bills differ?

Now, in total, I believe Dole-Johnston has more exemptions than Glenn-Chafee. I think some of these should actually be added to Glenn-Chafee. But Dole-Johnston is also missing some exemptions that Glenn-Chafee has. We need to get together on this. Dole-Johnston does not exempt actions relating to the removal of a product from commerce, for instance. It only exempts actions authorizing sales of a product. Now, this is wrong. If we allow expedited introduction of some product into the stores—that is, with no lengthy cost-benefit analysis and risk assessment—we should provide for expedited removal of dangerous products. That is only fair. Public health and safety demands no less.

If we just think about the lignite situation of a few years ago, we can see why it is important that we be able to expeditiously remove dangerous products from the marketplace.

Dole-Johnston also does not exempt Federal Election Commission rules and certain Federal Communication Commission rules relating to political campaigns. We believe the political nature of both these FEC and FCC rules recommend that they should not be treated like other rules. They may need review, but not under this legislation with review in the political environment of the White House and OMB.

Dole-Johnston does have exemptions not in the Glenn-Chafee bill. These are exemptions that also were not in S. 291, our bipartisan Governmental Affairs Committee bill. They have been added since then. No. 1, Dole-Johnston exempts rules relating to customs, duties and revenue; No. 2, international trade law and agreements; No. 3 public debt; No. 4, relief from statutory prohibitions; No. 5, decisions of the Federal Energy Regulatory Commission; No. 6, matters involving financial responsibilities of securities brokers and dealers.

Now, some of these exemptions do make a lot of sense. Customs duties and Treasury fiscal policy rules relating to the public debt, for example, should be exempted. These exemptions should be added to Glenn-Chafee. There are some areas we can agree and should keep working to improve the legislation. I think that is what we should do—keep talking about these and work out the things we all agree on are best between these two approaches.

Now, the issue of exemptions also involves the question about special exemptions. The debate last week went beyond the general exemptions to focus on whether special exemptions are needed to protect public health and safety rules. As my colleagues know, last week exemptions were added to Dole-Johnston for mammography standards and rules to protect children from poisoning.

At the same time, amendments for exemptions for meat inspection and safe drinking water rules were rejected. Again, this debate raised the issue of whether each bill needs special exemptions to protect important pending health and safety rules. The simple answer is that Glenn-Chafee needs no special exemptions, Dole-Johnston does.

First, both bills allow agencies to use the current APA good-cause exemption. This allows an agency to exempt a rule from notice and comment rulemaking whenever necessary to protect the public interest. Once exempted from notice and comment procedures, the rule is exempt from the cost benefit and other requirements of the regulatory reform legislation. As far as Glenn-Chafee is concerned, no other special exemptions are needed.

Second, proponents of Dole-Johnston argued last week that their bill has an extra exemption for health and safety rules, and Glenn-Chafee does not have this exemption.

This is a smoke screen. Again, Glenn-Chafee does not need an extra special exemption. The APA good cause exemption is enough. Dole-Johnston needs an extra exemption because of its effective date and because of its onerous requirements.

Proponents of Dole-Johnston argue that their bill solved people's concerns about USDA's proposed meat inspection rule and other pending rules, because it provided a 180-day—later extended to 1-year—extension which is in now, and I emphasize the word ''extension'' for agencies to complete all required cost-benefit and related steps.

Dole-Johnston supporters characterized this section as an emergency exemption and criticized Glenn-Chafee for not having a comparable section. This is just wrong. The real issue is not about emergencies. Again, the APA gives Glenn-Chafee an emergency exemption.

The real issue involves pending rules. The USDA meat inspection rule, for example, is not an emergency rule. It has been under development for some time. It is, after all, a proposed revision of a set of inspection results that have been in effect, more or less, since 1906. It is not an emergency rule. Neither are EPA's cryptosporidium safe drinking water rules or FDA's mammography rules or the rules to protect children from poison.

These health and safety rules are vulnerable under Dole-Johnston not because of the inadequacy of emergency exemption provisions, but because Dole-Johnston, No. 1, covers pending rules; No. 2, subjects those rules to onerous cost-benefit analysis and decisional criteria requirements.

Dole-Johnston 1-year extension allows agencies to issue a rule, but then they still have to finish their cost before analysis in that year and then go back and revise the rule for the least cost test demands a different solution.

Moreover, regardless of the cost-benefit test, Dole-Johnston's other requirements, like its APA revisions I discussed yesterday, still open up the rule to immediate challenge. These include new APA rulemaking publication requirements, a new APA substantial

support standard, the petition processes, and all the related avenues for judicial review. Even with the Johnston amendment, only to cover rules for which a notice of proposed rulemaking was published after April 1, 1995, pending rules already in the rulemaking pipeline will emerge and immediately be subject to all of the Dole-Johnston requirements.

This threat to rules in the pipeline will make agencies stop rulemaking, reassess the sufficiency of their rulemaking record, and even reanalyze their proposed rule then modify and republish their proposed rule in order to address issues that would be raised under the new standards of Dole-Johnston.

Let me make this very clear. The issue is not whether an agency has or could exempt a rule from notice and comment rulemaking. The issue is whether a new rule coming out of the pipeline will satisfy the new requirements of the new law. The answer is that Dole-Johnston's extension does not solve this problem.

Unlike Dole-Johnston, Glenn-Chafee will jeopardize pending rule makings. First, the Glenn-Chafee effective date is 10 days after an enactment for proposed rules. Glenn-Chafee will only cover new rules proposed at least 6 months after enactment of the legislation. This 6-month delay will allow agencies a reasonable amount of time to put into place the new tough procedures required by the law.

Second, Glenn-Chafee requires an evaluation of costs and benefits. We also require a certification, whether the benefits justify the costs, and whether the rule will achieve its objectives in a more cost-effective manner than the alternatives.

While this necessities a cost-benefit analysis, it is in no way as prescriptive as Dole-Johnston's least cost decisional criteria, let alone Dole-Johnston's minimal impact Regulatory Flexibility Act requirements.

The bottom line is the proponents of Glenn-Chafee are not afraid of having agencies comply with our cost-benefit requirements. They are tough, but they are also fair and they are workable. The Dole-Johnston 1-year extension, on the other hand, is no solution. It is an extension, not an exemption. In fact, it simply introduced uncertainty.

All interested parties will have to wait until the completion of the required cost before analysis and satisfaction of the least cost test to learn whether the rule will continue in effect or whether the agency will reenter rulemaking to revise the rule.

This uncertainty and waste of resources serves no interest other than Government inefficiency and ineffectiveness. To summarize these exemption questions, No. 1, we may be able to agree on more general exemption to the definition of rule and major rule; No. 2, Glenn-Chafee does not need any special exemptions because of the APA's current good cause exemption. This protects emergency rules. Our future effective date also protects rules now in the pipeline. No. 3, the only bill that needs extra special exemptions is Dole-Johnston. Its immediate effective date will capture pending rules. Its onerous requirements will force many important rules back to the drawing board, wasting resources, causing delays and literally inviting litigation.

Another matter that must be set straight involves some statements made yesterday regarding the risk assessment provisions in Glenn-Chafee. Some have stated that the Glenn-Chafee substitute is weak because it requires risk assessments for only particular agencies and programs rather than requiring them for all agencies. This is not weak. It is common sense. It makes sense to make agencies that issue rules relating to health, safety, and the environment comply with these requirements. It does not make sense to cover every agency.

For example, what if the health care financing administration wants to change Medicare eligibility requirements. That is a rule related to health. Under Dole-Johnston they may have to do a risk assessment. That does not make sense. I do not think so.

All we are trying to do in the Glenn-Chafee substitute is to use some common sense. It does not make sense to cover all agencies, because not all agencies should do risk assessments.

Glenn-Chafee risk assessment requirements are less prescriptive and better science than the Dole-Johnston substitute. We need to be careful when legislating science. I do not classify myself as a scientist. Many scientists have warned against writing language that is too prescriptive.

For example, the Dole-Johnston substitute states that agencies must base each risk assessment only on the ''best reasonably available scientific data in scientific understanding.'' I ask, who determines what data are best in that requirement? What is best? Scientists say there is often wide dispute within the scientific community about what data are best, and it is common practice for agencies to use several different data sets.

This language will not allow that to happen anymore. They use several different data sets, and then they use their best judgment. In other words, they come back to something that may be startling, they use common sense—and that is what we would require.

The Dole-Johnston substitute also says that when conflicts among data occur, agencies must discuss, ''all relevant information including the likelihood of alternative interpretations of the data and emphasizing postulates that represent the most reasonable inferences * * *'' Again, who makes this determination of most reasonable? Proponents of S. 343 are assuming there is only one right answer. But scientists tell us that risk assessment is a growing science with lots of uncertainty, and rarely, if ever, is there just one right answer.

Let me also respond to what the Senator from Delaware said yesterday, that the Glenn-Chafee substitute goes against the National Academy of Sciences by preferring default assumptions to relevant data. That is just not right. It is wrong. I will read that again: It goes against the National Academy of Sciences by preferring the default assumption to relevant data.

Default assumption means, basically, that we do not know, so we make a decision not knowing, not having as much data as we would like to have. That is a shorthand of what default assumptions means. But that is just not right. On the contrary, we explicitly state in the Glenn-Chafee bill that, ''each agency shall use default assumptions when relevant and adequate scientific data and understanding are lacking.'' That does not say we prefer such assumptions to relevant data. We say use them when relevant data are not available.

Moreover, unlike the Dole-Johnston bill, we require agencies to issue guidance to ''provide procedures for the refinement and replacement of policy-based default assumptions.'' In other words, we even provide in there for going out and doing our level best to get some relevant information, not just to go along with default assumptions, as was stated yesterday.

So, I disagree with the Senator on that point. But I also want to add that we should not be in the business of telling the agencies to throw out all their assumptions, no matter what. That also would not be good science. What we try to do in the Glenn-Chafee bill is to make our risk language less prescriptive. We should not freeze the science, as many scientists fear would happen if we legislate risk assessment with no room for incorporating new understanding in how these assessments should be done.

That brings me to a more general point. The Senator from Louisiana brought up the issue several times yesterday regarding EPA's own reports about its ability to do good science. First, I do not think it is really fair to imply that EPA has not done a good job. That is not just my opinion. The National Academy of Sciences, in their 1994 report called Science and Judgment In Risk Assessment reaffirmed EPA's approach to risk assessment, stating—and this is from the National Academy of Sciences: ''EPA's approach to assessing risks is fundamentally sound, despite often-heard criticism.''

The report gave many recommendations for EPA to improve its policies and practices. As I understand it, EPA currently has programs underway to do just exactly that. In their March 1995 report, just a couple of months ago, called Setting Priorities, Getting Results: A New Direction For EPA, the National Academy of Public Administration, NAPA, concurred with the National Academy of Science findings.

Second, I think it is important to point out what else the NAPA study found, the National Academy of Public Administration. They state:

Congress should not attempt to define ''best science'' or ''best estimate'' in statutes. Congress should not attempt to legislate specific risk assessment techniques, or to adjust assumptions that underlie risk assessments. Such legislation would almost certainly inhibit innovation and improvement in risk assessments methods while constraining scientists from using their judgment in appropriate ways.

That is a very definitive statement from NAPA. And their report goes on to say, further:

Congress should draft any risk legislation so as to constrain the grounds on which risk analyses might be challenged in court. Courts should ensure that regulators follow reasonable procedures, but should not be put in the position of resolving science policy questions such as the definition of ''best science.''

That is what we try to do in the Glenn-Chafee substitute. We get rid of words like ''best data'' or ''the most reasonable inference.'' We limit judicial review, and that is a far better approach.

Another issue: What is and is not exempted from risk assessment requirements? The Dole-Johnston substitute exempts from the requirements actions to introduce a product into commerce. Should we not also exempt actions to remove a product from commerce? To put a product on the market, no risk assessment needs to be done. But to get a dangerous substance off the market, an agency has to do a full-blown risk assessment? That does not seem right.

I mentioned a few moments ago, what if we had the thalidomide scare going on today? That would be held up from being taken off the market, I guess. And that would not make any sense at all.

Finally, what about peer review? The Glenn-Chafee bill is actually tougher than the Dole-Johnston bill. We require peer review analysis of both cost-benefit analysis and risk assessment. We believe both should be reviewed. Both have lots of assumptions. Both should be scrubbed to make sure that agencies are making good decisions based on good information.

The Dole-Johnston bill also exempts peer review from the Federal Advisory Committee Act, FACA. Last year, during the health care debate, my colleagues who support the Dole-Johnston substitute made a very big thing about making sure that such panels were done in sunshine and complied with FACA.

Now they seem to have changed their minds, exempting all peer reviews from FACA. I do not think that is the way we should be conducting business. Glenn-Chafee does not exempt FACA, and that is the way we should do business.

Mr. President, some of the comments that were made last year about FACA, when we were considering health reform—my colleague, Senator MACK, for instance, said:

Secrecy in Government is not the American way. Secrecy in Government has led to all sorts of abuses and denial of freedom in other lands. We must keep our system of government open and accountable to the citizens of our country for public inspection and scrutiny. FACA requires that these meetings should be meetings in public, published notice of meetings in the Federal Register. Let the public know of the agenda for those meetings. The act requires boards to permit persons to obtain transcripts, appear and testify or file statements, make a record, keep minutes, working papers, et cetera, available. Keep detailed minutes, permit citizens to purchase manuscripts and transcripts. Keep adequate financial records. And the act also requires there should be a 2-year time period for boards and commissions.

Senator CRAIG, Senator GRASSLEY, Senator LOTT, I believe my colleague Senator SPECTER, Senator MCCONNELL, and Senator DOLE all spoke on behalf of keeping FACA and supported FACA and the importance of FACA.

Senator DOLE in particular said:

And, plain and simple, the American public did not trust the Clinton plan. They did not trust the secrecy in which it was written. They did not trust the principle that Government knows best. There is no reason why these boards should be granted the power to meet in secrecy. Indeed, there is every reason why they must meet in public.

On and on, we have several pages of those here. I will not read all of them into the RECORD.

But, Mr. President, I ask my colleagues to take a very hard look at the regulatory reform substitutes before them. I urge them to support the Glenn-Chafee bill. The Glenn-Chafee bill is a very tough reform bill. It also provides a balanced—repeat, a balanced—and a fair approach to reform. It will relieve regulatory burdens on businesses and individuals.

I repeat that. It will relieve regulatory burdens on businesses and individuals. At the same time, it will also protect the health and safety and the environment of the American people. This is responsible legislation. I urge your consideration and support.

Mr. President, in indicating the litigation that can occur with this legislation, OSHA has looked at this, and they asked a question, they postulated something here. The title of this is: ''S. 343, Endless Rounds of Litigation While Workers Wait For Protection.'' They say:

Imagine: You are a metal finisher who works with a toxin that causes acute pneumonitis, pulmonary edema, kidney disease, and lung cancer. You are not alone. 500,000 other men and women also work with this compound.

Right now, OSHA can protect you from exposure to this dangerous hazard by proving that: workers are exposed to a significant risk, the proposed standard would substantially reduce that risk, and the standard would be technologically and economically feasible.

Under S. 343, a protective rule to limit your exposure to this compound could be invalidated because of the endless opportunities for judicial review. For example, a petition could:

Claim that OSHA failed to consider substitute risks. (See 631(8); Sec. 632(a); Sec. 633(f)(3))

Claim that OSHA failed to distinguish between risk assessment and risk management. (Sec. 633(a)(2))

Claim that OSHA failed to use only the best reasonably available scientific data and scientific understanding. (Sec. 633(c)(1))

Claim that OSHA failed to select data based on reasoned analysis of the quality and relevance of the data. (Sec. 633(c)(2))

Claim that OSHA failed to consider whether the data was published in peer reviewed literature. (Sec. 633(c)(3))

Claim that OSHA failed to discuss alternative interpretations of that data that emphasize postulates that represent the most reasonable inferences from the supporting data. (Sec. 633(c)(5)(A))

Claim that OSHA used a policy judgement when relevant scientific data was available. (Sec. 633(d)(1))

Claim that OSHA failed to explain adequately the extent to which policy judgements were validated, or conflict with, empirical data. (Sec. 633(d)(2)(A))

Claim that OSHA failed to describe adequately reasonable alternative policy judgements and the sensitivity of the conclusions of the risk assessments to the alternatives. (Sec. 633(d)(2)(C))

Claim that OSHA inappropriately combined or compounded multiple policy judgements. (Sec. 633(d)(2)(3))

Claim that OSHA failed to express adequately the range and distribution of risks and the corresponding exposure scenarios, and failed to identify adequately the expected risk to the general population and to more highly exposed or sensitive populations. (Sec. 633(f)(1)(C))

Claim that OSHA failed to describe adequately the significant substitution risks of the rule. (Sec. 633(f)(3))

Claim that OSHA's peer review panel was not balanced and independent. (Sec. 633(g))

Claim that OSHA's response to peer review comments were inadequate. (Sec. 633(D)(3))

Claim that OSHA failed to provide adequate opportunity for public participation and comment. (Sec. 633(D)(3))

Claim that OSHA did not properly determine that the benefits of the rule justify the costs. (Sec. 624(b)(1))

Claim that OSHA failed to identify all of the significant adverse effects of the rule. (Sec. 621)

Claim that OSHA failed to give regulated persons adequate flexibility to respond to changes in general economic conditions. (Sec. 621(6)(C))

Claim that OSHA did not properly determine the least-cost alternative of the reasonable alternatives. (Sec. 624(b)(3)(A))

And more claims, and more claims, and more claims.

Thankfully, OSHA addressed this dangerous compound in its Cadmium standard. If S. 343 had been in place, however, this protective standard could have been delayed for years, leading to many work-related cases of cancer and kidney disease that could otherwise have been avoided.

So, Mr. President, this is just one little example of—what is that, 25 or 30, I guess, examples after just a first-cut look at S. 343 that OSHA indicates they feel would provide grounds for litigation.

Mr. President, I wished to make a reasonably complete statement, which I think I have done here this morning. We have combined several previous things that were brought up over the last couple of days as well as refuting some of the scare stories that have been applied. We still have basically six different areas in which we disagree.

It is on major rules and how we deal with those; on the cost-benefit analysis versus the least-cost approach. We provide for review of current rules with no automatic sunset. We disagree with Dole-Johnston that provides a sunset after an extension period.

Our bill is not a lawyer's dream. It does not provide nearly unlimited judicial review of everything from beginning to end. And our substitute does not create brand new petitions by private sources, by private persons or groups, that will just eat up agency resources and let special interests, not the agency or Congress, guide our priorities. And we do not have special interest provisions. We do not try to deal with things in this bill that deal with processes. We do not try to solve things like the Delaney clause on which separate legislation is being prepared by a different committee; toxics release inventory and things such as that.

So I believe we have a better bill here, and I hope that when the vote occurs this afternoon after our noon break we will have enough votes to pass this. I know it is a squeaker. I know that we may lack the votes to do this. But I hope that after people look at the two bills side by side, they will realize we take the more reasoned approach to this and that this really is a superior bill.

Mr. President, I yield the floor.

Mr. KENNEDY. Mr. President, I support the Glenn-Chafee substitute to the regulatory reform bill, because it will achieve real reform without paralyzing the Government agencies that set health, safety, and environmental standards, and without wasting their resources on redtape that adds nothing to the wisdom of their decisions. It will lead to commonsense regulation, rather than excessive litigation and full employment for lawyers.

It will give us cost-effective regulations, rather than always the cheapest, but not necessarily the most effective, rule. And it will allow for full public participation in regulatory decisionmaking, instead of back door, special interest processes that exclude the public.

In each of these respects, our proposal is superior to the pending alternative. The Dole-Johnston alternative applies its cost-benefit analysis and risk assessment requirements to hundreds of rules each year that do not have enough of an impact on the economy to justify the expenditure.

To require dozens of costly, time-consuming procedural steps for even minor rules is wasteful and counterproductive. At a time when we are cutting agency budgets and laying off tens of thousands of employees, forcing the agencies to comply with these procedures is simply a way to prevent them from doing their real work—protecting the American public from significant health and safety threats.

Some say that we rely too much on the Government and that in doing so we risk our freedom.

But none of us as individuals can protect ourselves from the destruction of the ozone layer, from deadly bacteria in our food or drinking water, or from HIV when we get a blood transfusion. The Government must be active in these areas, and it must have the resources to do for all of us what we cannot do for ourselves. The Dole-Johnston proposal will cost at least $1.3 billion a year, but it does not provide any new funding to pay for these costs. This $1.3 billion is money that will not be available for enforcement and administration of essential laws and regulations.

The Dole-Johnston alternative relies on private lawsuits to be what some call the hammer to make agencies comply with the law. But as Professor Peter L. Strauss of Columbia Law School testified before the Judiciary Committee,

> Permitting judicial review of the process hands over to interested private parties weapons with which they can cheaply and unaccountably delay government action and make it more expensive to accomplish what government should be doing.

Our alternative, by contrast, leaves the review of rules more in the hands of Congress.

We can block any regulation from taking effect by invoking the legislative veto provision, which the Senate has already passed in separate legislation. That is a better answer than private litigation.

Congress gives agencies their power to regulate, and we are ultimately responsible for what they do. If a rule is unreasonably burdensome and costly, if it is based on bad science, Congress has the power and will have the opportunity under our alternative to intervene and block it.

We do not need to depend on special interest lawyers, and we should not depend on them, to ensure that Federal regulations make sense.

Senator HATCH has repeatedly cited examples of bad regulation from Philip K. Howard's book ''The Death of Common Sense.'' But Mr. Howard's testimony is enlightening, because he favors limits on judicial review like those in our proposal. Mr. Howard testified that, ''The main control over agencies should be oversight by Congress, not endless procedure or appeals to courts over procedural nitpicks.''

I also prefer the Glenn-Chafee substitute because the alternative creates special opportunities for businesses to escape regulation without any public involvement or notice. Section 629 of the Dole-Johnston alternative allows any regulated business to petition for a waiver from any major rule. The petition must be granted if the business shows that it is reasonably likely that the business can achieve the goal without complying with the rule.

In other words, if the new safe meat handling rules were in effect, and a meat packer were able to convince USDA that ''there is a reasonable likelihood'' that it could keep its meat free of E. coli without doing any sampling for bacteria, USDA would have to grant its petition.

The Dole-Johnston alternative gives no one else a chance to question or challenge the company's petition, to cross-examine its scientists, or even to know that the petition is pending. A secret relationship between the agency and the company is created. And if the agency grants the petition, no one can challenge the decision in court. Section 629(e) provides that ''in no event shall agency action taken pursuant to this section be subject to judicial review.'' The public interest is totally ignored.

When, as here, the issue is agency action to exempt a business from regulation, the Dole-Johnston alternative rejects any interest in risk assessment and good science. The agency is given 180 days to respond to the company's petition, which may not be sufficient time to investigate the issue fully.

The agency is not required to conduct a risk assessment, or subject its decision on waiving the rule to peer review. The Dole-Johnston alternative operates on the assumption that agencies can be trusted to make the right decision in the case of waiving a rule—but not in issuing the rule.

I object to this back door way to let businesses escape regulations that are designed to protect the public. At a minimum, there must be some opportunity for public involvement and comment.

I also question whether a process like this can be justified if it does not require peer review of the agency's decision, to ensure that there is not collusion. The Glenn-Chafee proposal does not provide for this kind of petition at all, and it is, therefore, superior to the Dole-Johnston alternative. I am also pleased that the Glenn-Chafee amendment does not include the special interest fixes or the Dole-Johnston alternative. For example, our proposal does not undermine the Delaney clause, which prohibits the approval of cancer-causing food additives.

We all agree on the need for Delaney reform, but it is a complex, technical subject that requires careful consideration by the committees of jurisdiction. The approach in the Dole-Johnston alternative is too simplistic and provides insufficient protection to infants and children, whose special diets leave them especially vulnerable to food-borne carcinogens.

Finally, the Dole-Johnston alternative continues to be a supermandate that requires agencies to choose the cheapest alternative in any case where the benefits to health, safety or the environment are quantifiable. Suppose that OSHA finds that requiring grain elevators to continuously vacuum up dust could save 10 lives a year by preventing dust explosions, but would be more expensive than have employees sweep up once a shift.

OSHA could not require the grain elevator to install dust control equipment, or to maintain a consistently

low ''action level'' of dust, because it is not the least cost alternative.

Our proposal, on the other hand, is not a supermandate and does not impose any new decision criteria. OSHA would be able to choose the more protective alternative, as it did under the Reagan administration, because that is the alternative that better accomplishes the goal of the statute—providing a safe workplace.

The Nation has made tremendous progress in the last quarter of a century toward cleaning up the environment, protecting endangered species, ensuring the safety of food and drugs, and improving health and safety in the workplace. We must not destroy this progress in the guise of reforming the laws and regulatory system that made it possible. The Glenn-Chafee substitute will help us streamline the regulatory process and make it more cost effective. It will not throw the baby out with the bath water.

I urge the Senate to support the Glenn-Chafee substitute.

Mr. BIDEN. Mr. President, I want to reform our regulatory process.

No one can deny that we need to write smarter, clearer, more effective, and more flexible Federal regulations. The question before us is not whether to reform our regulations. The question is how to reform them.

I believe that the most balanced answer to this question is in S. 1001, that Senators GLENN, CHAFEE, and I, along with other of our colleagues from both sides of the aisle, offer here today.

And I am afraid that S. 343, the Dole-Johnston bill, remains an unbalanced, costly, confrontational approach, that fails to meet its own reform criteria, and that will fail to protect the public health and safety—the general welfare that it is our Constitutional duty to protect.

Mr. President, the days are long gone when Americans grew their own food, made their own tools, stayed pretty close to home, and saw most disease as an act of God.

Now we buy food from all over the world, packaged and processed with unpronounceable chemicals, even irradiation.

We travel at higher speeds over longer distances, in larger and larger aircraft, and in automobiles that are as much electronic as they are mechanical.

Mr. President, as much as we may long for a simpler, more self-sufficient time, we must face the costs—in new risks to our health and safety—that come with the benefits of our rapidly evolving economy.

It is one thing to recognize those costs, Mr. President, and quite another to know what to do about them. What is the best way to protect against the new threats to our safety and health that come from the way we now live?

That is the heart of the question before us in this debate on regulatory reform.

Mr. President, the issue before us today has been a generation in the making. Many of the safety and health regulations now on the books had their origins 25 to 30 years ago, when we began to face up to the real costs—in injury, disease, and even death—from unregulated manufacturing processes and products.

By the end of the 1960's and the beginning of the 1970's, we came to realize that consumer choice alone—the guiding principle of the free market—was not enough to protect us from poorly designed, inadequately researched, or criminally negligent products and processes.

Our private enterprise economy functions so well because it is based on individual initiative and self-interest. Economic competition among free individuals drives the inventiveness that gives us new products, new technologies—progress that has given us the most powerful economy in the history of the world.

But those competitive individuals all face the same need to keep their costs lower than their competitors—each individual must find ways to avoid paying for anything that competitors get for free.

The unfortunate effect in this process is that what we all have in common—the need for clean water, clean air, clean food, safe working conditions, products that are safe and effective—those things we have in common are not necessarily protected in each business's calculations of economic efficiency.

At the same time, with the rapid technological changes brought by our free enterprise economy, we find ourselves more and more dependent on products whose safety and effectiveness we cannot evaluate ourselves—except, perhaps by experiencing the tragic consequences of thalidomide or DDT, or increasing automobile injuries and deaths.

So we need some way to make sure we can take care of those things we have in common—the common good.

A generation ago, the public began to demand cleaner air, safer food, water, and transportation. To accomplish those goals, Congress has passed laws, and agencies have written the regulations to put the goals of those laws into effect.

In era of skepticism, cynicism, and downright hostility toward government, these are the most popular federal laws now on the books, Mr. President.

Everywhere I travel in my own State of Delaware, and in other States around our country, people of every political persuasion tell that they continue to support government policies that keep our food and water safe and clean, that assure we can travel in safety, and that protect the environment.

At the same time, these are also some of the most frustrating, demanding, confusing regulations that our small businesses and property owners must face. Reform must balance the demands of the public for continued safety with the needs of those businessmen and women who seek reasonable relief.

Still, taken as a whole, in terms of their impact on the economy, these regulations are not, Mr. President, the unmitigated disaster some would have us believe.

Our food, our water, our prescription drugs, our highways and airways—even our children's clothes and toys—are safer today because of Federal regulations.

But at what cost, ask our colleagues? They tell us that our country is being strangled by regulations, jobs are being lost, that the burden of regulations is sinking our economy.

Now, Mr. President, a couple of days ago on the floor of the Senate I related a story from my own State of Delaware about regulations run amok, about a rule that flies in the face of common sense, a rule that cost a good friend of mine an outrageous amount of money simply to settle a claim out of court.

I know as well as anyone here that these horror stories are real, and that it is high time we undertook serious reform of the ways we write Federal rules and regulations.

But our job here is to weigh the full body of evidence, and to put the individual cases that are so frustrating and infuriating into context, and correct them individually. When I told that story, I said I would return to the floor to discuss the real cost of regulations, the real costs of these rules to our economy.

Fortunately, Mr. President, the big picture is not what some would have us believe. The fact is that the burden of regulation a share of our economy has not exploded as some of my colleagues have stated here on the floor.

As a matter of fact, the share of regulatory costs in our economy has actually gone down, as documented by an analysis done last month by the GAO. From 1977 to this year, the regulatory cost have shrunk by 11 percent—from about 4.5 percent of GDP to about 4 percent of GDP.

There is nothing in the facts to support the claim that the cost of regulations has exploded, nothing to justify putting hurdles, even landmines, in front of every regulation now on the books, and every regulation now in the works.

Mr. President, many of the stories we have heard here in recent days—stories of regulators' excesses and abuses of power—are more folklore than fact. But if even these horror stories were true, would that justify putting the health and safety of the American public at risk? Would the risks justify the benefits? Would it not be better to fix the particular abuses, rather than take the Dole approach?

Let us look at this another way, Mr. President. Many of my colleagues insist on using a grossly inflated estimate of the total cost of regulations—$562 billion a year, by one well-publicized estimate.

But that number includes costs like farm subsidies, that transfer funds from one sector of the economy to another—they add up to zero on the national accounts. And they also include the costs of complying with the IRS—a burden we all resent, but one that the Dole-Johnston bill does not touch. The IRS is not covered by regulatory reform—that is an issue for tax reform, a topic for another day.

So the real costs of complying with regulations is actually more like $228 billion a year, according the study cited in the GAO report I have here today—half of what some would have us believe.

But what do we get for those costs? Is this just money down the drain? Not according to the Center for Risk Analysis at the Harvard School of Public Health. Its report from March of this year cites one study—from the peer-reviewed Yale Journal on Regulation—that sets the benefits of health, safety, and environmental regulations at $200 billion a year.

A little quick math suggests that we are left with a total NET cost of regulations to the economy—if we take reasonable account of benefits that we can measure in dollars and cents, as well as the costs—of about $28 billion a year.

That $228 billion a year in regulatory costs means about $912 dollars a year for everyone in the country, or about $2.50 a day, for all of the health, safety, and environmental protection we enjoy.

If we throw in some of the benefits that cannot be measured in dollars and cents—a little extra peace of mind, some fairness in the distribution of benefits, deference to principles like federalism—that seems like a pretty fair deal.

Some might call it a bargain—clean water, safe food, secure transportation, and a few basic American values thrown in—for $2.50 a day.

Like most of the numbers we have heard in this debate, of course, these are estimates, extrapolations, and a reflection of how hard it is to measure these things. As much as we need to know the hard facts about the costs and benefits of regulations, we are still learning how to count them.

But that small number makes sense when we look at the effect of regulations on the growth of our economy, Mr. President. It is hard to find evidence that regulations are dragging us down. Throughout the entire post-War period to the present, Mr. President, before the enactment of significant environmental, health, and safety regulations and after, our economy has continued to grow at a remarkably steady pace.

When you look at the pattern of growth that our economy has been able to sustain over this period, Mr. President, it is impossible to detect a point at which regulations become a burden.

Between 1980 and 1994, our industrial output rose more than 50 percent. In the past 3 years, it has increased 15 percent. Our output is now twice as high as it was in 1970, and five times as high as 1950.

Our productivity has risen about 3 percent per year in the past decade. A recent comprehensive survey of the impact of environmental regulations—on those industries like chemicals, petroleum, and paper that have had the most to clean up—showed little or no correlation between regulations and profits, competitiveness, or productivity.

Where is the evidence that the cost of regulations has exploded?

Where is the evidence that the cost of regulations has become a major burden on the growth of the economy?

It simply is not there, Mr. President.

In fact, there is persuasive evidence that regulation has generated positive overall effects for our economy, by spurring innovations and economies.

We know that there are positive economic effects from lowering costly threats to public health and safety, threats that take their toll in medical bills, time lost on the jobs, and so forth. By making our citizens healthier and safer, regulations make our economy more efficient, because we do not waste scarce resources paying for preventable illness and injury.

But in addition to preventing wasteful expenditures—and preventing unnecessary human suffering—regulations can have positive effects on economic innovation.

Here is an example from that recent Business Week article: When OSHA issued a new standard for worker exposure to formaldehyde, costs to the industry were estimated at $10 billion. But when the affected industries changed the way they operated, the costs were negligible, and the changes improved their international competitiveness. The conclusion? The regulations were a large net plus for the industry and the country.

Let us think about this for a minute, Mr. President. Does anyone here want to argue that an economy that wastes less—that sends less of its waste products into the environment in which its citizens live—is less efficient than an economy that spews tons of waste into the air and water?

Logic does not support the idea that these regulations will make us less competitive—as a nation, over the long run—and the data do not support it, either.

So let us not let exaggerated costs and horror stories of regulatory excess stampede us into a wholesale attack on regulations that, by and large, are doing what we want them to do.

But there is a real problem, Mr. President, one that is at the heart of the movement to reform regulations, a movement we should all support.

That problem is the lack of flexibility and the lack of openness in rulemaking and enforcement of regulations. And that problem can be traced to the arrogance and insensitivity of the public officials charged with writing and enforcing many of our regulations.

It is fundamental, Mr. President—power corrupts. From the comically officious church parking lot attendant on Sunday morning to the most powerful public officials, people's heads swell when they are given power over others. Our regulatory agencies are not immune from this law of human nature.

Mr. President, the abuse of private power by polluters, unsafe employers, and sellers of dangerous products—that abuse of private power is the reason we need regulations.

And the abuse of public power by arrogant public officials is the reason we need regulatory reform.

It should be our job to fight both forms of abuse, not add momentum to that pendulum that swings from one extreme to the other.

Which of the two bills before us is more likely to remedy this problem and still protect the public interest?

I am convinced that the Glenn-Chafee approach is the more balanced, effective way to restore common sense to the way we write our regulations, without putting punitive layers of paperwork and procedures in the way of better regulations than we have today.

This approach requires a cost-benefit analysis and a risk assessment for public safety, health, and environmental regulations that have a major impact—$100 million—on the economy.

It backs those up with specific requirements for peer review, congressional review, and executive oversight of each agency's rule writing. And the courts will examine each agency's compliance with the scientific and economic justifications for each rule.

It requires that agencies include flexible, market-based alternatives in their considerations, and makes them show how the rule they choose matches up to those alternative for cost-effectiveness.

The Glenn-Chafee substitute calls for a thorough-going review of regulations now on the books, and sets up a procedure to assure that we have a sensible way to rank the risks we face—from contaminated air, water, or food, or from unsafe aircraft, cars, or toys. We will attack the worst problems first, the best way to allocate our scarce resources.

Mr. President, the Glenn-Chafee substitute is tough, thoughtful reform.

Ironically, the Dole-Johnston bill adds to the costs of regulation by adding inflexible, prescriptive procedures to the process, subject to petition and judicial review requirements that could keep better rules—replacing the bad ones on the books today—from seeing the light of day.

But most significantly, it forces agencies to write every rule according to fixed criteria—they must choose the least cost alternative among all the possible versions. But the cheapest rule may not be the best—it depends on the circumstances, it requires more flexibility.

The cheapest broom may get the job done in most cases, but when you need an operation, maybe you would consider paying a little more for the best doctor you can afford. It depends on the problem you are trying to solve.

Flexibility is not what the Dole-Johnston bill provides. Do we really think that public officials will become more accommodating, more concerned with differing circumstances, if they must, by law, choose the rule that they can defend in court as the cheapest way to get the job done?

Maybe they could get the public more benefits for a little more cost—maybe they could write a rule that is more cost-effective. But not under the Dole-Johnston bill.

Under the Dole-Johnston bill, agencies will practice defensive rule writing—to conform to whatever the latest case law says is the cheapest way to do things. They are not encouraged to apply a variety of criteria—maybe in some cases, the cheapest rule is the best; maybe we want to maximize the benefits in safety and health; maybe we want the rule with the most net benefits—the spread between costs and benefits.

But the Dole-Johnston bill is not concerned with flexibility—it mandates that every rule fit into the same box—the least cost box.

Furthermore, the Dole-Johnston bill will add bureaucracy and litigation, instead of reducing it. For example, lawyers will be able to challenge rules—or prevent them from going into effect—by raising any of a number of new issues which they cannot now raise.

This will keep Washington lawyers busy, and will keep agency lawyers busy. That means everyone will be in court—instead of out in the field, enforcing the new regulations. And in an effort to avoid lawsuits in the future, agencies will practice defensive rulemaking—being overly cautious, spending enormous amounts of money and becoming even more bureaucratic.

This is not reform. It makes the regulatory system more bureaucratic, not less. It results in more litigation and less policy. It makes it harder for the Government to respond to legitimate needs.

Furthermore, the bill includes new cumbersome and complicated processes by which industry and special interests can petition to have existing rules thrown out. There are numerous of these petition processes in the Dole-Johnston bill—and each of them can be brought into court if the agency denies the petition. That explosion in litigation simply is not what regulatory reform is about.

The effect of these and other procedural hurdles would be either to require larger bureaucracies, with bigger budgets—or, more likely under current conditions—to make the process of getting out new, better rules virtually endless.

If advocates of this gridlock think that hog-tying the bureaucracies will reduce the public's demand for safety, health, and environmental protection, they have seriously misread public opinion. The demand for these protections will collide with the cumbersome process they have devised, adding to the frustration with government—and to the hostility and suspicion of the special interests who are served by delay and weakening of those protections.

Regulatory reform should be the way to make the system more flexible, more open, but S. 343—the Dole-Johnston bill—would establish a more costly, less flexible rule writing process.

Mr. President, S. 343 has been written to be just a bad mirror image of the process some imagine we have today. It will tie up agencies in new procedures, adding to the costs and uncertainty of the regulatory process, the same complaints many citizens have rightfully leveled against the current process.

It would waste resources by piling requirements on rulemakers that add nothing to the public safety and health, and add nothing to the effectiveness of the regulatory process, and will do nothing to make agencies more accommodating to the real needs of individuals, firms, and communities.

Now I know that some of my colleagues here today, and certainly some of those business men and women who feel themselves most aggrieved by current regulations view the prospect of frustrating a few Federal bureaucrats eagerly.

Some may even see regulatory reform as pay back time: a chance to dump on Federal agencies some of the burdens they have felt.

Mr. President, I ask those who may feel that way to consider how they will feel if the effect on the regulatory process is to make it more complex, more time-consuming, more uncertain. Will those who feel most aggrieved by the current system be better served if they succeed in their attempt at retribution?

The fact is, Mr. President, that the big corporations whose contributions have bought them access to the legislative process—those corporations have always been able to make the system work. They play the regulatory system like a harp, and they have helped to write the new rules of the game, a game in which their deep pockets and hefty legal staffs will carry a lot of weight.

But what about the guy who cannot sail or fish on the Delaware River, or cannot take his family to the beach, when our waters are not protected? What about the family with crippling health care costs from their child's respiratory problems when our air is not clean?

What of the small businesswoman who just wanted a fair shake and a straight answer, who is told by OSHA or the EPA, ''Sorry, that rule has been held up by another petition—we cannot tell you how to bring your business into compliance?''

Mr. President, those of us who are rightfully proud of the accomplishments of public safety and health regulations should be among the first to want them to work efficiently and effectively, without waste of taxpayers' dollars and without antagonizing the citizens who operate the businesses and who own the property that are the subjects of so many of these regulations.

Any waste in the process, any wasted effort and dollars by those who comply with these regulations, is a waste of resources that could be used to create another job—or to improve the quality of our air and water, or increase the safety of our airways and highways.

The tough choices before us in the next few years will leave little room for excess in any programs. Those of us who support the Glenn-Chafee amendment recognize our continuing responsibility to promote the general welfare; reform is essential to wringing every dime's worth of protection out of every regulation.

We cannot maintain a regulatory process that thoughtlessly pushes the cost of regulation onto the people whose businesses create the products—and the jobs—we all depend on. We must not have a regulatory process that generates increasing resentment and frustration on the part of the businessmen and women whose behavior—and balance sheets—must change to put our regulations into effect.

Mr. President, all Americans benefit from regulations that work well, and that work efficiently. And we are all poorer if our businesses divert resources away from productive economic activity for regulations that are not well designed.

But demonizing Federal regulations—legislating by anecdote, where often imaginary excesses are inflated into an anti-Government scenario of bureaucrats run amok—is surely not the way to accomplish real regulatory reform.

Now, Mr. President, I am impressed by the extent of the changes in S. 343 since it was reported out of the Judiciary Committee. The sheer volume of revisions confirms, I believe, the minority view back then that it was seriously flawed and not ready for consideration by the full Senate.

The changes also reflect the good work of many of my colleagues, including Senator ROTH and Senator JOHNSTON, who have lent their expertise to remove some of the worst elements of the earlier version of S. 343. They have spent hours and hours over recent weeks debating and revising the details of what we all agree is a very complex, arcane bill.

But the volume of changes also has its downside, Mr. President. It means that this bill, in its current form, has never been the subject of committee hearings or debate. It has remained a moving target, defying any attempt to analyze the cumulative implications of its many interrelated subchapters and provisions.

In the process, it has become an amalgam of innumerable drafts and revisions, last-minute concessions, and internal inconsistencies.

The Dole bill began as a proposal that would frustrate, not promote reform, by adding paperwork, delays, and costs to a system already swamped by procedures. The many changes that have been adopted in recent weeks have blunted, but not deflected, its original intent.

That is why I am pleased to support the efforts of Senator GLENN, Senator CHAFEE, and many others, to revive a superior approach to legislative reform, one that was subject to extensive hearings, and that enjoyed a unanimous, bipartisan vote from the Governmental Affairs Committee.

I am pleased to be an original cosponsor of this alternative, that is a tough, considered approach to regulatory reform, that raises the standards for the regulations that will be written from now on, and that provides a rational program to assure all earlier regulations meet these new, higher standards.

Mr. ROTH addressed the Chair.

The PRESIDING OFFICER (Mr. ASHCROFT). The Senator from Delaware.

Mr. ROTH. Mr. President, I rise to call upon my colleagues to take a leadership role to change the status quo, to reduce the cumulative regulatory burden that costs the average American family $6,000 per year, and to ensure that we will have smarter, more cost-effective regulation that will benefit us all.

I rise to repeat once again that meaningful regulatory reform is critical to ensuring that we reduce the regulatory burden while still ensuring strong protections for health, safety, and the environment. The answer to this problem is legislation that will make a difference. Make no mistake about it, the answer to this problem is the Dole-Johnston compromise, not the Glenn substitute.

Mr. President, there is no argument but what the regulatory process is broken. Virtually every authority who has studied the regulatory process—from Justice Stephen Breyer to the Carnegie Commission, from Vice President GORE to the Harvard Center for Risk Analysis, from scores of scholars to dozens of think tanks—agrees that the regulatory process needs to be reformed. And this problem is so undeniable that I do not believe any of my colleagues would publicly deny that there is a problem. But the question remains, who wants to do something about this problem that none of us can deny?

I submit that the Dole-Johnston compromise, S. 343, will do something about the problem. It will effect meaningful, responsible regulatory reform. And I regret to say that the Glenn substitute will not.

We all agree that we do not want to be where we are with Government regulation. We will admit that we need to move back to reform old rules and move ahead to be sure future rules make sense.

Mr. President, allow me to draw an analogy. You could compare S. 343 and the Glenn substitute to automobiles that purport to allow us to take this journey which we all say we want to make.

As I detailed yesterday, if you look at these two vehicles, they look similar at first blush. From a distance, they both have provisions for cost-benefit analysis, review of existing rules, risk assessment, comparative risk analysis, market mechanisms and performance standards, reform of the Regulatory Flexibility Act, congressional review of rules, and regulatory accounting.

When you try to start the Glenn vehicle, you find it does not go backward. It will not ensure that old, irrational rules already on the books are reviewed and reformed. You will find that the Glenn vehicle does not go forward. It does not have a focused cost-benefit test which will ensure that new rules make sense, that their benefits justify their costs. When you look under the hood of the Glenn vehicle, you will find to your surprise that it has no engine. The judicial review provision is so weak that an agency can do a very sloppy job of doing a cost-benefit analysis or other analysis and then does not have to act upon that analysis, so it makes a difference on the rule. And there is little anyone can do about it.

Now, what good is this—a car that cannot go in reverse, cannot go forward, and has no engine? That vehicle will get you nowhere. That is the Glenn substitute. If we are to have that, we may as well not have a regulatory reform statute because the Glenn substitute represents nothing but the status quo.

Mr. President, I need to take a little time to dispel a very serious misconception that some people have about the Glenn substitute, and that is it is not—it is not—the Roth bill. The Glenn substitute is not by a long shot S. 291, the bill that I introduced in January and that was reported unanimously out of the Governmental Affairs Committee.

While S. 291 was itself a compromise and was originally adopted by Senator GLENN as S. 1001, he has now taken steps to fatally weaken it.

Let me briefly highlight a few major departures. First, the Glenn substitute seriously weakens the lookback provision that was in the Roth bill. The Roth bill required agencies to review all major rules in a 10-year period or be subject to sunset or termination.

The revised Glenn substitute now makes the review of rules a purely voluntary undertaking. There are no firm requirements about the number of rules to be reviewed or which rules to review. In other words, it is a matter up to the sole discretion of the agency. There are no requirements about the number of rules, if any, that have to be reviewed.

A second major change. Senator GLENN's substitute guts the judicial review provision that was in the Roth bill. Section 623(e) of the Roth bill and the original Glenn bill stated that the cost-benefit analysis and risk assessment shall, to the extent relevant, be considered by a court in determining the legality of the agency action, and that meant that the court should focus on the cost-benefit analysis in determining whether the rule was arbitrary and capricious.

The Glenn substitute strikes that language. That weakens the whole bill. That means the Glenn vehicle has no engine. The Glenn substitute does adopt cost-benefit language that was in the Roth bill. But without any meaningful judicial review, the cost-benefit test does not mean much at all. For a reviewing court, the analysis is just another piece of paper among the thousands of pieces of paper in the rulemaking record.

The Glenn substitute asks the agency to publish a determination whether the benefits justify the costs. But the Glenn substitute does not push regulators to issue rules whose benefits actually do justify their costs. I have always believed we need a stronger cost-benefit test.

In effect, the Glenn substitute merely asks the agency to do a cost-benefit analysis. However, the agency can do a poor analysis and, worse still, does not have to act upon the analysis. In other words, the cost-benefit analysis need not make a difference in the rule. The rule can still be inefficient and ineffective. This is not the Roth bill. This is not what I want, and it is not what the American people want.

Mr. President, the Dole-Johnston compromise is the proper vehicle for regulatory reform. It will allow us to go back to review old rules on the books. It will allow us to go forward and to ensure, as a general rule, new rules will have benefits that justify their costs. It has an engine to ensure we will get where we want. And I urge my colleagues who want real regulatory reform to set aside partisan politics and join me in supporting the Dole-Johnston compromise.

The truth is, if you compare the Dole bill and the Glenn bill section by section, they, at first blush, look a lot alike. At bottom, there are some very key, important differences. First, meaningful regulatory reform must change future rules. The key to ensuring that new rules will be efficient and cost-effective is to have an effective cost-benefit test. The Dole bill has a focused cost-benefit test. The decisional criteria in section 624 ensures that the benefits of a rule will justify its cost unless prohibited by the underlying law authorizing the rule.

In contrast, the Glenn bill has no cost-benefit decisional criteria. The bill requires that a cost-benefit analysis be done, but the bill does not require that the cost-benefit analysis be used or that the rule will be affected by

the cost-benefit analysis. The agency only has to publish a determination whether the benefits of a rule will justify its cost and whether the regulation is cost effective. But the Glenn bill does not push regulators to issue rules whose benefits actually do justify their costs. I have always believed that an effective regulatory reform bill should have a stronger cost-benefit test.

Some of my colleagues have complained about the least cost component of the decisional criteria. Many of us have been willing and have sought to negotiate language to substitute for or remedy some of the concerns as expressed by my colleague, but I want now to return to a second point about regulatory reform.

The PRESIDING OFFICER. The Chair advises the Senator that under a previous order, the Senate was to recess at 12:30 and not to reconvene until 2:15.

Mr. GLENN. Mr. President, I ask unanimous consent——

The PRESIDING OFFICER. The Senator from Delaware has the floor.

EXTENSION OF TIME FOR RECESS

Mr. ROTH. Mr. President, I ask unanimous consent that the recess ordered for 12:30 p.m. today be delayed in order that Senator DASCHLE be recognized to speak for a period of not more than 10 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. GLENN. Mr. President, I ask unanimous consent that Senator ROTH be permitted to speak until the minority leader reaches the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROTH. I thank the distinguished Senator.

Mr. President, as I was saying, I want to return to a second point about regulatory reform. Effective regulatory reform cannot be prospective only. It must look back to reform old rules already on the books, and the Dole-Johnston compromise contains a balanced, workable and fair resolution of how agencies should review existing rules. Agencies may select for themselves any particular rules that they think need reexamination, while allowing interested parties to petition the agency to add an overlooked rule.

To ensure that only a limited number of petitions will be filed, S. 343 limits petitions to major rules and sets a high burden of proof. Petitioners must show a substantial likelihood that the rule could not satisfy the cost-benefit decisional criteria of section 624. This is an efficient and workable method to review problematic rules.

The Glenn substitute, on the other hand, makes the review of agency rules a voluntary undertaking. There are no firm requirements for action, no set rules to be reviewed, no binding standard, no meaningful deadline.

The Glenn substitute simply asks that every 5 years, the agency issue a schedule of rules that each agency, in its sole discretion, thinks merits review. It does not require any particular number of rules to be reviewed, and if someone asks the agency to review a particular rule, there is no judicial review of a decision declining to place the rule on the schedule. Moreover, there is no judicial review of any of the deadlines for completing the review of any rules.

Mr. GLENN. Will the Senator yield for a question?

Mr. ROTH. My time is limited, so I want to continue.

The third point I want to emphasize is that effective regulatory reform must be enforceable to be effective. That means there has to be some opportunity for judicial review of the requirements of the legislation, just as there is with most any law Congress passed. S. 343 strikes a balance by allowing limited but effective judicial review.

S. 343 carves away from the standard level of judicial review provided by the Administrative Procedures Act which has existed for almost 50 years. The limited judicial review provided by S. 343 will help discourage frivolous lawsuits, and that is why S. 343 has limited judicial review.

An agency's compliance or noncompliance with the provisions of S. 343 can be considered by a court to some degree. The court can, based on the whole rulemaking record, determine whether the agencies sufficiently complied with the cost-benefit analysis and risk assessment requirements of S. 343 so that the rule passes muster upon the arbitrary and capricious standard.

The arbitrary and capricious standard is very deferential to the agency. A court would uphold the rule unless the agency's cost-benefit analysis or risk assessment was so flawed that the rule itself was arbitrary and capricious. The court would not strike down a rule merely because there were some minor procedural missteps in the cost-benefit analysis or risk assessment.

In contrast, the Glenn substitute, as now redrafted, does not permit meaningful judicial review of the risk assessment or cost-benefit analysis. The Glenn substitute only requires a court to invalidate a rule if the cost-benefit analysis or risk assessment was not done at all. But the Glenn substitute does not really allow the court to consider whether the cost-benefit analysis or risk assessment was done properly. Indeed, the language of the legislation has been so weakened that now substantial portions of this bill are irrelevant to the extent that a court could not require the agency to perform the cost-benefit analysis, the risk assessment or peer review in the manner prescribed by the bill.

Compliance with cost-benefit analysis and risk assessment requirements of the bill would be optional by the agency, the same way it is optional for them to comply with the Executive order that now requires these analyses.

Now, Senator GLENN has claimed that his bill is essentially the same as S. 291 which, of course, is the regulatory reform bill I introduced in January, which did receive bipartisan support of the Committee on Governmental Affairs. I say, as I stated earlier, that while the original Glenn bill was similar to the Roth bill, the latest version of the Glenn bill seriously differs from the Roth bill. Many of the provisions have been weakened. The Roth bill and the original Glenn bill required agencies to review all major rules in a 10-year period with a possible 5-year extension, or the rules would sunset or terminate. The revised Glenn substitute lacked any firm requirement about the number of bills to be reviewed.

Now, Mr. President, I think that is a very important and very significant change. As a matter of fact, as I said earlier, anyone who has reviewed the regulatory rules on the books have agreed that many of them are, today, irrelevant, cumbersome, and not equipped to do the job that they were intended. These studies have been made by distinguished organizations, including a group at Harvard. Our former colleague, and now Vice President GORE, has stated on a number of occasions, as part of his program to reinvent Government, that many regulations are undesirable. So I think it is a very, very serious mistake the way the Glenn substitute has weakened the lookback provisions of this legislation.

As I said, my original bill required all rules to be reviewed in a 10-year period, subject to a 5-year extension, and if a rule were not reviewed in that period of time, then, of course, the rule would be terminated. Under the revised Glenn substitute, that is not the case. It leaves everything entirely in the discretion of the agency head. An agency head could provide a 5-year schedule of reviewing rules that includes many appropriate rules. On the other hand, he or she could include one, zero, or five, as there are no requirements in the current version of the Glenn legislation that rules be reviewed.

As I say, I think this is a serious mistake. Worse still, Senator GLENN has weakened the judicial review provision that was in the Roth bill and that originally appeared in the Glenn bill. Here I have reference to section 623(E) of the Roth bill, the original bill, which stated that the cost-benefit analysis and risk assessment shall, to the extent relevant, be considered by a court in determining the legality of the agency action.

This is a matter that is particularly bothersome, because what the proposed legislation provides is that an agency will make a cost-benefit analysis and, where appropriate, it will make a risk assessment. But there is no requirement in the Glenn substitute that either the cost-benefit analysis or risk assessment be used in the rulemaking process. Now, it seems to me that that destroys the whole purpose of regulatory reform. I think many of us feel very strongly that regulatory reform,

as a general rule, means that benefits should justify costs.

Mr. President, I ask unanimous consent that the time before the recess be further extended for a statement to be made by the majority leader, following the statement of the minority leader.

The PRESIDING OFFICER. Without objection, it is so ordered.

The minority leader is recognized.

Mr. DASCHLE. Mr. President, I appreciate very much the distinguished Senator from Delaware accommodating both myself and the majority leader.

Mr. President, over the last week we have debated a regulatory reform bill that poses a number of serious concerns. Senators have come to the floor with amendments to address those concerns for over a week now.

It has become increasingly clear that in order to produce a bill that will be acceptable to a majority of this body and the President, significant changes will need to be made. Frankly, given the way the debate has gone—the fact that we have until now been unable to pass most of our amendments—I am not optimistic that we will be able to bring this bill into a form that is reasonable and responsible, unless the circumstances change.

Despite efforts last week to clarify that the bill will not override existing law, the so-called least-cost standard that remains will drive agencies away from choosing more cost-effective and thus economically sensible and justifiable regulatory options.

Last week, the Senate rejected by one vote my amendment to protect the ability of the Department of Agriculture to issue its proposed rule requiring science-based hazard analysis and critical control point, or HACCP, systems in meat and poultry inspections.

I later learned that while I was here on the Senate floor recounting the story of 2-year-old Cullen Mack, a young boy from South Dakota who fell ill from eating beef contaminated with E. coli bacteria, people were suffering from E. coli poisoning in at least four States: Georgia, Tennessee, Wisconsin, and Illinois.

So, despite the fact that we are confronted presently by real gaps in our ability to ensure a safer food supply, and despite the fact that the USDA rule would take a huge step toward that goal, we continue to have a bill that would subject that rule to legal challenge and consequent delay.

Farmers have special concerns about this bill. The Department of Agriculture each year issues regulations to implement the farm program— regulations that address wheat, wool, rice, cotton, and feedgrain programs. The Department issues regulations to implement the Federal crop insurance program and the Conservation Reserve Program. USDA marketing orders—orders which are voluntarily approved by agricultural producers—are implemented through Federal regulations.

Many, if not all, of these regulations would be subject to the cost-benefit and risk assessment delays of this bill. They would be subject to the decision criteria in the bill calling for the least-cost option, and they would be subject to judicial challenge. Do we really want to foreclose regulatory options that would provide greater benefits to farmers? Is this what we really want for rural America? I certainly do not think that this makes sense for South Dakota or any other rural State.

Recently, the majority leader, came to the floor of the Senate to discuss the power of shame. His comments were made in the context of the public debate over the content of Hollywood movies.

The leader made the point that shame can be a very valuable tool in the effort to encourage movie-makers to be more socially responsible in writing and producing movies. I agree. I think that in this society, shame can be a very powerful means of encouraging more responsible behavior.

Certainly, the evidence is clear that the Community-Right-To-Know Program has been able to put shame to good use. What industry wants to declare year after year that they are releasing poisons into the air and water of local communities? What industry is so callous that it is not moved to reduce those releases when faced with public disclosure of its behavior?

Why, then, if we can agree that shame is such a powerful tool, are we attempting to erode the effectiveness of the toxic release inventory—known as the Community-Right-To-Know Program—in this bill?

Last Thursday, this body voted against an amendment by Senators BAUCUS and LAUTENBERG to protect the Community-Right-To-Know Program.

Apparently, despite the clear success of this program in getting industries to cut their releases of toxic chemicals, shame is too tough a medicine for some industries to endure. Instead of shaming the special interests into responsible behavior, the Senate essentially defended the special interests' shameful behavior.

In addition to the special-interest fixes and the willingness of the sponsors of the bill to undermine even the most needed and supported rules, there are countless opportunities for petitions in the bill that will consume vast agency resources. Petitions themselves are subject to judicial review, increasing the likelihood of delay and administrative burden.

The sum effect of all these provisions would create havoc with out ability to protect public safety. The Office of Management and Budget estimated that the Dole-Johnson bill would cost the Federal Government roughly $1.3 billion to implement, including the salaries of an additional 4,500 full-time Federal employees, who would be needed to fulfill the bills' requirements. I am skeptical that the bill itself could even pass a cost-benefit test. It may well impose more costs on the Federal Government—and thus the taxpayers—than it purports to save in regulatory expenses.

At a time when we are trying to downsize the Government and balance the Federal budget, it makes little sense to consider legislation that would reverse our course. Last week, the House appropriators recommended cutting the Environmental Protection Agency's budget by one-third. Other Federal agencies will surely feel the budget knife this year and in the years to come.

Where will the money to pay the costs of this bill come from? Where will we find this army of analysts to fulfill all the new requirements of this bill? Who will pay for them?

The primary beneficiaries of this bill will be the large corporate law firms, which undoubtedly will enjoy a renaissance of business if it becomes law. The judicial review provisions invite a morass of litigation. In fact, I understand that there will be at least 144 different issues that can be litigated, if this bill is enacted. It is ironic that this body passed legislation limiting opportunities for litigation earlier this year and now stands poised to pass a bill designed to create an explosion of litigation.

Mr. President, no Senator would agree that every regulation that has ever been issued by the Federal Government makes good sense. All of us Members recognize that excesses occur in the development and enforcement of rules.

In many cases, we in Congress are to blame, as we enact laws that provide little or ambiguous regulatory guidance. Federal agencies are staffed by human beings, who are known to make mistakes from time to time. The political winds frequently change, carrying the Federal agencies in different and often inconsistent directions. So, the entire process is imperfect.

The question we are confronted with, then, is how can we improve the regulatory development process without crippling the ability of the Federal Government to protect the quality of our food supply, our water, our air, and all the other of those services that Americans have come to expect.

The bill we have been debating now for a week was seriously flawed when it was introduced, and our efforts to improve it have been thwarted. It remains a bill that could be used to undermine the ability of the Federal Government to carry out its responsibility to protect our environment and the health of American families. It is not emblematic of the type of society that most Americans believe we should be striving for, and should not be enacted in its current form.

The alternative regulatory reform bill that has been introduced by Senators GLENN, CHAFEE, and others would provide serious, constructive reform that I believe should gain broad support. Unlike the Dole bill, the Glenn-

Chafee bill would limit the opportunities for litigation to the fundamental question of whether the rule is a major rule and whether the final rule is arbitrary and capricious, taking into account the entire rulemking record. Unlike the Dole bill, it does not allow judicial review of the agency decisions to grant or deny petitions.

The Glenn-Chafee bill contains no special-interest fixes, which do not belong in a procedural bill like this and which should only be addressed through hearings and legislation debated within the committees of jurisdiction.

The Glenn-Chafee alternative does not impose rigid criteria of the Dole bill that agencies must apply when selecting a regulatory option, driving agencies toward the cheapest, but not necessarily the most cost-effective, alternative.

I think we can all agree that the costs and benefits of proposed rules should be considered during their development. But calculating those costs and benefits can present a great challenge.

What is the value of ensuring that our children and grandchildren do not suffer the effects of lead on their ability to reason? What is the value of ensuring that when we take our families to see the Grand Canyon, the air will be clean and we will have a clear view of that incredible vista? Given the extreme challenges in characterizing these values, does it make sense to apply such a rigid test to the rules that will effect the quality of our lives so profoundly?

The Glenn-Chafee substitute places cost-benefit analysis in proper perspective. It requires agencies to identify the costs and benefits of proposed rules, but does not elevate cost considerations above all else. The cheapest option is not always the best or the most cost-effective one.

The Glenn-Chafee bill follows an approach that I believe provides a far better representation of the goals and objectives of mainstream America with respect to regulatory reform. Apparently the Governmental Affairs Committee agrees with me.

I say that because the Glenn-Chafee is nearly identical to the bill passed unanimously by the Governmental Affairs Committee. It is moderate and sensible, and I believe it should serve as a model for reforming the regulatory process. The modifications that Senators GLENN and CHAFEE subsequently made to the Governmental Affairs-passed bill represent good, sensible improvements.

First, we have eliminated the arbitrary sunset for existing rules, that would have occurred whenever an agency failed to perform the needed review in a timely manner. Given the history of antagonism to environmental and public health and safety regulations that have been demonstrated by recent administrations, it does not make sense to provide future administrations that might also be antagonistic to such rules with the incentive to intentionally fail to perform reviews as a back-door means of repealing existing rules and thwarting the will of Congress.

Second, the Glenn-Chafee bill eliminates the narrative definition of major rules, adding clarity to the bill, and limiting its scope so as not to overburden Federal agencies.

Finally, the Glenn-Chafee alternative incorporates technical changes to the risk assessment portions of the bill to more closely track recommendations made by the National Academy of Sciences, and to cover specific programs, not merely agencies.

These changes strengthen the bill, make it more responsible and more reasonable. If the Senate is interested in real reform and wants to pass a bill that can be signed into law then I urge my colleagues to support this substitute.

Mr. President, I know the distinguished majority leader is here. To accommodate him and allow Senators to get to the caucus, I yield the floor.

Mr. DOLE. Mr. President, I thank the Democratic leader, Senator DASCHLE. I will take just a moment. I want to review for my colleagues. I think we made some progress on the regulatory reform bill. I think everybody would like to vote for regulatory reform.

There are some limits. We cannot accommodate everyone's request. We would have a bill that many on this side and many on that side would not vote for if we tried to accommodate every request.

There will be a cloture vote immediately after the vote on the so-called Glenn-Chafee substitute. I think there will be a third cloture vote. As I set out in the schedule, hopefully we would finish this bill today, to start on Bosnia late this evening or early tomorrow morning.

There has been a cloture petition filed. There could be a third cloture vote. I have not made that final determination. Sooner or later, we have to recognize we have just about accommodated everybody we can. We have made a number of major changes in this legislation. Some are concerned that perhaps we made too many—''we,'' talking about the people who manage the bill and understand the bill.

We think it is a good bill. It is real regulatory reform. It is what the American people are demanding. It is what small businessmen, farmers, ranchers, everybody else is demanding. We believe it is time to come to grips with it, and move on to something else.

We have had parts of 9 days on this bill. That seems to be a standard on the Senate side. Everything takes 9 days. Maybe this will take 10 days. I do not know that the end is in sight. I alert my colleagues, if you are for regulatory reform, vote for cloture; if you are opposed to regulation reform, vote no, as you did yesterday.

RECESS UNTIL 2:15

The PRESIDING OFFICER. Under the previous order, the Senate will now stand in recess until the hour of 2:15 p.m.

Thereupon, the Senate, at 12:53 p.m., recessed until 2:15 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer [Mr. GRAMS].

COMPREHENSIVE REGULATORY REFORM ACT

The Senate continued with the consideration of the bill.

VOTE ON AMENDMENT NO. 1581

The PRESIDING OFFICER. Under the previous order, the question now occurs on amendment No. 1581.

Mr. SHELBY. Mr. President, I ask for the yeas and nays on the GLENN amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the amendment. The clerk will call the roll.

The legislative clerk called the roll.

The PRESIDING OFFICER. Are there any other Senators in the Chamber who desire to vote?

The result was announced—yeas 48, nays 52, as follows:

[Rollcall Vote No. 310 Leg.]

YEAS—48

Akaka	Feingold	Lieberman
Baucus	Feinstein	Mikulski
Biden	Ford	Moseley-Braun
Bingaman	Glenn	Moynihan
Boxer	Graham	Murray
Bradley	Harkin	Nunn
Bryan	Hollings	Pell
Bumpers	Inouye	Pryor
Byrd	Jeffords	Reid
Chafee	Kennedy	Robb
Cohen	Kerrey	Rockefeller
Conrad	Kerry	Sarbanes
Daschle	Kohl	Simon
Dodd	Lautenberg	Snowe
Dorgan	Leahy	Specter
Exon	Levin	Wellstone

NAYS—52

Abraham	Gorton	McCain
Ashcroft	Gramm	McConnell
Bennett	Grams	Murkowski
Bond	Grassley	Nickles
Breaux	Gregg	Packwood
Brown	Hatch	Pressler
Burns	Hatfield	Roth
Campbell	Heflin	Santorum
Coats	Helms	Shelby
Cochran	Hutchison	Simpson
Coverdell	Inhofe	Smith
Craig	Johnston	Stevens
D'Amato	Kassebaum	Thomas
DeWine	Kempthorne	Thompson
Dole	Kyl	Thurmond
Domenici	Lott	Warner
Faircloth	Lugar	
Frist	Mack	

So the amendment (No. 1581) was rejected.

Mr. DOLE. I move to reconsider the vote by which the motion was rejected.

Mr. HATCH. I move to lay that motion on the table.

The motion to lay on the table was agreed to.