

**EXAMINING S. 3302,  
THE MOTOR VEHICLE SAFETY ACT OF 2010**

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**HEARING**

BEFORE THE

**COMMITTEE ON COMMERCE,  
SCIENCE, AND TRANSPORTATION**

**UNITED STATES SENATE**

**ONE HUNDRED ELEVENTH CONGRESS**

**SECOND SESSION**

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**MAY 19, 2010**  
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Printed for the use of the Committee on Commerce, Science, and Transportation



U.S. GOVERNMENT PRINTING OFFICE

66-783 PDF

WASHINGTON : 2011

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ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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**EXAMINING S. 3302,  
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**WEDNESDAY, MAY 19, 2010**

U.S. SENATE,  
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,  
*Washington, DC.*

The Committee met, pursuant to notice, at 4:18 p.m. in room SR-253, Russell Senate Office Building, Hon. John D. Rockefeller IV, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. MARK PRYOR,  
U.S. SENATOR FROM ARKANSAS**

Senator PRYOR [presiding]. I'll go ahead and call our hearing to order today. The Committee on Commerce, Science, and Transportation today will be considering S. 3302, the Motor Vehicle Safety Act of 2010.

We have a great panel of witnesses today. I want to thank all of our witnesses for coming, and the others in attendance here.

And Chairman Rockefeller has been detained on the floor. We think he's heading back this direction, but he has asked me to go ahead and get underway. And we will have opening statements as Senators arrive here. As you all know, we're in a rollcall vote right now, and I don't think it has closed, just yet. So, we'll probably have a few Senators trickle in.

But, first I want to thank Chairman Rockefeller for his leadership on this issue and for holding this hearing to review legislation that he and I have worked on in recent weeks to address some of the issues that came to light during this committee's March 2nd hearing on sudden unintended acceleration. That hearing revealed several weaknesses at NHTSA, and within the industry, that we have attempted to address in the legislation under consideration before us today.

I believe our legislation, while not perfect, represents a reasonable, strong, smart, and lasting approach for dealing with automobile safety concerns identified in our review of the recent sudden unintended acceleration cases. Among others things, our legislation requires NHTSA to focus on electronic and computer control systems in the modern automobile. And I think one of the reasons that's important is most of us, when we think of cars, we certainly think of them as mechanical, and they are, still, very much. But, now there's a very important electronic component to most vehicles, if not all, and I think it's time for NHTSA to focus on the computer systems and electronics of vehicles, because I think they have a very direct bearing on safety.

The bill also increases funding for NHTSA to oversee the diverse range of mechanisms involved in automobiles of the Digital Age. It establishes safety standards to address weaknesses identified in our recent review of sudden unintended acceleration. It provides the design and function of NHTSA's website in early warning reporting database. And, here again, we just think that it's time for NHTSA to look at that anew. And, see if we can improve the way the database works and, where it would benefit as many people as possible.

The bill also enhances NHTSA's existing authorities to provide for better consumer protection. It strengthens penalties for companies that knowingly mislead NHTSA. And it attempts to address a potentially problematic cozy relationship between NHTSA and the industry it is tasked to oversee. I know that not everyone agrees that there's a cozy relationship there, but the bill tries to make sure that there's not.

And I look forward to hearing from our witnesses today. And I hope that we're able to move this legislation through the Committee sometime soon and move it to the floor and, hopefully, get the process started as soon as we can.

So, as we're still waiting on Senators to arrive because of the rollcall vote, what I'd like to do is acknowledge and introduce our first witness. It's The Honorable David Strickland, Administrator of the National Highway Traffic Safety Administration, U.S. Department of Transportation. I could give a very long introduction, here, because he has had a distinguished, even a remarkable, career helping consumers, and he's already making a big impact at NHTSA.

So, with that, Mr. Strickland, would you mind giving your opening statement?

**STATEMENT OF HON. DAVID L. STRICKLAND,  
ADMINISTRATOR,  
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATOR**

Mr. STRICKLAND. Thank you very much, Senator Pryor. I really appreciate the kind introduction and the opportunity to appear before the Commerce Committee again.

Members of the Committee, the men and women of NHTSA thank you for the opportunity today to discuss the proposals to strengthen the authority of the National Highway Traffic Safety Administration. I applaud the Committee members, and their staffs, for working so hard to understand these issues and for reflecting that understanding in the Motor Vehicle Safety Act of 2010.

Time has not permitted a full review of all the legislation's provisions throughout the Executive Branch, so my remarks will be confined to some of the major provisions.

Today's hearing is an opportunity for us to work together to improve safety on our Nation's roadways. Again, we very much appreciate the provisions in the bill that would enhance NHTSA's vehicle safety authority. NHTSA is a strong agency. The bill's authorities would make us stronger. If enacted, these measures would significantly increase the agency's leverage in negotiating and dealing with the manufacturers. With the addition of imminent hazard au-

thority, which would bring NHTSA's authority into line with that of many other safety and health agencies in the Federal Government, this provision gives NHTSA an important avenue through which to deliver on its promise of consumer protection. And it is a mission that I strongly believe in.

However, as drafted, the provision stops short of giving NHTSA full recall-order authority in these situations, when needed. The bill would permit NHTSA to order manufacturers to notify purchasers that the vehicle, or equipment, poses an imminent safety hazard, and provide the purchaser with information explaining the safety risks and actions purchasers can take to reduce that risk. Notification does not constitute a recall, which consists of both notice to the owners and the provision of a remedy or the noncompliance or defect. We would like to work with the Committee to ensure that the legislation provides consumers with an actual remedy in the face of an imminent hazard.

As part of our safety mission, NHTSA collects a wealth of information in our various databases. We share in President Obama's assessment that information maintained by the Federal Government is a national asset.

The proposed legislation would require NHTSA to improve the accessibility of the information on its publicly available safety databases. We will be very happy to do so, and we already have several ideas on how to make our recall, and our investigations data, much more user-friendly.

Even in their current state, NHTSA's information stores are among the most outstanding consumer safety databases in government. Improving them would promote transparency. Transparency promotes accountability and provides information for citizens about what their government is doing.

Some of the rulemaking provisions that are also included in the legislation do not currently provide the flexibility that NHTSA needs in determining the best way to devise standards that accomplish the bill's current purposes. For example, the event data-recorder provision contains very specific time periods during which data would have to be recorded under the new rule. NHTSA needs the flexibility to determine what parameters are technologically feasible and what would be best to serve the purposes of the provision.

Similarly, the section's prohibition on permitting event data recorders to record or transmit vehicle location may be disruptive to advanced crash notification systems that can provide emergency responders with precise location of accidents. NHTSA needs discretion to balance the competing needs of privacy and the automatic notification of emergency first responders.

I and the staff of NHTSA are looking forward to working with the Secretary and the Congress to strengthen and improve NHTSA so that it can continue to achieve its mission in saving lives, preventing injuries, and reducing economic costs due to road traffic safety crashes. We will be accountable to the President, to the Secretary of Transportation, and to the American public, whom we are very proud to serve.

Thank you very much, Senator Pryor and the rest of the Committee. I look forward to answering your questions.

[The prepared statement of Mr. Strickland follows:]

PREPARED STATEMENT OF HON. DAVID L. STRICKLAND, ADMINISTRATOR,  
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Chairman Rockefeller, Ranking Member Hutchison, and members of the Committee:

Thank you for the opportunity to appear before you today to discuss legislative proposals to strengthen the authority of the National Highway Traffic Safety Administration (NHTSA) and to address many issues raised by the recent Toyota recalls. I applaud the Committee members and their staff for working so hard to understand these issues and for reflecting that understanding in S. 3302, "The Motor Vehicle Safety Act of 2010."

**Status of NHTSA's Activities Related to Toyota Recalls**

Before I speak to some of the proposed measures in the bill, allow me to briefly summarize the current status of NHTSA's activities related to the Toyota recalls. As you know, we initiated three separate actions in February: a timeliness query (TQ) related to the pedal entrapment recall; a TQ related to the "sticky pedal" recall; and a recall query (RQ) looking at whether those two recalls were sufficient in scope and whether there are other matters related to unintended acceleration in Toyota vehicles that should have been addressed by the company. On April 19, Toyota agreed to pay \$16,375,000 in civil penalties in connection with the sticky pedal TQ. This is the maximum penalty available under current law. NHTSA believed the penalty was warranted due to the company's failure to inform the agency in a timely way about the safety defect involved in that recall.

We are continuing to review the large number of documents submitted by Toyota in response to the pedal entrapment TQ. We have not reached a decision yet on whether the facts of that case warrant a civil penalty. We have recently begun to review the huge volume of documents received in response to the RQ. The documents are so numerous that we have entered into an agreement with the Department of Justice to help us categorize and analyze the documents. That task will take some time.

At the same time we have undertaken two important reviews of issues related to unintended acceleration. The first is a review of the electronic throttle control (ETC) system in Toyota vehicles. This review entails in-depth research into the design, function, and safety measures associated with that system, including all of its electronic components and software. The National Aeronautics and Space Administration (NASA) is assisting us in this effort, which is well underway. NASA brings its great expertise in electronic control systems, forensic analysis, and fail-safe design to the project. NASA's expertise is being complemented by specific automotive electronics and safety systems expertise from both inside and outside of NHTSA. The team is working to identify any possible failure modes in the ETC system that can lead to unintended acceleration and that involve conditions that can realistically be expected to occur in consumers' use of these vehicles. We are hoping to complete this review of the ETC system by the end of August, but that will depend on just how quickly the necessary testing and analysis can be done. If we do find such possible failure modes that might explain any of the unintended acceleration events reported to NHTSA, we will open a defect investigation.

The second review will be conducted by an independent panel of experts chosen by the National Academy of Sciences (NAS). This group will study the broad subject of unintended acceleration and electronic control systems across the automotive industry. They will look at subjects such as electronic vehicle control systems' design and reliability (including hardware and software issues), electromagnetic compatibility and electromagnetic interference, existing relevant design and testing standards, human factors and the possibility of human error, and mechanical failure. The panel will make recommendations to NHTSA on research, rulemaking, and enforcement activities and the personnel, infrastructure, and financial resources required for NHTSA to help ensure the future safety of ETC systems and other electronic control functions. NAS has begun the process of identifying panel members, and we have been informed that the panel will be established by July and will complete its work within 15 months. We think this group's work comes at a very opportune moment, not only to provide advice to the agency on the unintended acceleration issue, but also to provide such advice on the range of electronics issues that might affect motor vehicle safety as new electronic crash avoidance and other technologies rapidly proliferate in the vehicle fleet.

### Legislative Proposals

We very much appreciate the provisions in the bill that would enhance NHTSA's vehicle safety authority. If enacted, these measures would significantly increase the agency's leverage in dealing with recalcitrant manufacturers in situations where we think recalls are necessary or where the manufacturer has not been totally forthcoming on possible defects or noncompliance issues. As illustrated by our recent penalty action against Toyota, the current maximum penalty is not a very significant sum of money for a major corporation and, accordingly, does not present much of a deterrent.

The addition of imminent hazard authority would bring NHTSA's authority into line with that provided to many safety and health agencies. If the threat to human life is truly imminent, the agency needs to act quickly and not be slowed down by a lengthy procedural process. Of course, we understand the need to use such extraordinary authority very judiciously, and would use it only in those situations where the hazard was truly imminent and the manufacturer unwilling to cooperate.

However, as drafted, the imminent hazard provision (section 202) stops short of giving NHTSA full recall order authority in these situations. The bill would permit NHTSA to order manufacturers to notify "purchasers" (we think this should be "owners, purchasers, and dealers") that the vehicle or equipment poses an imminent safety hazard and provide the purchaser "with information explaining the safety risk and actions the purchasers can take to reduce the risk." Such notification does not constitute a recall, which consists of both notification to the owners and the provision of a remedy for the noncompliance or defect. We would like to work with the Committee to ensure that the legislation provides consumers with an actual remedy in the face of an imminent hazard.

Of course, the bill would ensure that a manufacturer facing a recall order issued under this authority would have the opportunity for prompt and thorough review in the court of appeals. This important aspect of the draft legislation retains the manufacturer's right to judicial review of a recall order but situates that review directly in the appellate courts. Current law requires NHTSA to bring an action in district court to enforce a recall order and to prove its case in a trial de novo. The manufacturer could further challenge a district court decision in the appellate courts. Meanwhile, the vehicles or unsafe equipment would still be in use by consumers who remain exposed to all of the dangers associated with the defect or noncompliance. We think the balance struck by the Committee greatly enhances the protection of consumers.

We believe the bill's rulemaking provisions correctly identify the major areas where new or revised standards may have a beneficial effect on reducing the frequency or severity of unintended acceleration. In many of these areas the agency has already begun to increase its understanding of the subject and possible regulatory options, and we expect to learn a great deal more from the two reviews discussed earlier. Of course, to get to the point where we can propose well-conceived and fully researched new safety standards will, in most cases, take a great deal more work. These rulemakings would be additions to NHTSA's already ambitious regulatory agenda, which includes many other high priority safety and fuel economy topics. The possibility exists that our ability to achieve the deadlines set for us in the proposed legislation may be constrained by circumstances. In light of these issues, we look forward to working with the Committee to help ensure that the deadlines contained in the legislation are achievable.

Some of the rulemaking provisions contain language that we believe would not preserve sufficient substantive flexibility for NHTSA in determining the best way to devise standards that accomplish the bill's purposes. For example, the event data recorder (EDR) provision (section 107) contains very specific time periods during which data would have to be recorded under the new rule. NHTSA needs the flexibility to determine what parameters are technologically feasible and would best serve the provision's purpose. Similarly, that section's prohibition on permitting EDRs to record or transmit vehicle location may be disruptive to advanced crash notification systems that can provide emergency responders with precise location information. NHTSA needs the discretion to balance the competing interests of privacy and automatic notification of emergency responders.

The bill would also require NHTSA to improve the accessibility of the information on its publicly available safety data bases. We will be very happy to do so and we have several ideas on how to make our recall and investigations data more user friendly. We appreciate the fact that the bill would give us some time for this project because significant changes to such large and publicly used data bases require great care in planning and execution. While we surely share the view that our data bases can be improved, I must add that even in their current state they are among the most outstanding consumer safety data bases in government.

The bill also includes what this Administration believes are extremely important whistleblower protections (section 306) for employees of motor vehicle manufacturers, part suppliers, and dealerships. The safety of our vehicles is better ensured when the workers who manufacture, supply, or sell them feel they can come forward with safety concerns without retaliation. NHTSA has, on rare occasions, received reliable information from whistleblowers and, of course, has not revealed their identities. However, we believe that NHTSA is not the appropriate agency to administer whistleblower protection provisions. Additionally, the diversion of administrative resources that would be required to carry out section 306 could detract from achievement of NHTSA's safety mission. We encourage the Committee to contact the Department of Labor (DOL) for technical assistance on this section. DOL already administers five other whistleblower statutes relating to the transportation sector.

This Administration's appointees are subject to the most stringent ethical standards ever applied within the Executive branch. We are certainly supportive of strengthening ethical standards applicable to career employees where the need exists.

Thank you and I would be happy to answer any questions.

Senator PRYOR. Thank you, Mr. Strickland.

Let me start, if I can, with event data recorders. Do you think that the law or the rules should require event data recorders on all new vehicles?

Mr. STRICKLAND. At this point, sir, we are looking at such a mandate, in terms of its feasibility and its cost. We believe that event data recorders provide a tremendous amount of information. Right now there is a rule in place, that will go into effect in 2012, where if there is an event data recorder on the vehicle, it has to have certain data elements provided. In light of what we have learned, not only from the past incidents with Toyota, but with other issues, we believe that there is great value to having these instruments on every car. But, we are going through our rulemaking process and our prior research, on an ongoing basis, to go forward with such a provision.

Senator PRYOR. And you mentioned that you thought that NHTSA should have flexibility in the type of data, et cetera, that's collected there. Could you go through that one more time?

Mr. STRICKLAND. Yes, certainly, Senator.

There is a tremendous number of elements and cost and other issues that have to be taken into consideration. Right now, most data recorders, I believe, record 5 seconds of pre-crash data and 1 second of post-crash data—

Senator PRYOR. And is that enough time?

Mr. STRICKLAND. My understanding, from the staff and from other experts is that this does provide us with the guidance, in terms of a crash scenario, to better understand what happened. We are looking right now at the sufficiency of the data, where there could be improvements made, looking at the cost and the technological issues, and there are also energy issues. There are design issues that have to be taken into account.

I know that, in some instances, event data recorders, in terms of their survivability and other issues, can theoretically be made to address all these issues. It could cost as much of a car. It could be—I think an airline data recorder is about \$20,000. So, I believe, for us to be able to make the right decision, we do need to have the flexibility to look at all of the elements so that we can make the right decision, in terms of the data. We also need to properly align the costs of the safety device so that we can still have, you

know, affordable cars throughout the populace, but achieve what we need, in terms of getting data.

Senator PRYOR. And then, one last question on the data recorders. Who should have access to the recorded data?

Mr. STRICKLAND. Well, right now, sir, the owner of the vehicle has access, and then can provide access to public safety officials and to NHTSA. We have not had any particular issues in getting data. We've had some difficulties, on occasion; but, we believe that it would be of great benefit if NHTSA had the ability to also have access of the data onsite, with the proper protections and protocols. But, right now, the law says, and the protocol is, that it's the owner of the vehicle that has control of the data, and we must ask permission to get access to it.

Senator PRYOR. Thank you. And I'm going to make this my last question, then I'm going to turn the hearing back over to the proper authority, here, the Chairman—

The CHAIRMAN. Do you remember my name?

Senator PRYOR.—of the Commerce Committee. What's that?

The CHAIRMAN. Do you remember my name?

Senator PRYOR. Senator Rockefeller?

The CHAIRMAN. Is that it?

Senator PRYOR. OK, yes.

[Laughter.]

Senator PRYOR. Senator Rockefeller.

Mr. STRICKLAND. Thank you, Mr. Pryor.

Senator PRYOR. And the last question that I would like to ask is on whether NHTSA—in your view, has adequate expertise in-house to fully understand and regulate electronic and sulfur control systems in a modern-day vehicle.

Mr. STRICKLAND. We have expertise on board right now to handle our mission. We can always be stronger. We can always be better.

The President has requested for us, in the 2011 budget, resources for 66 new positions. Some of those positions will be going to improve our internal expertise. We are in the midst of recruiting additional engineers and experts, as we speak. We definitely look forward to working with the Committee and the Congress, in terms of resources and the allocation of our resources, to make sure that we have what we need, in terms of expertise. I am confident with our onboard expertise, but, as I said, we are always looking to get stronger.

Senator PRYOR. Thank you.

And, Mr. Chairman, thank you for allowing me to go ahead and start the hearing. And I made a very short opening statement, and I think what we said, at the outset, is that we anticipate that you'll be making an opening statement, as well as Senator Wicker.

**STATEMENT OF HON. JOHN D. ROCKEFELLER IV,  
U.S. SENATOR FROM WEST VIRGINIA**

The CHAIRMAN [presiding]. Well actually, Senator Wicker and I are going to beat you—

[Laughter.]

The CHAIRMAN.—because we're just going to put ours in the record.

Senator PRYOR. Oh.

[Laughter.]

Senator PRYOR. OK.

[The prepared statement of Senator Rockefeller follows:]

PREPARED STATEMENT OF HON. JOHN D. ROCKEFELLER IV,  
U.S. SENATOR FROM WEST VIRGINIA

On March 2, the Commerce Committee held an extraordinary all day hearing on the serious safety defects found in Toyota vehicles.

During the hearing, it quickly became clear that we were also dealing with even larger safety issues that reached far beyond the individual cases of sudden acceleration that were the subject of recent Toyota recalls.

First, we learned the incredible extent to which almost every function in a car today is controlled by computers and electronics—especially safety systems. And yet, we have no minimum standards for vehicle electronics, including the electronic throttle controls that govern cars' speed.

Second, we learned that the National Highway Traffic Safety Administration (NHTSA) does not have the resources and the authority it needs to effectively enforce safety standards for all the cars on the road today.

While vehicle electronics largely control today's cars, NHTSA had only two electronics engineers to investigate the safety of hundreds of different car models.

And the agency's ability to enforce safety regulations is severely limited by the \$16 million cap on civil penalties against automakers—the equivalent of a parking ticket for corporations with billion-dollar revenue streams.

We are here today for a legislative hearing. With a number of my colleagues on this Committee, I introduced the Motor Vehicle Safety Act of 2010 to address these problems. To summarize, the bill would:

- Dramatically raise civil penalties for auto manufacturers that violate vehicle safety standards or withhold critical safety information from NHTSA;
- Require disclosure of more safety information to consumers, and mandate that NHTSA make its vehicle safety data bases more accessible;
- Give auto industry employees the same whistleblower protections as airline employees;
- Require senior auto executives to take a hands-on role in safety issues;
- Stop the revolving door of NHTSA safety regulators leaving to work for the auto industry;
- Increase NHTSA's authorization levels so it can hire the engineers and safety experts it needs to regulate today's computerized vehicle fleet;
- Create minimum safety standards for vehicle electronics;
- And require vehicles to stop within a certain distance—even if the engine is operating at full throttle.

I look forward to discussing the bill with my colleagues and hearing feedback from our witnesses: most importantly, how do they see these provisions and others in the bill working to protect consumers on the road?

It was Toyota's recent recalls that brought intense focus to serious safety risks on the road—but this legislation is about auto safety writ large. It tackles the issues industry-wide and directly at the government agency charged with safety oversight.

If we are serious about protecting the American people—and the hard-working employees of companies like Toyota—we cannot hide from questions of safety. We must face them head-on, honestly and directly.

The American people will buy more cars—and the auto industry will thrive—only when people feel confident their cars are safe.

*We can do better by the American people—and with this legislation we will.*

The CHAIRMAN. Speaking personally, I'm totally embarrassed and apologize to the witness, and to the other witnesses, because we were having a vote on the floor, which is, to me, of such magnitude that I could not leave, and therefore, put everybody else at inconvenience, and I do apologize for that. And I thank you, Senator Pryor, for chairing.

OK, I want to actually continue on his line of questioning, Mr. Strickland. If we get what we call for in the bill, you're going to

get a lot more money next year, a lot more money the year afterwards, a lot more money the year afterwards. It'll go up to about \$280 million. And when you said, "We are recruiting"—well, there are several areas of recruiting, it seems to me. In other words, when you say, "We could always do better"—and I, at one point, had, in my talking points, that you had, actually, only two people who were trained engineers in electronics, and I wasn't aware of any people who were trained in computer software.

Now, I can, hopefully, be entirely wrong. But, if I'm not wrong, or if I'm close to not being wrong, then it's not a question of, "We can always do better," you've got to do a whole lot better, because the world has changed from a little cord that went to the pedal—as opposed to the computers, which now govern everything. And we're talking about brake overrides and all the rest of it. This is a very, very, very different automobile, and I assume it'll get much more complicated.

So, I'm really interested in—when you say, "We can always do better," who are you going afterwards? How do you do it? How long does the training take? Maybe you just get people who have this already, but, to me, it's not a question of, "We can always do better," it's a question, "You've got to do a whole lot better, real fast." And yet, I'm not entirely certain that—unless you get somebody who's already fully trained, that you can do that really fast.

Can you comment on all this, please?

Mr. STRICKLAND. Yes, sir, Mr. Chairman. Right now, to answer the first part of your question, we have 10 engineers with electrical/electronics training. We have a software engineer at our vehicle test center in East Liberty, Ohio. We always have the ability, and we have called upon our resources, to hire contractors, to assist us in our efforts.

I do agree, we need to strengthen ourselves quickly, and the universe of expertise in automobiles is a finite one. Electrical engineers, software engineers, automotive engineers, usually work in the manufacturing sector for one of the automobile manufacturers, where they would have a great deal of expertise, either on the line or in development. I expect that to be the source of our recruitment, those folks that have done a lot of this type of work. So, as Administrator, my expectation will be to hire the best folks and get them online quickly. There should not be a serious uptick, in terms of the needs for training, in terms of dealing with the issues that are at hand. The goal for us is to make sure we get as many of these folks as possible where we need them. I am relying upon our senior leadership and our staff in recognizing the areas of emphasis for electronics and software and mechanical systems.

The CHAIRMAN. But, you're saying that you have one person in Ohio on software, and I'm kind of gaping. I mean, cars are computers now.

Mr. STRICKLAND. Yes, sir, they are.

The CHAIRMAN. And if you have somebody—you don't have anybody in your office, but you have somebody in Ohio, and then you talk about contracting to get advice. I mean, you've got how many—280 million cars to overlook, and hundreds of brands of cars, and hundreds more iterations in the years to come, thousands of more iterations, cars from all over the world. Do you have your

eyes—have your people identified—you say it will not be a problem to get the electrical folks and the computer folks—or, actually, you haven't said that about computers, you said you have one in Ohio. That doesn't sound like a lot of help.

Mr. STRICKLAND. Well, I think, sir, you have to recognize that we leverage our expertise internally for all of our engineers and our experts. But, we have a universe of about 250 million cars that NHTSA is responsible for the oversight and its safety. So, it isn't necessarily we're looking at a correlation of one-to-one. What we do is, as you well know, we look for trends and data to show defect issues. And our expertise on board, even though they might not specifically be a computer engineer or a software engineer, our group of automotive engineers, collectively, are some of the best in the world. And their expertise—

The CHAIRMAN. OK. Well, let me just—I only have 16, 18, 17, 16 seconds left. Tell me, rather than all of the wonderful things that are going to happen, what frustrates you about what expertise you do not have. Don't make this sound happy. I mean, this is the real world, people's lives are at stake. Where are you disappointed when—granted, you've only been there a short period of time. I don't know how much attention was paid to this over the last 10 years, and you haven't had a very good budget. But, you're getting that, so you're going to be able to count on that, I think, so that you have to be frustrated about what you don't have.

Mr. STRICKLAND. Mr. Chairman, we, at NHTSA, take our jobs very seriously. Thirty-four thousand people lost their lives in 2008 because of roadway accidents. Our best successes, unfortunately, always lead to the fact that we have a tremendous loss of life on the roads. And so, however you lose your life, it's a very serious matter.

My frustration? My frustration is that fact that every time somebody loses their life on the roadway, it is because we weren't able to do enough. We can never do enough. And we appreciate the resources that this committee is trying to get for us to improve ourselves and to strengthen ourselves. But, in terms of a general frustration, it's a mission frustration. And until we get to zero, I, frankly, will always be frustrated.

The CHAIRMAN. Thank you.  
Senator Wicker.

**STATEMENT OF HON. ROGER F. WICKER,  
U.S. SENATOR FROM MISSISSIPPI**

Senator WICKER. Thank you, Mr. Chairman. Let me say, I would ask that my opening statement be placed in the record.

The CHAIRMAN. Of course.

[The prepared statement of Senator Wicker follows:]

PREPARED STATEMENT OF HON. ROGER WICKER, U.S. SENATOR FROM MISSISSIPPI

Thank you, Mr. Chairman, for holding this hearing to examine the Motor Vehicle Safety Act of 2010. The incidents of unintended acceleration, and the attention they brought to the defect recall process at NHTSA, raised public awareness about vehicle safety. I appreciate the Committee's efforts to address that issue.

I want to thank all our witnesses and stakeholders for being with us today. Your expertise and input is invaluable to our efforts to ensure vehicles are safe. Your tes-

timony will also help us identify the best possible process and interaction between consumers, manufacturers and NHTSA.

While I support addressing specific issues that have been raised regarding vehicle safety, I do have reservations about the bill in its current form. I have some concerns about the various provisions that I will address further during questioning with our witnesses.

Generally, there are mandates that could require significant and costly redesigns of some vehicles without significant safety benefits—especially given the existence of other provisions such as the brake override. The time frames for creation of rules by NHTSA, and subsequent implementation of these rules by the manufacturers, appear unrealistic and in some cases impossible.

I am interested to learn more about the budget authorization increases in the bill. I would like to know how NHTSA anticipates using these funds. It is also important to learn more about how the specific amounts requested relate to the actual costs that NHTSA anticipates taking on with the new authorities and requirements in the bill.

Some have expressed concern about the privacy implications of all the new data that will be collected under the bill. I would like to submit for the record testimony submitted at the recent House hearing on vehicle safety legislation about the privacy issue.

I want to ensure that all rulemakings and new mandates are appropriately researched and founded in facts. This is the only way to ensure they will achieve the most effective results in the most efficient way possible. We must also be very careful to avoid creating unintended consequences, especially when dealing with such highly technical issues.

I want to thank the Chairman for his continued commitment to vehicle safety, and I look forward to working with stakeholders and my colleagues toward a bipartisan bill that focuses on necessary actions to ensure vehicles are safe.

Senator WICKER. I have several reservations about the bill, in its current form. And let me just mention, in taking time in this round, the mandates could require significant and costly redesigns, without convincingly making significant safety benefits. So, I'm concerned about that.

The Chair mentioned the budget authorization. It, indeed, doubles the spending on this aspect of your agency. I think we should be careful to make sure the specific amounts requested actually relate to the actual cost that NHTSA will be taking on under this new legislation.

And, number three, a number of people are concerned about the privacy implications of the data that will be collected under the bill. At this point, I'd like to ask that the testimony, before the House Energy and Commerce Committee, of Jim Harper, on May 6, be entered into the record. Do I have a unanimous consent for that—

The CHAIRMAN. You certainly do.

Senator WICKER.—Mr. Chairman? Thank you very much.

[The information referred to follows:]

PREPARED STATEMENT OF JIM HARPER, DIRECTOR OF INFORMATION POLICY STUDIES, THE CATO INSTITUTE TO THE HOUSE ENERGY AND COMMERCE COMMITTEE'S SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION AT A HEARING ON "H.R. \_\_\_\_\_, THE MOTOR VEHICLE SAFETY ACT"—MAY 6, 2010

Chairman Rush, Ranking Member Whitfield, and members of the subcommittee, thank you for inviting me to address this hearing on H.R. \_\_\_\_\_, the Motor Vehicle Safety Act of 2010.

My name is Jim Harper, and I am Director of Information Policy Studies at the Cato Institute. In that role, I study and write about the difficult problems of adapting law and policy to the challenges of the information age. I have maintained a website called *Privacilla.org* since 2000, cataloguing many dimensions of the privacy issue, and I also maintain an online Federal legislative resource called *WashingtonWatch.com*. It had over 1.6 million visitors in 2009.

Cato is a market liberal, or libertarian, think-tank, and I pay special attention to preserving and restoring our Nation's founding, constitutional traditions of individual liberty, limited government, free markets, peace, and the rule of law.

I serve as an advisor to the Department of Homeland Security on its Data Integrity and Privacy Advisory Committee, and my primary focus in general is on privacy and civil liberties. I am not a technologist, but a lawyer familiar with technology issues. As a former committee counsel in both the House and Senate, I understand lawmaking and regulatory processes related to technology and privacy.

After sharing two prefatory observations about the constitution and risk management, I will turn to the privacy issues involved with the mandate for event data recorders authorized by section 107 of the legislation. My conclusions are that most of the Motor Vehicle Safety Act exceed the proper role of the Federal Government, that collective overspending on collection of accident data may undermine the goal of preserving drivers' lives, and that mandatory EDRs are another move toward constructing surveillance infrastructure that threatens the privacy and liberty of the American citizen.

### **What's a Constitution When Lives Are at Stake?**

My analysis of Federal legislation always begins with the Constitution. Which grant of power in the Constitution allows Congress to act? And what impediments on Federal power may limit Congress' action?

The Motor Vehicle Safety Act shares a constitutional infirmity with much of the legislation Congress considers today. There is no source of authority for it in the Constitution.

Likely, if your committee advances this legislation, your report will cite the commerce clause (article I, section 8, clause 3) as the specific power granted to Congress in the Constitution to enact it as law. That clause gives Congress power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The preface to the Cato Institute's pocket constitution—more than three million copies in print—discusses the meaning of this provision. Since the New Deal,<sup>1</sup> the Supreme Court has abandoned the meaning and purpose of the commerce clause, allowing Congress to regulate based merely on activity having effects on interstate commerce.<sup>2</sup>

You may regard the constitution's limited, enumerated grants of power, as quaint. But they are not. You swore an oath to bear true faith and allegiance to the constitution at the beginning of this Congress, as the Constitution requires you to do.

This is not just ceremony, and the Constitution is not just a symbol. The results of continuing nonchalance about the Constitution's limits are plain to many observers.

With reason, many people regard the Federal Government as overly large, remote, and imperious. Your good intentions notwithstanding, many view Congress negatively, as a body that cannot hew to any principle.

It is not just principle. There are consequences to disregarding the Constitution. Campaign finance law "reformers" believe that too much money is spent on politics and influence at the Federal level. But people and organizations will always try to influence the government's influence over them. Money follows power. Huge expenditures on political influence follow directly from the hugeness of Federal power.

As you press the Federal Government into involvement in every segment of the economy—including auto safety, automobile design, and auto safety research—you should not be surprised to find that every segment of the economy spends money on lobbying and campaigning to push for its interests. If you want campaign finance reform, follow the Constitution and move authority back to the states and people where it belongs.

The good intentions that animate your auto safety efforts do not overcome constitutional limits on the government.

### **Is Auto Safety for Rich People?**

Everybody shares the goal of maximizing the welfare of Americans, including by making auto travel safe. Better data about the operation of cars in the moments before collisions would almost certainly improve knowledge of how to make auto travel safer. Important questions remain about using event data recorders to gen-

<sup>1</sup>*E.g. Wickard v. Filburn*, 317 U.S. 111 (1942) (approving the regulation of wheat grown for personal use and not for sale under the Commerce Clause).

<sup>2</sup>The Court discovered the commerce power's present outer limits in *United States v. Lopez*, 514 U.S. 549 (1995), which found that gun possession near a school was too attenuated from effects on commerce to be within the commerce power.

erate statistical research that would improve the design of the Nation's cars, however.

Risk management and benefit-cost analysis can enlighten efforts to maximize welfare by improving auto safety. As a member of the Department of Homeland Security's Data Privacy and Integrity Advisory Committee, I helped design a framework for analyzing programs that generalizes to the problem of auto safety. In fact, we used the "security" of cars against common threats to illustrate risk management.

In the DHS Privacy Committee's "framework document,"<sup>3</sup> we defined the risk management problem as determining how, and how well, a program addresses threats to the public. With benefit information in hand, the costs of the program can be compared to determine whether it cost-effectively lowers risk. (Making auto travel safer for people is easier than securing against terrorism. Both the threats to car occupants and the costs of steps to counter such threats are easier to measure.)

Responses to health threats like automobile collisions can be categorized four ways:

- Acceptance—a rational alternative that is often chosen when the threat has low probability, low consequence, or both. Low-speed "fender benders" occur often, but are acceptable in terms of human safety because they have only the rarest impacts on life and health.
- Prevention—alteration of the target or its circumstances to diminish the risk of the bad thing happening. This is the main goal of data collection, to learn how cars might be altered to protect life in the event of serious collisions.
- Interdiction—confrontation with, or influence exerted on, an attacker to eliminate or limit its movement toward causing harm. The Privacy Committee report cited "flashing your lights to warn another car about the fact that you are passing" as a "mild interdiction." Discovering new interdiction techniques may be a goal of data collection.
- Mitigation—preparation so that, in the event of the bad thing happening, its consequences are reduced. It is unlikely, but the inclusion of first aid materials, for example, may be a mitigation of the effects of collisions on human health.

More data might contribute to each type of response to threats to human health from auto collisions. Continuing with the risk management framework:

The final step in analyzing the program's efficacy is to be aware of new risks created by the prevention, mitigation, or interdiction of the threats under consideration. Installing heavy iron siding to a car may mitigate the risk to the car from accidents. At the same time, the reinforced car may pose new risks to other cars and pedestrians.

I do not worry that NHTSA will propose iron siding that sends cars careening into bike paths and playgrounds. But the costs of the data collection program may have risk transfer effects that are important to consider.

According to the Research and Innovative Technology Administration's Bureau of Transportation Statistics there were 6,813,369 new retail sales of passenger cars in the United States in 2008.<sup>4</sup> This is the lowest number of new car sales since at least 1990, given economic conditions 2009 was probably not a good year, and the only year for which BTS reports lower sales is 1960. The number of vehicles on American roads, meanwhile, continues to rise, to a whopping 254,403,082 as of 2007.<sup>5</sup>

A demand curve is a graph illustrating the willingness of consumers to buy at a certain price. A downward sloping demand curve reflects the common circumstance in most markets: people buy less of things that cost more. In the demand curve pictured on the next page, an increase in price of two units will cause sales to drop by one unit.

<sup>3</sup> Report of the Data Privacy and Integrity Advisory Committee, No. 2006-01 (March 29, 2006) [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_aducom\\_03-2006\\_framework.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_aducom_03-2006_framework.pdf).

<sup>4</sup> U.S. Department of Transportation, Research and Innovative Technology Administration, Bureau of Transportation Statistics, Table 1-12: U.S. Sales or Deliveries of New Aircraft, Vehicles, Vessels, and Other Conveyances [http://www.bts.gov/publications/national\\_transportation\\_statistics/html/table\\_01\\_12.html](http://www.bts.gov/publications/national_transportation_statistics/html/table_01_12.html).

<sup>5</sup> U.S. Department of Transportation, Research and Innovative Technology Administration, Bureau of Transportation Statistics, Table 1-11: Number of U.S. Aircraft, Vehicles, Vessels, and Other Conveyances [http://www.bts.gov/publications/national\\_transportation\\_statistics/html/table\\_01\\_11.html](http://www.bts.gov/publications/national_transportation_statistics/html/table_01_11.html).



This is not the demand curve for automobiles in the United States, but the U.S. automobile demand curve almost certainly slopes the same direction. When automobiles are more expensive, people buy fewer automobiles.

I do not know how steep the U.S. demand curve for automobiles is, and I do not know the cost of installing electronic data recorders in cars. But it is a near certainty that putting EDRs in cars raises their costs and lowers sales.<sup>6</sup> It lowers sales more for poor people than for rich people. New car sales affect the availability of used cars, of course, and the cost of trading up from an older used car to a newer used car.

This has negative effects for the automobile industry, of course, and unemployment has negative effects on the health and well-being of people. But lower auto sales probably also have negative effects on the safety of drivers and passengers.

When people forgo new car purchases or trade-ups to newer used cars, they remain in older cars that are likely to be involved in more collisions due to wear and tear and design problems that have been rectified in newer models. When they are in collisions, occupants of older cars may suffer more injury and death than they would in newer cars which are better designed to protect them.

Because the poor are in older cars, the bulk of these effects—greater numbers of collisions and greater morbidity and mortality in collisions—will fall on poor people.

I do not have the cost data or the economic training to determine the amount of injury and death produced by including EDRs in automobiles, but it is almost certainly above zero, and it probably falls more heavily on the poor.

<sup>6</sup>I focus here on the policy of putting EDRs in all cars as a whole, not the incremental advance of that policy in this bill. By requiring all makes to build EDRs into their cars, the bill would prevent any one manufacturer from gaining a cost advantage by not doing so.

It would be a mistake to conclude that EDRs should not be put in automobiles. The data they collect can improve auto safety so that the dynamic I have described—newer cars being safer—will continue.

The idea of trade-offs merely sharpens the auto safety risk management question to: *How much data do you need to make cars safer?*

It seems plain that statistically relevant evidence about auto safety could be produced using sampling, by drawing on a cross-section of collisions from which EDR data is available. Putting EDR functionality in every car is overkill that has costs.

Perhaps 50 percent of the cars produced should have EDRs. Maybe it's 30 percent, or 60 percent. If there is to be a mandate, why not place it on more expensive models?<sup>7</sup> If EDRs were offered as a public safety option, perhaps the wealthier cohort of auto consumers would choose them, avoiding cost impositions that endanger the poor.

Analyzing EDR data from 100 percent of accidents is not required to produce valid auto safety research. An across-the-board mandate serves some other end, which I speculate about below. The auto industry's general "voluntary" inclusion of EDRs in automobiles is not strong evidence to the contrary. The industry may not have considered these trade-offs, or it may be pursuing ends beyond or distinct from safety.

### **EDRs and Privacy**

Privacy is a complex and vexing issue, and the interaction between EDRs and privacy is a challenge to describe or calculate. But the installation of EDRs in U.S.-sold vehicles to date has been a challenge to privacy. Making EDRs mandatory in new U.S. vehicles will erode privacy further, the privacy protections in the Motor Vehicle Safety Act notwithstanding.

The word "privacy" is used casually to describe many concerns in the modern world, including fairness, personal security, seclusion, and autonomy or liberty. Few concepts have been discussed so much without ever being solidly defined.

The strongest sense of the word "privacy" is its control sense: having control over personal information about oneself. In his seminal 1967 book *Privacy and Freedom*, Alan Westin characterized privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."

I use and promote a more precise, legalistic definition of privacy: as the subjective condition people experience when they have power to control information about themselves and when they have exercised that power consistent with their interests and values.<sup>8</sup> The "control" dimension of privacy alone has many nuances, and I will parse them here briefly.

#### *A Personal, Subjective Condition*

Importantly, privacy is a subjective condition. It is individual and personal. One person cannot decide for another what his or her sense of privacy is or should be.

To illustrate this, one has only to make a few comparisons: Some Americans are very reluctant to share their political beliefs, refusing to divulge any of their leanings or the votes they have cast. They keep their politics private. Their neighbors may post yard signs, wear brightly colored pins, and go door-to-door to show affiliation with a political party or candidate. The latter have a sense of privacy that does not require withholding information about their politics.

Health information is often deemed intensely private. Many people closely guard it, sharing it only with doctors, close relatives, and loved ones. Others consent to have their conditions, surgeries, and treatments broadcast on national television and the Internet to help others in the same situation. More commonly, they relish the attention, flowers, and cards they receive when an illness or injury is publicized. Privacy varies in thousands of ways from individual to individual and from circumstance to circumstance.

An important conclusion flows from the observation that privacy is subjective: government regulation in the name of privacy is based only on politicians' and bureaucrats' guesses about what "privacy" should look like. Such rules can only ape the privacy-protecting decisions that millions of consumers make in billions of daily actions, inactions, transactions, and refusals. Americans make their highly individual privacy judgments based on culture, upbringing, experience, and the individualized costs and benefits of interacting and sharing information.

<sup>7</sup> That rule could be adjusted where less expensive models do not share all the relevant design characteristics with the more expensive models.

<sup>8</sup> See generally, Jim Harper, "Understanding Privacy—and the Real Threats to It," *Cato Policy Analysis* No. 520 (Aug. 4, 2004) [http://www.cato.org/pub\\_display.php?pub\\_id=1652](http://www.cato.org/pub_display.php?pub_id=1652).

The best way to protect true privacy is to leave decisions about how personal information is used to the people affected. Political approaches take privacy decision-making power away from the people. At its heart, privacy is a product of autonomy and personal responsibility. Only empowered, knowledgeable citizens can formulate and protect true privacy for themselves, just as they individually pursue other subjective conditions, like happiness, piety, or success.

#### *The Role of Law*

The legal environment determines whether people have the power to control information about themselves. Law has dual, conflicting effects on privacy: Much law protects the privacy-enhancing decisions people make. Other laws undermine individuals' power to control information.

Various laws foster privacy by enforcing individuals' privacy-protecting decisions. Contract law, for example, allows consumers to enter into enforceable agreements that restrict the sharing of information involved in, or derived from, transactions. Thanks to contract, one person may buy foot powder from another and elicit as part of the deal an enforceable promise never to tell another soul about the purchase. In addition to explicit terms, privacy-protecting confidentiality has long been an implied term in many contracts for professional and fiduciary services, like law, medicine, and financial services. Alas, legislation and regulation of recent vintage have undermined those protections.<sup>9</sup>

Many laws protect privacy in other areas. Real property law and the law of trespass mean that people have legal backing when they retreat into their homes, close their doors, and pull their curtains to prevent others from seeing what goes on within. The law of battery means that people may put on clothes and have all the assurance law can give that others will not remove their clothing and reveal the appearance of their bodies without permission.

Whereas most laws protect privacy indirectly, a body of U.S. state law protects privacy directly. The privacy torts provide baseline protection for privacy by giving a cause of action to anyone whose privacy is invaded in any of four ways.<sup>10</sup> The four privacy causes of action, available in nearly every state, are:

- Intrusion upon seclusion or solitude, or into private affairs;
- Public disclosure of embarrassing private facts;
- Publicity that places a person in a false light in the public eye; and
- Appropriation of one's name or likeness.

While those torts do not mesh cleanly with privacy as defined here, they are established, baseline, privacy-protecting law.

Law is essential for protecting privacy, but much legislation plays a significant role in undermining privacy. Dozens of regulatory, tax, and entitlement programs deprive citizens of the ability to shield information from others. Mandated EDRs undermine privacy, despite the protections outlined in the Motor Vehicle Safety Act, as I will discuss below.

#### *Consumer Knowledge and Choice*

Perhaps the most important, but elusive, part of privacy protection is consumers' exercise of power over information about themselves consistent with their interests and values. This requires consumers and citizens to be aware of the effects their behavior will have on exposure of information about them.

Technology and the world of commerce are rapidly changing, and personal information is both ubiquitous and mercurial. Unfortunately, there is no horn that sounds when consumers are sufficiently aware, or when their preferences are being honored. But study of other, more familiar, circumstances reveals how individuals have traditionally protected privacy.

Consider privacy protection in the physical world. For millennia, humans have accommodated themselves to the fact that personal information travels through space and air. Without understanding how photons work, people know that hiding the appearance of their bodies requires them to put on clothes. Without understanding sound waves, people know that keeping what they say from others requires them to lower their voices.

<sup>9</sup>The Gramm-Leach-Bliley Act and Federal regulations under the Health Insurance Portability and Accountability Act institutionalized sharing of personal information with government authorities and various "approved" institutions. See 15 U.S.C. §§ 6802(e)(5)&(8); various subsections of 45 C.F.R. 164.512.

<sup>10</sup>*Privacilla.org*, "The Privacy Torts: How U.S. State Law Quietly Leads the Way in Privacy Protection," (July 2002) [http://www.privacilla.org/releases/Torts\\_Report.html](http://www.privacilla.org/releases/Torts_Report.html).

From birth, humans train to protect privacy. Over millions of years, humans, animals, and even plants have developed elaborate rules and rituals of information sharing and information hiding based on the media of light and sound.

Tinkering with these rules and rituals today would be absurd. Imagine, for instance, a privacy law that made it illegal to observe and talk about a person who appeared naked in public without giving the nudist a privacy notice to that effect and the opportunity to object. People who lacked the responsibility to put on clothes might be able to sue people careless enough to look at them and to recount what they saw. A rule like that would be ridiculous, but legislation of precisely this character has been a staple of privacy proposals in Congress for at least a decade.

The correct approach is for consumers to be educated about what they reveal when they interact online and in business so that they know to wear the electronic and commercial equivalents of clothing.

### **No, Really: EDRs and Privacy**

If you needed any proof that privacy is complex, witness the fact that my introduction of the concept has consumed three written pages. I now turn to how EDR policy currently threatens privacy by depriving consumers of control over personal information.

There are at least three ways that EDRs undermine privacy: In the current market environment, consumers generally cannot control whether or not their vehicles have EDRs; they do not control what their EDRs do; and they have limited ability to control what happens with the data. The Motor Vehicle Safety Act makes the problem worse with regard to the first two, while providing some protection with regard to the third.

#### *Control of Whether or Not Vehicles Have EDRs*

As I noted earlier, giving consumers choice with regard to EDRs could improve auto safety by allowing price-sensitive consumers—the poor—to decline having them. The margin of cost savings could move these consumers into safer vehicles, saving their lives and the lives of others.

This would also protect privacy. If EDRs were a choice, auto manufacturers, marketers, dealers, and resellers would give consumers at least some information about EDRs and what they do. There would be greater public discussion of their safety merits, privacy consequences, and value per dollar because car buyers could do something with that information.<sup>11</sup>

Consumers motivated by privacy could opt out of having EDRs entirely. Consumers motivated by personal and public safety could opt to have EDRs in their vehicles. Giving consumers control over the choice whether to have EDRs in their cars would improve their privacy by improving their control over their personal information infrastructure.

#### *Control of What EDRs Do*

I note that some states have proposed to give consumers control of whether their EDRs are activated.<sup>12</sup> This would shore up consumers' control of personal information and thus their privacy. Consumers could decide based on their particular circumstances whether they want their vehicle collecting data about their use of it.

Given all the technology built into it, it is not a stretch to say the car is a computer. But consumers do not get to control this computer. Consumers should have more choice and control. At a minimum, government policy should not deprive them of it or channel the market away from consumer control.

Of course, EDRs today are closely integrated with basic vehicle operations and safety features like air bags. This is a historical accident, not something inherent to EDRs. The data recording function could be logically separated from vehicle maneuvering and operated by drivers from the console.

An extension of this thinking would be to give consumers the ability to access and control much of the software that runs inside their vehicles. Red Hat CEO Jim

<sup>11</sup>It is important not to be fooled by today's public ignorance of EDRs. Consumers are able to make choices about EDRs. In the present market environment, with EDRs standard on most vehicles, consumers exercise rational ignorance: There is no plausible benefit from learning about EDRs, so they invest no time or energy in learning about them or their consequences. They are disempowered objects of government and industry policy.

<sup>12</sup>I have not investigated the status of state laws, but a 2006 article cites proposed legislation in Montana, New Hampshire, and New Jersey. Aleecia M. McDonald and Lorrie Faith Cranor, "How Technology Drives Vehicular Privacy," *I/S: A Journal of Law and Policy for the Information Society*, Volume 2, Issue 3 (2006) <http://lorrie.cranor.org/pubs/vehicular-privacy-authors-Verston.pdf>.

Whitehurst recently made a pitch for automakers to adopt open source principles in a recent, very interesting *Business Week* commentary.<sup>13</sup>

Open source has its place, and I would not recommend open source for the functions integral to stopping, starting, and turning, but the many other computing and communications features in automobiles would benefit from open source software development. A feature of this approach would be that consumers could gain control over the functioning of much of the computing their automobiles do.

This control would improve their privacy by allowing them to select what data is recorded, how long it is kept, where and how it is stored, and so on. Given the opportunity, some drivers might create extensive personal records of their driving, perhaps offering researchers greater insight into driver behavior than the mandatory, one-size-fits-all EDRs envisioned by the Motor Vehicle Safety Act.<sup>14</sup>

One can only guess at why government and corporate policy is converging on requiring EDRs in cars and denying consumers control of the EDRs' functioning. My best guess is that their use in litigation is regarded by industry as an important protection and by litigators as important evidence.

EDR data is being used in litigation today, and its use will increase. Giving consumers control of the data would protect privacy, but it would frustrate the interests of government, industry, and the trial bar. When all these interests unite in Washington, D.C., it is no surprise that consumer privacy loses.

#### *Control of EDR Data*

With consumers substantially deprived of control over EDRs' existence and functioning, protections going to the use of EDR-produced data cannot be entirely satisfying. The rules about data proposed in the Motor Vehicle Safety Act provide some privacy protection, but far less than the full array of controls consumer should have.

Section 107(d)(1) would make any data in an EDR the property of the owner or lessee of the vehicle in which it is installed. This restates the appropriate and probable legal status of such data. It is some benefit to privacy to have a restatement because the law in this "new" area is unclear.

The privacy subsection (107(d)(2)) bars collection of the data by anyone other than the owner or lessee except in certain circumstances: when there's a court order, with the data owner's permission, and when a government agency has certain beneficent purposes.

The first two are appropriate restatements of the appropriate legal rules around data, and I take it that the court order provision is not meant either to expand or to contract the circumstances in which courts can authorize or require the acquisition of EDR data.

The third is interesting, though, because it illustrates how the bill giveth with one hand and taketh away with the other. It creates (or affirms) an intellectual property right in EDR data, but prescribes an unrestricted, royalty-free license to that data benefiting government researchers. The license is limited to data that will not reveal the identity of the driver, owner, or lessee—a privacy protection—but on balance this provision reduces the consumer's control by carving another exception from consumer control of data produced by the EDR.

There is little question that the data in someone's computer is their property. So it is with the data in people's cars. But the Motor Vehicle Safety Act would reduce people's property rights in EDR data by a small margin.

Overall the disability on consumers to control the existence of EDRs in their cars and to control the functioning of EDRs in their cars threatens privacy. And it threatens privacy more than the modest protections of EDR data in the bill, which restate, then slightly derogate from, the better view of existing law about who "owns" data.

There is no privacy apocalypse that occurs should EDRs be mandatory nationwide in all new cars. This is but a small step in the continuing erosion of privacy that has been going on for years—and that will continue.

The future trajectory of EDR policy is deeply concerning. As they have in the past, EDRs will probably continue to add new functions and capabilities.

I note with dismay that the bill would allow NHTSA to require EDRs to capture "certain events such as rapid deceleration, full-throttle acceleration lasting more than 15 seconds, and full braking lasting more than 10 seconds, even if there is not a crash or airbag deployment." This is an open-ended grant of authority that could allow recording of travel at 90+ miles per hour or 85 miles per hour, or maybe 70.

<sup>13</sup>Jim Whitehurst, "Why Toyota Should Go Open Source," Bloomberg Businessweek (Apr. 1, 2010) [http://www.businessweek.com/innovate/content/mar2010/id20100329\\_064567.htm](http://www.businessweek.com/innovate/content/mar2010/id20100329_064567.htm).

<sup>14</sup>Researchers might pay for it, opening up a new market in which some drivers cleverly capitalize on personal information about themselves to subsidize their mobility.

Future changes to policy may further erode the weak privacy protections in the bill. Perhaps reasonable suspicion will allow law enforcement officers to access EDR data and issue speeding tickets based on it. The existing ban on location data may fall, or EDR data might be correlated with location data collected by other functions in the car.

The mandatory EDR is surveillance infrastructure. There are no two ways about it. At some point in the future, a day will come when it is “switched on,” and drivers across the country may be subject to government monitoring of their comings and goings.

Government and industry appear largely to agree on having EDRs in all our automobiles, with consumers prevented from controlling those EDRs. Because the data collected by EDRs will be available to government and litigators, the Motor Vehicle Safety Act puts a sort of ankle bracelet on every American driver when he or she gets behind the wheel.

These things are not happening because of an evil plot hatched at NHTSA or because of a cabal between NHTSA and the auto manufacturers. They are happening because so few people are looking down the road. You should be aware that the good intentions behind this bill help build “Big Brother infrastructure.”

To avoid this, to protect privacy, and to limit the injury and loss of life that I think comes from an overbroad mandate for EDR use, Federal policy should prefer EDRs to be optional, or at least not make them mandatory. Consumers should have control over the functioning of EDRs in their cars. And if they choose them, consumers should have full ownership of the data their EDRs produce, being free to barter or trade that data to anyone who wants to access it.

Senator WICKER. Now, let me ask—we’re going to get some very good information from the National Academy of Sciences and from NASA. The Act allows NHTSA 3 years to complete the electronics rulemaking. There’s no specific requirement in the legislation, as it exists today, that the results of these studies be taken into consideration by your agency.

So, what’s your opinion about that, Mr. Administrator? What is your understanding of the status of the NAS and NASA studies? And how can we be sure that these very valuable studies, from very reliable entities in the United States, will be taken into account as part of the rulemaking?

Mr. STRICKLAND. Thank you, Mr. Wicker, for the question.

The rulemaking provision regarding electronics has several questions that we are still trying to go through at the Department and at NHTSA and through the administration. So, I’ll have to be fairly limited in my response. I’ll be happy to get back to you in more detail on the record. But, this is—I will—I want to lay out a couple of things for you right now.

[The information referred to follows:]

We are nearing completion of our work with NASA. It has already provided NHTSA with new insights into certain issues related to vehicle electronics and software systems. Those insights will certainly be part of NHTSA’s factual basis in determining whether a rulemaking on electronic systems is necessary. When we have the results from the NAS study a year or so from now, we expect to have specific recommendations on what type of standards, if any, may be useful in this area. Should NHTSA conclude that it could advance vehicle safety by promulgating such standards, NHTSA would conduct the necessary research efforts to support a rulemaking proceeding. In any such proceeding, NHTSA would take special consideration of the studies by NASA and NAS and would include those studies in its rulemaking docket.

Mr. STRICKLAND. The NASA study is underway. We are going through our project and our test plan that we are working with NASA, and we need to have that peer-reviewed after that is completed, which is going to take us some time. The hope is to have the NASA portion of the study, which is Toyota-specific, in terms

of the sudden unintended acceleration issues with the Camry, the other vehicles that were described. Hopefully, that'll be done by late summer, early fall of this year.

The second part, which is a larger, more comprehensive component, is the National Academy of Sciences study. Right now the National Academy is doing this, independently of NHTSA, and they are working to empanel the experts that will be conducting the study. That study will take approximately 15 months, presuming that everything goes smoothly and the National Academy can get the information that it needs from the various constituencies.

After all that work is done, NHTSA will have to make some decisions, both from the National Academy of Sciences' work and from the NASA work, whether there actually is an issue that rises to a safety defect, before we can even think about either opening an investigation or thinking about how we would craft a potential standard for electronics. The reason why we're investing this time and this effort and over \$3 million to do this work is so that we can actually get an answer to find our way forward on whether we do need to have such a standard or rule. So, we would hope that working with the Committee, we could work through these particular issues and understand sort of where we are as an agency in the expertise that we have brought on board, internally and hiring NASA and hiring National Academy, before we sort of think about next steps.

But, I can definitely understand the Committee's concern about having some underlying protections and some minimum standards from manufacturers in this area. We'd like to have a longer, ongoing conversation with the Committee and the Congress on this issue.

Senator WICKER. Well, thank you. And my time has expired.

I am heartened by your testimony, Mr. Administrator. I have a great deal of confidence in NAS, for example, that they will apply sound science and call it by the numbers. And that's what we need. And to the extent that that information is available to us, we certainly need to make sure that it's taken into account. So, thank you for your testimony.

Mr. STRICKLAND. Thank you, Senator Wicker.

The CHAIRMAN. Thank you, Senator Wicker.

Senator Klobuchar has come. And you have your—an option.

**STATEMENT OF HON. AMY KLOBUCHAR,  
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Oh. That sounds exciting.

The CHAIRMAN. Yes, it is. Always options.

Senator KLOBUCHAR. OK.

The CHAIRMAN. You can make an opening statement and ask questions. You can put your opening statement in the record, like the rest of us have, and ask questions.

[Laughter.]

Senator KLOBUCHAR. Oh.

[Laughter.]

Senator KLOBUCHAR. I think I'll pick a hybrid, like a hybrid car.

The CHAIRMAN. That's fine.

Senator KLOBUCHAR. OK.

Thank you very much, Mr. Strickland, for being here—

Mr. STRICKLAND. Thank you.

Senator KLOBUCHAR.—back here.

Mr. STRICKLAND. Thank you.

Senator KLOBUCHAR. And, again, I'm very excited that we're moving forward—I thank the Chairman—with the Motor Vehicle Safety Act. And I'm glad to be one of the supporters.

As I said during the March hearings on the Toyota acceleration, it's time to change the rules of the road and place the consumers in the driver's seat. We had several instances in our State, and it's a very concerning issue in our State.

I just wanted to ask you a little bit about, first of all, the fine and that issue. In your testimony, you noted that the sticky-pedal-timeliness query led to a fine of 16.4 million being levied against Toyota. And you also note that NHTSA's continuing to review the large number of documents submitted by Toyota, regarding the pedal-entrapment query. How would the penalties against Toyota differ, in either instance, if the new bill became law?

Mr. STRICKLAND. I guess the question is always about, what is the proper level of a penalty to create a deterrent value, to make sure that a manufacturer doesn't make a similar mistake in the future. I think we assessed the maximum penalty allowed under law for the sticky pedal. We are working on the timeliness query regarding floor mat entrapment and then the larger overall recall query. I can't make an estimation as to what the decision would be by NHTSA, in terms of the levies, if there is a penalty found. But, we definitely would take into account the number of vehicles involved, the severity of the incident that happened.

Senator KLOBUCHAR. But, would the new bill, if made law, allow you to ask for larger penalties or—

Mr. STRICKLAND. It would.

Senator KLOBUCHAR.—would it make it easier?

Mr. STRICKLAND. It would. Actually, there are several elements of the bill that would make a lot of our enforcement—

Senator KLOBUCHAR. And what are those?

Mr. STRICKLAND.—jobs easier, including the ability to assess a penalty which would be more in line with the size of the company and the severity of the violation.

Senator KLOBUCHAR. And why do you think that would be helpful?

Mr. STRICKLAND. Deterrence is always the goal. We don't want to be in a situation where we are prosecuting violations. We will want manufacturers to comply with the law. The ability for us to have a fine, which creates a deterrent value, means the manufacturers, hopefully, would be more attentive to the law, more attentive to the amount of time and the turnaround in providing the information to NHTSA and to the American public. It's a very important element of what we do; and having an ability to assess a fine that is in line with the revenues of some of the largest corporations on the planet would assist in that goal.

Senator KLOBUCHAR. OK. I also had a question about NTSB. As you know, this committee has jurisdiction over NTSB, which has also requested authority to investigate more traffic accidents. Do NHTSA and NTSB work together now? And do you see it as a posi-

tive, to have NTSB have broader investigative authority related to vehicle accidents?

Mr. STRICKLAND. It's a little bit of a loaded question for me, Senator, in that the current Chairman of the NTSB and I were former colleagues on this very committee, as staff, and very close friends. So, I will say that prior to both of our appointments for these agencies, NHTSA and the NTSB has worked very closely together, in terms of dealing with the issues that the Safety Board has found that NHTSA should address, starting all the way from airbags all the way to the current Motor Coach Safety Plan. So, having the NTSB be a partner in investigations and to work with is always a value-added. I mean, it's about safety, and more folks that are on the beat to help protect American public is always a good thing.

Senator KLOBUCHAR. One last question. I believe it's important that NHTSA have similar authorities, as we've discussed, other safety enforcement entities of the Federal Government. I'm pleased that you clarified the scope of the imminent hazard authority that NHTSA would have, should the Motor Vehicle Safety Act become law in your testimonies. I believe it has been unfairly characterized as too broadly defined.

You note that you'd like the opportunity to work with the Committee to ensure that consumers, in cases like this, have an actual remedy. What do you mean by an actual remedy?

Mr. STRICKLAND. Well, a recall has two components. We identify a safety defect that poses an unreasonable risk, and the manufacturer has to propose a remedy to fix that defect. The provision is currently crafted, while it provides information to consumers, the important next step is to make sure that that consumer can take their car in and get that defect remedied. Without the ability for NHTSA, to be able to order a mandatory recall in the case of an imminent hazard, that doesn't complete the safety loop. You can inform someone about a problem, but if you can't fix it, that still leaves a risk out there and possibly getting people injured or killed.

So, I think it's especially important for the imminent hazard authority to be complete, as it is with other consumer protection agencies, so that we can inform, and when we need to intervene, force a mandatory recall to get those vehicles fixed.

Senator KLOBUCHAR. All right, very good. Thank you—

Mr. STRICKLAND. Thank you, Senator.

Senator KLOBUCHAR.—for clarifying that.

The CHAIRMAN. Thank you, Senator Klobuchar.

I'll ask a question. The corporate-responsibility aspect of this is interesting to me, and we found that out in our hearings with respect to Toyota, and I think it's probably true, generally. And that is the concept of, when you're doing an investigation, and you ask for information, that that information isn't just sort of forwarded to you by some group of people working at some level. But, that it be certified—I think that's the correct word—that it be certified with a signature by the CEO of the company in North—of its company in North America. I think that makes a lot of sense.

Now, what I don't know is how big a problem that is. It was, in the case of Toyota. And that, of course, is headquartered overseas, and they had difficulties with their own transportation ministry, and with you.

But, explain to me why that's necessary, and how broadly you think it is not needed. In other words, people who just tend to promptly return what you ask for. Give me the state of the play. That means—it's in the bill and I'd like that——

Mr. STRICKLAND. Yes, sir.

The CHAIRMAN. It's important. But, talk to me about it.

Mr. STRICKLAND. Corporate accountability is incredibly important. The veracity of the information is incredibly important. It is already a Federal crime if a manufacturer misleads or lies to NHTSA. But, the issue that the staff has found over the years, that the Secretary has testified to you about when we were here before you in March, and the issues that I have found, as Administrator, is that there clearly had been a disconnect at Toyota, between Toyota Motor Corporation in Japan and Toyota North America here——

The CHAIRMAN. I'm not just talking about them.

Mr. STRICKLAND. Yes, understand.

The CHAIRMAN. Yes.

Mr. STRICKLAND. This is broader. Using them as a leaping point. For any manufacturer, any provision that makes the leadership responsible and accountable for decisions that they make in regards to provision and information to NHTSA, the speed they provide it, and the accuracy with which the information is provided, is important and necessary, and would be welcomed by NHTSA.

The CHAIRMAN. There's a kind of a relationship, it seems to me, between that and what Senator Klobuchar was talking about, the imminent hazard authority, because, I mean, there are people who say, "Well, it'll shut down the auto industry." And that strikes me as absurd, because you put in very clear language that the authority could only be used if a vehicle defect, quote, "presents an imminent hazard to public safety that may result in death or serious bodily harm."

The Secretary of Transportation has that authority already with buses, he has it with trucks, has it with aircraft that might have defective parts. And if you add up all of the injuries and deaths between those three modes of transportation, or four, or whatever it was, it doesn't come close to what happens in automobiles. And so, it doesn't make any sense to me that that would not also apply to automobiles.

Tell me how would you and the Secretary apply that? How would you make judgments about what constituted present—presents an imminent hazard to public safety that may result in death or serious bodily harm? How would you do that?

Mr. STRICKLAND. We would use this authority very carefully, as we do in all of the modes that you mentioned, including the Federal Rail Administration, as well. It is a situation where it is a timely issue that is so important that we know that the ability or the possibility of death or serious injury is so acute that we must act now. So, it is going to be used very carefully, very sparingly. We rely upon——

The CHAIRMAN. How do you judge that it is that acute?

Mr. STRICKLAND. It is acute——

The CHAIRMAN. Cars are out there, you're here.

Mr. STRICKLAND. A report that we would get about a particular situation—I can't imagine a fact pattern, but we have a situation where there is a significant loss of life, or a loss of life in a situation that we feel it would be repeatable and easily foreseeable—in that situation, we would probably look very hard at acting quickly, to making sure that that recall happened as soon as possible. That—

The CHAIRMAN. Are these patterns that you're looking for, or specific episodes?

Mr. STRICKLAND.—it wouldn't have to be a pattern, sir, just like we act right now. For example, the Santee California crash, for example, where we—the loss of life that we had from the Saylor family. That was one accident. We lost four people. But, that immediately, you know, triggered action for NHTSA, not based upon looking at a trend analysis. It's something where it could be a small number of incidents, it could be one singular incident, it could be a number of incidents. But, I would imagine we would look to our other sister agencies and modes, and how they apply this, and use the same type of screening and application of this. Because we know it is a situation has to be very, very carefully used, because we know the importance of changing the process, of going through the public hearing, what we normally do. It has to be a clear and present danger of loss of life that has to be intervened in an incredibly fast fashion.

The CHAIRMAN. Let me ask you something which is not in the bill. When you have the unanticipated-acceleration problem, the person gets rid of the car. They get rid of the car by selling it to a second-hand car dealer, or whatever. And philosophically, that, I think, creates quite a dilemma, because if the machine was dangerous for the individual who wanted to get rid of it, because it suddenly surged forward and they couldn't stop it—now, we're going to have a brake mechanism, but we don't yet—how is it that you can let that go to a secondhand or a used car dealer? Because it's still a lethal instrument.

Mr. STRICKLAND. Currently, we don't have authority over the used car market in the way that we have authority over new car sales and dealers and manufacturers. This is an issue that we very much would like to work with the Committee on.

One concept that I know that, internally, we are discussing at NHTSA, is having the type of ability to have car resellers, like used car dealerships, actually have to check to make sure if there has been any recalls on that particular vehicle, if there was a remedy that had to be exacted, and if that remedy had been applied to the car. If it hadn't been applied, then it's their responsibility to actually get the recall repair done before they can put it back in the stream of commerce. That is something that is currently not in law. We think it could be very helpful for us to make sure that we have fulfilled the recall-and-defect-remedy loop. And we'd be very interested in speaking with you and the Committee, and hopefully having that provision included.

The CHAIRMAN. I want to talk more on that, but I've overshot my time already.

Senator Wicker.

Senator WICKER. With regard to the imminent hazard authority, the Federal Railroad Administration doesn't have this. Consumer Product Safety Commission, very concerned with protecting Americans, doesn't have this authority. In those instances, the agency must either obtain a court order or provide an expedited administrative review of the determination. So, why should NHTSA be provided different authority than we have provided to other safety agencies?

Mr. STRICKLAND. Mr. Wicker, I would have to say that the Federal Rail Administration does have the authority, they have to just review, post-order, by the Administrator. And that authority is also available at FMCSA, at FAA, and there's probably a host of other agencies, I think, also included with FDA.

So, the construction, as currently drafted in the legislation, is not without precedent. And it is an authority that, through all of the sister modes at DOT, has been very carefully and thoughtfully used, and it has had a tremendous impact on safety, and being able to give the Administrator an ability to intervene in a crisis situation.

NHTSA is the mode where we have the largest loss of life—we have over 34,000 people that lost their lives in 2008. As Senator Rockefeller alluded to, our other sister modes have nowhere near the amount of deaths and injuries as the roadways do. We think that this particular provision is incredibly important and would give us a tremendous opportunity to effectuate our safety mission.

Senator WICKER. So, are you saying that I am mistaken in the premise of my question, that the Federal Railroad Administration does have the authority, to the extent that it is envisioned in the proposed Act?

Mr. STRICKLAND. That is correct. I'm very confident in that. My director of enforcement was the head of enforcement at FRA, and was over at FRA for over 25 years, and used this authority, specifically, numerous times. I'm very confident in that. FRA does have the authority, as drafted, with the ability to effectuate a remedy, which is the one component that is not in the legislation, as introduced.

Senator WICKER. Thank you.

The CHAIRMAN. Thank you, Senator Wicker.

Senator Pryor.

Senator PRYOR. Thank you, Mr. Chairman. I just have a couple of follow-ups for Administrator Strickland, and that is, Do automobile manufacturers, today, provide the vehicles with software updates to improve the safety of the automobile? Can they go in and update the software on existing vehicles?

Mr. STRICKLAND. Yes. Manufacturers will, depending on the level and whether it rises to a safety defect, will perform software modifications on the fly, sometimes on the line, themselves. They'll issue a technical service bulletin, where they will go out and load new software on a vehicle to deal with the drivability issue.

If it is a safety defect issue, they need to report it to NHTSA, per the Motor Vehicle Safety Act, and then follow on with a recall and everything else. But, there is lots of activity, software-wise, that the manufacturers undertake.

Senator PRYOR. If it's not safety related, do they have to provide the information to NHTSA?

Mr. STRICKLAND. That is correct. If it's not safety related, they do not.

Senator PRYOR. OK. But, do they routinely provide it to NHTSA, or do they normally just take care of it, and NHTSA not know about it?

Mr. STRICKLAND. In addition to their provision of information from the early warning TREAD mandates, our staff also follow the manufacturers individually. We take a look their technical service bulletins and their other announcements so that we can make an evaluation whether a manufacturer may look at a software update as not being a safety-related issue; we may have a different interpretation of that. If we do find that, we then approach the manufacturer and may take action. So the manufacturer doesn't have an obligation if it's not safety-related, but we, independently, also verify those issues as we see them arise in manufacturer bulletins and other advisories that they do.

Senator PRYOR. And do you know the industry practice, in terms of the consumers' knowledge about the software updates to the manufacturers or the dealerships or authorized repair centers? Do they routinely notify the consumer of the update?

Mr. STRICKLAND. I can only speak as an owner of two automobiles. I have never personally received a notice about a software update for my vehicle, except for when they wanted me to purchase a DVD update for my GPS system, for a certain amount of money. But, anything short of that, I've never received anything like that, and I'm not knowledgeable of such activity.

Senator PRYOR. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Pryor.

If I might just continue on what we were talking about before. It's interesting to me, the—in fact what the—the computer update—I'm trying to imagine what I would be getting, under this bill, that, one, I could understand—well, let's start with “read”; second, understand; and, third, be informed, because that would mean that I would have to stop doing some things that I had been doing, because the computer was doing them, and start doing things, or whatever. So, what does this notice of update do for the driver of the car?

Mr. STRICKLAND. Well, Chairman Rockefeller, the question that I don't have the answer to is the number of software updates and upgrades that may happen. It may be part of routine maintenance when a person brings in their car at a particular mileage check, where they may do these type of upgrades, and not notify the consumer. Personally, as a consumer and as a person who's worked in consumer safety for a number of years, I've always believed that consumer information empowers people. I think that this provision would definitely help assist telling people about what's going on with their automobiles and inform them, and then, if they want to know more, they can make a query of the manufacturer.

Our only mission in this area is safety. If it's safety-related, we have to know about it and that information must be conveyed to the consumer. Anything beyond safety is beyond the ambit of our mission. It may be very good for consumers to know about these

additional changes, but, as far as our mission goes, it is not core to our mission. I would have to think longer before I can give you more a specific answer about the provision—or how much information will be provided by a manufacturer. The representatives from the Alliance and AIAM may be more knowledgeable as to these types of updates that are outside of the safety realm, but I—personally, I always think more information is——

The CHAIRMAN. But, my point is, they're not outside the safety realm.

Mr. STRICKLAND. Sometimes——

The CHAIRMAN. If it's a computer——

Mr. STRICKLAND.—they are.

The CHAIRMAN. If it's a software——

Mr. STRICKLAND. If it's a software update——

The CHAIRMAN.—update, I mean, that may very much be gas, brake, whatever.

Mr. STRICKLAND. There are several types of updates. They will often make modifications for things—for drivability or roadability to improve the comfort of the driver. It has nothing to do with safety, but it may change particular aspects of the performance of the vehicle, for example. So, those types of updates we're not concerned about those. Our concern comes into when a software update does impact safety. If there is an issue where the software is correcting a defect, where we should be having a full recall, then the Motor Vehicle Safety Act comes into play. Anything outside of that, in terms of software updates, which deals with other comfort issues, we, as an agency, aren't concerned about those. But, perhaps the consumers should know about them, because it is their car.

The CHAIRMAN. All right. One more quick one. On the last subject, of the used car, and the consumer needing to be informed—and, by the way, the used car dealer needs to be informed, because maybe the consumer doesn't tell the used car dealer; he just says, you know, "I'm getting another car, and here, I want to sell this one, trade it in for this one." And there's a lot wrong with the car; the unintended acceleration being the example, of course, that I think of. Number one, how in the law, which we have not made about this subject, but which I think is very important for the future, perhaps—definitely next year—how do they know what was wrong with the car, unless the person tells them? I mean, NHTSA isn't involved in that transaction.

And second, when you do, if they want to find out what the state of cars are, there is, evidently, your website, to see whether a make or model of a car was recalled or experiencing a large number of complaints. The bill would also require manufacturers to give consumers access to dealer bulletins on car——

Now, all this sounds very good. But, most people, when they buy cars, don't delve into a whole lot more than the ignition, the brake, gas, the radio. I mean, it's just true. There are all kinds of buttons that never get used. So, does the Website really do good? I mean, do people just charge to the NHTSA Website every time they're considering a change, or something?

Mr. STRICKLAND. We would hope that every American consumer——

The CHAIRMAN. Yes, but, Mr. Strickland, you've got to be realistic, here. I don't think they're going to do that. My colleagues might disagree.

Mr. STRICKLAND. There is a responsibility upon the manufacturer and the new car dealer, which NHTSA does have a direct regulatory relationship. For professional resellers, used car dealerships, we do not. I think it does help safety if there is responsibility placed upon a used car, a reseller to have responsibility to check the website, to check with the manufacturer for any pendent recalls or defects that need to be addressed.

The CHAIRMAN. Who does have—

Mr. STRICKLAND. Right now, there is—

The CHAIRMAN.—the watchover authority—

Mr. STRICKLAND.—there isn't any.

The CHAIRMAN. Well, that's a problem.

Mr. STRICKLAND. Yes, sir, it is. I agree.

The CHAIRMAN. How would you solve that?

Mr. STRICKLAND. As I suggested, we'd like to work with the Committee on providing us the authority to be able to enforce regulations on used car resellers to deal with exactly this problem.

The CHAIRMAN. Well, that's very interesting. I think that's a dangerous situation.

Senator Klobuchar.

Senator KLOBUCHAR. I have no additional questions. Thank you, Chairman.

The CHAIRMAN. That can't be.

[Laughter.]

Senator KLOBUCHAR. It's true. I'll submit them for the record.

The CHAIRMAN. All right.

Senator KLOBUCHAR. Thank you. And, plus, we have a charming second panel.

The CHAIRMAN. We do, and they're coming on, because we're going to thank Mr. Strickland. I, again, apologize for being late.

Mr. STRICKLAND. It's quite understandable. Important business, Mr. Chairman. Thank you for inviting me and taking the time. And thank you for the hard work on this bill. It's a—

The CHAIRMAN. Yes, it's a—

Mr. STRICKLAND.—great piece of legislation.

The CHAIRMAN.—I think it's a good bill. I really do think it's a good bill. In any event, thank you very much.

And we go, then, to the next panel, which is The Honorable Dave McCurdy, who I had breakfast with this morning, President and Chief Executive Officer; Mr. Clarence Ditlow, who we are very familiar with, the Center for Auto Safety; Mr. Michael Stanton, President and Chief Executive Officer; and The Honorable Joan Claybrook, President Emeritus, Public Citizen and former National Highway Traffic Safety Administrator, U.S. Department of Transportation.

And I apologize to all of you, too.

[Pause.]

The CHAIRMAN. The Honorable Mr. McCurdy, we will start with you, if you have a statement you wish to make.

**STATEMENT OF HON. DAVE McCURDY, PRESIDENT AND CEO,  
THE ALLIANCE OF AUTOMOBILE MANUFACTURERS**

Mr. McCURDY. Thank you, Mr. Chairman and Senator Pryor and other members of the Committee, for inviting me to offer the Alliance views on Senate bill 3302, the Motor Vehicle Safety Act of 2010.

There has been a lot of discussion on auto recalls in recent months, so let me start by reassuring the American consumer that we are, in fact, in a historic period of auto safety in this country. Our roads are safer today. U.S. traffic fatalities, reported at the end of 2009, reached the lowest level in 49 years. Consumers are benefiting from many innovative, lifesaving technologies that assist the driver, including electronic stability control, lane-departure warning systems, blind-spot monitors, adaptive cruise control, and many others. What seems like science fiction is automotive fact.

If Congress wants to reassure consumers quickly about auto safety, I would encourage this committee and the Congress to focus on three to four measures that enhance safety the most. Here are our recommendations:

The Alliance supports a vehicle brake override standard that will reassure consumers that they can count on their automobiles, no matter what the cause of unintended acceleration, whether it's a sticky pedal or a pedal getting caught in a floor mat, or faulty electronics.

A pedal-placement rulemaking would not provide additional safety benefits, however. Administrator Strickland told the House, recently, that it needs further research, and we agree.

Second, the Alliance supports requirements requiring event data recorders in new vehicles. The Congress should allow NHTSA to fully implement the first rule, and collect data from it, before ordering NHTSA to start writing the next rule.

Some of the proposed new requirements will add significantly to the cost of these devices. In these tough economic times, Americans want to know they are getting a real safety benefit for their money. In my opinion, Senator Udall's legislation, S. 3271, the Vehicle Safety Act, is a better approach.

The Alliance urges Congress to adopt legislation that enhances our expertise, such as the Center for Vehicle Electronics and Emerging Technologies within NHTSA, which is in your bill. Even in this partisan environment, this is something we can all agree upon.

Automakers also urge Congress to fully fund the National Automobile Sampling System, or NASS. In addition, we encourage Congress to fund the Driver Alcohol Detection System for Safety, or DADSS, to help identify vehicle technologies that could stop drunks from turning on a car. More people die in alcohol-related crashes every single week than all of the alleged unintended acceleration incidents, combined, over the last decade.

As you consider this legislation, we urge you to consider its legal and marketplace effects. Congress must balance the desire for more public information with valuable product information. The purpose of early warning data is to enable NHTSA to identify trends and take action sooner, not to create an eBay or Amazon.com, where competitors can surf for company trade secrets or lawyers can shop

for clients. Safety legislation should empower the engineers, not trial lawyers.

Congress will need to preserve basic fairness and due process under the law. The Alliance does not oppose an increase in civil penalties. But, penalties must be capped at some reasonable level.

Regarding granting NHTSA imminent hazard authority, the proposed provisions, in our opinion, are so lacking in standards and the opportunity to be heard before a neutral decisionmaker as to violate the due-process clause of the U.S. Constitution.

Regarding corporate responsibility for NHTSA reports, the proposed personal liability for automotive executives would be \$250 million. That's 50 times higher than for executives under Sarbanes-Oxley.

In closing, I know the challenges of reaching a consensus. I've chaired several subcommittees and a full committee. This bill can be made stronger by focusing on what's most important. And we look forward to working with you to identify those elements and provisions that will benefit consumers the most.

Thank you.

[The prepared statement of Mr. McCurdy follows:]

PREPARED STATEMENT OF HON. DAVE MCCURDY, PRESIDENT AND CEO,  
THE ALLIANCE OF AUTOMOBILE MANUFACTURERS

Thank you, Chairman Rockefeller, Ranking Member Hutchison, and members of the Committee, for inviting me to offer the Alliance's views on S. 3302, the Motor Vehicle Safety Act of 2010. The Alliance is committed to working constructively with the Congress on legislation that promotes the National Highway Traffic Safety Administration's (NHTSA) mission to "save lives, prevent injuries and reduce economic costs due to road traffic crashes." We appreciate the opportunity to share our views on how S. 3302 contributes to the overall safety of the driving public, as well as areas in which we believe the legislation could be improved.

*Reassuring Consumers*

There has been a lot of discussion on auto recalls in the past few months, so let me start by reassuring the American consumer.

Government data shows many advances in road safety. According to NHTSA, overall traffic fatalities reported at the end of 2009 reached the lowest level in 49 years, declining for the 15th consecutive quarter. This fact is remarkable given that the number of licensed drivers has more than doubled and annual vehicle miles travelled (VMT) have more than quadrupled since 1954.

Consumers are benefiting from a range of innovative new safety technologies. Because consumers want more safety features, automakers have developed many of today's significant safety innovations without a government mandate, including anti-lock brakes, electronic stability control (ESC), adaptive headlights, side airbags and curtains, front passenger safety belt reminder systems and advanced collision avoidance features like lane departure warning, blind spot monitors and adaptive cruise control.

Automobiles are complex, integrated systems that undergo years of rigorous testing and certification before they ever go on sale. Every auto innovation begins with an idea, but the real work is years of research, computer simulations, product development, laboratory testing, road testing, certification and more. Through the Society of Automotive Engineers (SAE), 14,000 mobility experts in 100+ countries have worked together to develop more than 2,600 globally recognized standards for motor vehicle transport.

*Real-World Benefits*

The industry continues to work to advance the state-of-the-art in real world safety. Our engineers are always testing and developing new safety technologies, then evaluating their performance in real-world situations. Proposed legislation needs to meet the same test. Congress and all stakeholders should be focused first and foremost on passing a bill that will result in real-world safety benefits for Americans. This includes carefully weighing the potential costs of any regulation with the real

world benefits consumers might expect. We believe that this legislation can advance safety through:

- Enhancing real-world expertise on the advanced technologies that enhance safety.
- Adopting consumer confidence measures, including more education on how cars work.
- Balancing proposals with consumer concerns and marketplace concerns.
- Adopting measures to help engineers, not trial lawyers.
- Fully funding data collection programs (*e.g.*, NASS, FARS, NMVCCS, etc.) to enable improved identification of real-world safety trends.

#### **Title I. Vehicle Electronics and Safety Standards**

A number of rulemakings are mandated, many of them to be conducted concurrently according to unrealistic timelines. Some are overly prescriptive. Other rulemakings are simply unnecessary because they mandate standards already adopted by NHTSA. Still other mandates are premature.

To ensure that motor vehicle safety is enhanced, the Alliance has the following recommendations. In all instances, however, more reasonable timelines for rulemaking and especially for implementation are needed.

##### *Rulemakings or Actions that should be pursued on a Priority Basis*

*Section 101. Electronics and Engineering Expertise.* The Alliance supports Section 101 that establishes a Center for Vehicle Electronics and Emerging Technologies within NHTSA. We note that concerns over NHTSA's alleged lack of expertise with advanced vehicle technologies are in part unjustified considering the complex rulemakings the agency has completed in the last decade on numerous advanced vehicle technologies, including advanced airbags, electronic stability control, event data recorders and others. As the industry works to reinvent the automobile to make it safer, cleaner and more efficient, highlighting and promoting this area of expertise within the agency is welcomed.

*Section 102. Vehicle Stopping Distance and Brake Override Standard.* The Alliance supports the intent of Section 102, which would direct NHTSA to develop a rule requiring "brake override" technology for vehicles equipped with electronic throttle controls. A number of Alliance members already incorporate this technology into their vehicles and the others are moving in that direction. Alliance members recognize that safety is at the top of consumers' minds, and brake override technology will reassure them that they can count on their brakes in difficult situations. The Alliance recommends that this standard be written to amend FMVSS 135 and FMVSS 105, which already prescribe brake stopping distances.

The Alliance also notes that Section 102 (and Section 103) calls for the creation of standards that would "prevent" certain outcomes from happening. Such a requirement for the standard is beyond anything reasonable—or even possible in the real world. The Alliance recommends that the use of the word "prevent" in these two Sections be changed to the more typical requirement such as "reduce" or "mitigate."

*Section 105. Keyless Ignition Systems Standard.* The Alliance supports requiring that passenger vehicles with pushbutton ignition systems have a consistent means to shut off the engine. However, the Alliance is deeply troubled by the suggestion that the actual intent of this provision is to redesign the ignition systems of certain vehicles to perform non-stop/start-related functions, such as to shift the vehicle into neutral or de-power the accelerator without turning off the engine. Such a radical departure from the current operation of these systems is questionable at best and may actually result in significant unintended consequences (such as in the case of an engine fire). At the very least, a change of this magnitude needs careful consideration by NHTSA, automakers and other stakeholders to ensure that all aspects of such a change are considered before they are required. If Congress believes this idea is worth pursuing, it should direct NHTSA to study potential options and report to Congress and the public on the potential benefits and trade-offs of such a redesign.

*Section 107. Vehicle Event Data Recorders (EDR).* The Alliance supports the intention of Section 107, which would require NHTSA to mandate installation of event data recorders on new vehicles; however, the Alliance is very concerned about and would oppose certain aspects of this provision. In 2006, NHTSA published a rule setting the parameters for EDRs voluntarily installed in vehicles. That comprehensive rule, in which certain technical details submitted by petition for reconsideration are still not resolved, was the result of a lengthy and complicated deliberation with substantial public comments.

Given that the existing rule has been scheduled for implementation in 2012, the Alliance recommends that the first phase of mandatory implementation should be

consistent with the existing rule being implemented by NHTSA, including the resolution of pending petitions relating to technical issues and the effective date, to enable manufacturers who have implemented EDRs on parts of their fleet to come into full compliance. Equally important is the fact that manufacturers who opted not to install EDRs previously will need sufficient lead time, and certainly more than 2 years, to develop and implement this technology in their fleets. The law should not mandate lead times that may be unrealistic and NHTSA should have the authority to establish the lead time, including any phase-in schedule, after consultation with the manufacturers.

Specifications and requirements for EDRs, including those for data storage time, require analysis and consideration of available technology, feasibility, safety benefit and cost, should be left to NHTSA to study and decide whether to undertake further rulemaking and not specified in this legislation.

The Alliance also supports strong privacy protections for consumers. The Alliance believes that information stored on an EDR is the property of the vehicle owner and should not be accessed by anyone without the owner's permission or as required by law. Additionally, even with the owner's permission, data that is retrieved for the purpose of including in a publicly available database should be rendered anonymous by excluding at minimum the last six digits of the vehicle identification number (VIN) associated with the data. The bill should contain an exception for the transmission of EDR data to 9-1-1 call centers for purposes of emergency response.

With respect to the second phase of the EDR requirements, the Alliance believes that the provisions are extreme and would cost consumers thousands of dollars for the devices that would be required. For automakers to develop a device that is resistant to temperature, water and crashes and capable of continuously recording various pieces of data for 75+ seconds, we would need to create the equivalent of an airline "black box" for vehicles. This would be very expensive with no current demonstration of benefit.

A better approach would be to provide for a NHTSA study of the results of the first phase rulemaking as a prologue to any future enhancements to the rule.

#### *Unnecessary Rulemakings*

*Section 103. Pedal Placement Standard.* The Alliance recommends deleting Section 103, which would direct NHTSA to develop a rule specifying minimum clearances for passenger vehicle foot pedals with respect to other pedals, the vehicle floor, and any other potential obstruction to pedal movement. While perhaps well-intentioned, Section 103 would require NHTSA and auto manufacturers to spend valuable resources focusing on one aspect of a limited, past design problem that is unlikely to reoccur in the future given the recent attention. Implementing brake override technology as S. 3302 would accomplish is a better, more comprehensive solution to address concerns about unintended acceleration caused by pedal entrapment.

*Section 106. Transmission Configuration.* Section 106, which would direct NHTSA to prescribe a Federal motor vehicle safety standard for passenger vehicles requiring an intuitive configuration and labeling of gear shifting controls that makes the neutral position conspicuous is unnecessary. Such a standard already exists. Federal Motor Vehicle Safety Standard No. 102, "Transmission shift position sequence, starter interlock, and transmission braking effect," currently specifies the transmission shift position sequence to reduce the likelihood of shifting errors. The standard was among the first group of early standards issued by the agency and was last amended in 2005. Changing the shift configuration (as is suggested) potentially involves transmission re-designs that are very costly and require substantial lead time. As a result, any changes in shifting configuration will require far more than the one model year of lead time that is provided. Given that this standard has been in effect for a long time, changing the shift position sequence is unnecessary and ill-advised.

#### *Rulemakings that Require Additional Study*

*Section 104. Electronic Systems Performance Standard.* As the Committee is no doubt aware, NHTSA has contracted with the National Academy of Sciences (NAS) to examine the broad subject of unintended acceleration and electronic vehicle controls across the entire industry over the course of 15 months. The NAS will make recommendations to NHTSA on how its rulemaking, research, and defect investigations activities can help ensure the safety of electronic control systems in motor vehicles. In addition, NHTSA with the help of NASA is conducting its own review and investigation into the electronic systems that have been the focus of recent hearings. Both studies will be peer reviewed by scientific experts and the total cost for these studies will be approximately \$3 million. Section 104 would require NHTSA to re-

quire electronic systems in passenger vehicles to meet minimum performance standards within 3 years of enactment. In this regard, S. 3302 presupposes the outcome of these reviews.

Auto manufacturers subject electronics systems in our vehicles to rigorous testing that is unparalleled in the consumer electronics sector. Auto systems are designed to last at least three to four times as long as standard consumer electronics and are subjected to much harsher extremes in testing. The Alliance supports the work on electromagnetic interference that is ongoing at NHTSA and the National Academy of Sciences. The results of the NAS study should inform any future rulemaking that considers standards for electronic vehicle controls.

## **Title II. Enhanced Safety Authorities**

*Section 201. Civil Penalties.* The Alliance does not oppose an increase in the civil penalties, but the penalties must be capped at some reasonable level. Furthermore, the Alliance questions whether a five-fold increase in penalties is necessary. Only 2 years ago, this same committee visited this issue and set a \$15 million-per-offense cap on penalties that could be assessed to manufacturers of other types of consumer products. Many of these manufacturers are as large as auto manufacturers, and auto manufacturers are already subject to civil penalties of up to \$16.4 million per series of related violations. It is not clear to the Alliance why auto manufacturers should be singled out for disproportionate penalties relative to other consumer products manufacturers.

*Section 202. Imminent Hazard Authority.* Although Section 202 is captioned “Imminent Hazard Authority,” it contains two separate provisions: the new imminent hazard authority in Section 202(a) and substantial changes to existing judicial review provisions in Section 202(b). If Congress concludes that an “imminent hazard” authority at NHTSA is desirable, both of these provisions must be rewritten to protect manufacturers’ due process rights under the U.S. Constitution.

While there might be justification for expedited action on situations that create an “imminent hazard” to safety, the provision in Section 202(a) provides for no standard for judging what an “imminent hazard” might be. Current law provides for recalls when a defect presents an “immediate and substantial threat to motor vehicle safety,” but those terms are not used in the bill, and the new terminology is not defined. Neither the Secretary nor the manufacturer would have the kind of guidance required under the U.S. Constitution on what situations might be subject to this authority. Worse yet, Section 202(a) provides no administrative hearing on an Imminent Hazard Order by the Secretary in a reasonable—or any—time, nor does it provide the manufacturer with the opportunity for a hearing before a fact-finding judge. General principles of due process require a hearing of some sort within a reasonable time on such an administrative order or alternatively, a limitation on the duration of the order. For instance, the Consumer Products Safety Commission cannot get an imminent hazard order without first going to court; under the Federal Railroad Act, an order can only last 30 days before an administrative review hearing. Section 202(a) has no timeline for an administrative hearing. Under this legislation, the Secretary can order a stop sale of unlimited duration and the manufacturer is left with the sole remedy of going to the U.S. Court of Appeals, a process that can take up to 2 years. There is no administrative hearing, no judicial hearing before a fact-finding judge, and no expedited review. This and the lack of standards are serious due process concerns.

Due process generally requires that an aggrieved party be given notice and an opportunity for a hearing *before* the party is deprived of property. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (“An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.” (internal quotation omitted)).

“The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” *Loudermill*, 470 U.S. at 546. It is a “‘root requirement’ of the Due Process Clause” that the entity “‘be given an opportunity for a hearing before [it] is deprived of any significant property interest.’” *Id.*, 470 U.S. at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)); *see also Zinermon v. Burch*, 494 U.S. 113, 127 (1990). The lack of adequate process is particularly troubling where there exist no “additional procedural safeguards” to protect the interests of aggrieved parties. *Matthews v. Eldridge*, 424 U.S. 319, 343 (1976).

Section 202(b) goes beyond the section’s caption and also amends the existing statutory process by which a manufacturer obtains judicial review of an order to recall vehicles (without regard to imminent hazards). Under current law, a manufacturer contesting a mandatory recall order is entitled to a *de novo* trial in district court

in which NHTSA has the burden of proof to establish the presence of a safety-related defect. *U.S. v. General Motors Corp.*, 518 F.2d 420, 438 (D.C. Cir. 1975). The draft bill would appear to substitute appellate review of any recall order for district court review. Appellate review, which is usually deferential to the finder of fact—whether a district court or an agency that has held an enforcement hearing—is inappropriate where, as under Section 202(b), there has been no hearing on the facts and no provision for a fact-finding judge to make an initial decision. Under this scenario, the manufacturer would never get due process of law to establish the record in a neutral forum. The manufacturer should have the opportunity to develop a record and defend itself in District Court. S. 3302 as introduced deprives the manufacturers of due process.

Finally, the imminent hazard provisions, as currently drafted, significantly expand the powers of the Secretary to affect manufacturers' businesses without actually offering any additional safety benefits. NHTSA may order the manufacturer to stop production, sale, offer for sale, lease, offer for lease, distribution, the introduction or delivery for introduction in interstate commerce, or importation into the United States. The current "stop sale" provision in the Safety Act already prohibits the delivery to a customer of any vehicle until the safety defect has been remedied. As long as the defect is remedied prior to the vehicle getting into customers' hands, there is no added safety benefit gained by stopping production, importation or halting distribution to dealerships. Halting distribution unnecessarily prevents manufacturers from utilizing the most efficient method for fixing defects in vehicles—the dealer body.

### **Title III. Transparency and Accountability**

*Section 301. Public Availability of Early Warning Data.* Section 301 expands the coverage of the "early warning reporting" program to include several categories of data that are already being collected by NHTSA under the "early warning reporting" regulations. For example, NHTSA's rule already requires manufacturers to report on customer complaints, warranty claims, and field reports under the "early warning reporting" program, and NHTSA found that it had ample authority to require this information under the existing law. Accordingly, it is unclear why this provision is needed.

Section 301 would replace the current "disclosure" provision of Section 30166 of Title 49 with a new provision that appears to compel release of all early warning information "provided to the Secretary pursuant to this subsection" unless the information is exempt from disclosure under the Freedom of Information Act (FOIA). The legislation directs NHTSA to undertake rulemaking "establishing categories of information provided to the Secretary pursuant to this subsection that must be made available to the public," and authorizes NHTSA to "establish categories of information that may be withheld from public disclosure under paragraphs (4) and (6)" of FOIA. The Section goes on, however, to *require* disclosure of consumer complaint aggregated data, without regard to whether it might qualify for exemption from disclosure under the FOIA, and repeals NHTSA's existing regulation establishing categories of early warning information that the agency determined to be eligible for withholding from disclosure under paragraph (4) and (6) of the FOIA.

As NHTSA has already done much of what this provision directs namely, considered which categories of early warning information are entitled to exemption from disclosure under FOIA through an extensive rulemaking proceeding that was reviewed and upheld by the courts it is unclear what benefit is served by repealing the outcome of that effort in its totality and directing NHTSA to do it all over again. A simple direction to NHTSA to review the existing regulation and make appropriate changes resulting from the review would seem to accomplish the same purpose.

As to the new direction to "establish categories" of information "that must be made available to the public," the Alliance respectfully suggests that this provision misunderstands the FOIA process and the protection it affords to trade secrets and confidential business information. While the courts have upheld (and, indeed, encouraged) agencies to establish categories of *exempt* information under FOIA to help manage the administrative burdens of FOIA, we know of no such process for creating categories of information that "must be made available to the public," nor do we believe that such direction is authorized under FOIA and the case law that has evolved around the processes for protecting confidential business information (so-called "Reverse FOIA cases"). A submitter of confidential business information to the government is entitled to have that information reviewed and considered for withholding from public disclosure under FOIA standards, and that right cannot be taken away by the administrative creation by NHTSA of "categories" of information that must be disclosed. By contrast, the courts have encouraged agencies to create

“categories” of exempt information to ease the practical problems of reviewing and passing on multiple requests for confidential treatment by numerous submitters, when those submissions are likely to be repetitive and where most such requests are likely to be granted.

Since TREAD was enacted in 2000, NHTSA has applied FOIA standards to evaluate the confidentiality of early warning reports, and their evaluations have been upheld by the reviewing courts. As Section 301 continues to provide for the application of FOIA standards to these data, but simultaneously calls for the creation of “categories” of information to be disclosed, the Alliance believes that this provision raises serious questions about the consistency of the provision with the FOIA itself and the rights of submitters of confidential information to the government.

*Section 302. Improved NHTSA Vehicle Safety Database.* The Alliance supports Section 302, which would provide for improvements in NHTSA’s Vehicle Safety Database. We have long advocated for increased funding for NHTSA’s National Automotive Sampling Survey. More resources to sample more cases will aid the agency and the manufacturers in developing appropriate vehicle safety countermeasures. In addition, Alliance members think the marketplace and consumers will be well-served by an improved *safercar.gov* website. There is a bountiful supply of information currently available to the Agency and the public, but unfortunately it is not shared with consumers in a way that can be most helpful to them.

*Section 304. Promotion of Vehicle Defect Reporting.* The Alliance does not object to Section 304; however, we note that the requirement to affix a notice somewhere inside a vehicle is redundant. Such information is already required to be included in the vehicle’s owner’s manual. It is not clear why Congress believes that an owner who believes he/she has a defective vehicle would consult his/her glove compartment, but not check his/her owner’s manual. One place should be sufficient—the owners’ manual is already required, and already instructs consumers how to lodge a complaint.

*Section 305. NHTSA Hotline for Manufacturer, Dealer, and Mechanic Personnel.* The Alliance does not object to Section 305; however, we note that such a hotline is redundant to the similar hotline NHTSA is required to maintain for the general public. It is unclear what public benefit is served by requiring NHTSA to spend resources to maintain a separate hotline for employees of manufacturers, suppliers, dealers, and other repair facilities.

*Section 307. Corporate Responsibility for NHTSA Reports.* The Alliance has serious concerns about Section 307, which imposes personal liability up to \$250,000,000 on the “principal executive officer” but does not define the term or provide any means for determining who that person may be. The responsibility to review the submission and, based on the officer’s knowledge, confirm the detailed accuracy of the submission fails to understand or recognize that many submissions (because of the breadth of the agency’s requests and the complexity of many of the investigations) are assembled by dozens of company employees working together who must review thousands and thousands of records. Even if it was feasible to require a single person to have requisite knowledge after review of an entire submission, including the thousands and thousands of records and judgments of the many people assembling the submissions, it would not be possible to make the kind of affirmations required under this proposal. Furthermore, the inequity among manufacturers of who may be impacted by this provision could be substantial. The “principal executive officer residing in the U.S.” is likely to be far different for companies headquartered in the U.S. than those that are headquartered in other countries. In addition, this responsibility to certify reports applies to information provided in response to a “preliminary safety investigation, or in response to an official safety investigation.” These terms are not currently used by the agency and are also not defined in Section 307. In addition, \$250,000,000 in personal liability is both unreasonable and disproportionate to the matter at hand. Even the Sarbanes-Oxley Act of 2002, upon which this provision seems to be based, caps liability at \$5,000,000. This provision needs significant modification to address these issues.

In addition, to the extent that Section 307, or any other provision of new legislation, would establish requirements regarding the review, analysis, or confirmation of data in such a way as to require such work to be performed in the U.S. to allow an official in the U.S. to make a certification, such a requirement would violate important international obligations. Requiring U.S.-based recall decision-making would also encourage other countries around the world to impose the same unnecessary burdens, significantly increasing the cost of doing business for all automakers.

Indeed, since NHTSA statutory and regulatory authority allows a manufacturer to rely on foreign engineering and testing to certify compliance at the time of sale, it is inherently inconsistent not to recognize and allow the same review, analysis, or confirmation to be used for responding to a defect investigation. Particularly at

a time when more and more of the auto industry is developing worldwide research, development, sourcing and construction processes for new vehicles, any requirement forcing duplication of activities such in the U.S. is counterproductive.

*Section 308. Anti-revolving Door.* The restrictions contained in Section 308 go far beyond the current ethics restrictions on former Federal employees. This section would impose greater employment restrictions on NHTSA employees, regardless of level, than are currently placed on cabinet level appointees or Members of Congress. Perhaps the concerns addressed in this section could more appropriately be addressed through amendments to the general ethics laws.

#### **Title IV. Funding**

*Section 401. Authorization of Appropriations.* The Alliance supports Section 401, which would increase authorized funding for NHTSA's vehicle safety programs. The Alliance agrees that NHTSA should have resources sufficient to accomplish its important mission. The Alliance further urges Congress to set aside some of the proposed increase to fund the National Automobile Sampling System (NASS) at a level sufficient to provide the statistically valid, nationally representative sample originally intended. The need for quality sources of data continues to grow as automakers reinvent the automobile in response to societal demands for ever safer and cleaner vehicles. Starved for funds, the capability of NASS has been dramatically reduced. Currently, NASS collects in-depth data on approximately 4,500 crashes, less than a third of the intended design size of 15,000 to 20,000 crash cases annually. A \$40 million annual investment in NASS equates to 1.73 cents for every \$100 of economic loss.

The Alliance also urges Congress to set aside some of the proposed increase to fund the research and development of vehicle technologies to end drunk driving, *i.e.*, the Driver Alcohol Detection System for Safety (DADSS) research program. According to the Insurance Institute for Highway Safety (IIHS), DA DSS has the potential to save more than 8,000 lives per year, a substantial portion of the nearly 12,000 fatalities that occur each year because of drunk drivers.

#### **Provisions in the House Discussion Draft Not Included in S. 3302**

*Judicial Review of Defect Petition Rejections.* The Alliance commends the Senate for not including Section 306 of the House draft, which would allow for judicial review of defect petition rejections. This section seeks to reverse established law by overturning a twenty-two year old case, *Center for Auto Safety v. Dole*, 846 F.2d 1532 (D.C. Cir. 1988). Here is the important passage from the decision:

While safety is an indispensable element of the decision not to investigate, NHTSA can and does consider such "non-safety" factors as its available resources, enforcement priorities, the likelihood of uncovering sufficient evidence to establish the existence of a defect, and the prospect of ultimately succeeding in any necessary enforcement litigation. The regulation subjudice provides the court no way to second-guess the weight or priority to be assigned these elements. In particular, it would be unwise, and inconsistent with the broad mandate of the agency under the governing statute, to infer a mandatory allocation of the agency's limited resources from the regulation at issue. We must thus conclude that NHTSA's decision governed by this regulation is not reviewable.

It is no more appropriate now than it was in 1988 to mandate that the Agency with the greatest expertise to evaluate such decisions and the companies that will be affected by these judicial reviews be forced to defend past decisions rather than to pursue other potentially more safety-promoting activities such as advancing the work on other open investigations. Rather it creates an environment of "regulation by litigation" which will not serve the agency, the industry or the public well. It is inconsistent to assert that the agency needs more resources and more expert staff to undertake its safety mission and in the same breath assert that a non-expert court is better able to make these decisions than NHTSA. This proposal will contribute to clogging the court system and it will waste important agency resources. If every petition denial is subject to judicial review, NHTSA will be forced to spend substantially more resources in responding to each petition, regardless of its merit, and to be prepared for the anticipated judicial review. That, in turn, is likely to lead NHTSA to create much more stringent petitioning thresholds so that the agency must only respond to very well supported petitions with substantial technical analyses of multiple events. Finally, this provision would not have changed the outcome of the unintended acceleration investigations. The results of a successful appeal would simply be for the agency to open an investigation, which it did numerous times in the recent case.

*Vehicle Safety User Fee.* Alliance members are not in favor of including a new open ended fee on the cost of each new vehicle. Indeed we are sensitive to the cumulative impact of increased vehicle costs on consumers, especially in the current economic downturn. It is important to bear in mind the larger context of regulatory factors impacting vehicle costs. Only last month, the Administration finalized new fuel economy and greenhouse gas standards for automobiles, which the Alliance supported. The new standards will provide significant energy security and environmental benefits, but they will also increase the price of a new car by hundreds of dollars over the next several years. Additionally, NHTSA recently finished or is still working on—vehicle rulemakings that are projected by the agency to increase the price of a car by an additional \$428 to \$813. Finally, each of the new technology mandates in this proposal will also have some associated cost for consumers. Vehicle owners are not the only ones who benefit from the efforts of NHTSA. Highway safety is a national priority—promoting reductions in health care costs associated with accidents and protecting pedestrians as well as vehicle owners. This national purpose is particularly well suited to the general appropriations process which is better suited to fund programs providing a general benefit to the public.

The CHAIRMAN. I thank you.

And, Mr. Ditlow, we look forward to—nice to see you again—look forward to hearing from you.

**STATEMENT OF CLARENCE M. DITLOW,  
EXECUTIVE DIRECTOR, CENTER FOR AUTO SAFETY (CAS)**

Mr. DITLOW. Good to see you again, too, Chairman Rockefeller. Thank you for—

The CHAIRMAN. Is your button on?

Mr. DITLOW. We're on.

The CHAIRMAN. Yes.

Mr. DITLOW. Chairman Rockefeller, Senator Pryor, other members of the Committee, thank you for the opportunity. I am Clarence Ditlow, Executive Director of the Center for Auto Safety. I ask that my full statement be put in the record.

The CHAIRMAN. All statements will be.

Mr. DITLOW. OK, thank you.

The CHAIRMAN. Yes.

Mr. DITLOW. And I'd also like to introduce Paul Sheridan, who would have benefited from Section 303 of this bill, because he was the whistleblower that blew the whistle on the Chrysler minivan in the 1990s, got fired, and then sued for \$82 million. So, people like Mr. Sheridan certainly need protection.

The—when we look at this bill, I want to focus in on the difference on how this legislation would affect standards versus defects. When you look at standards, the bill moves forward and enacts standards. Now, rulemaking and standards, it's done on the record. Ex parte communications are docketed. If the agency doesn't issue a good rule, as it did under the TREAD Act with tire-pressure monitoring, the public can challenge it, get the rule rewritten, and turn it into a better rule. But, if it's a defect, we don't have the same level of protection that we have for standards. With defects, there are no checks and balances, there's no right for review. Most of the records in defect-provisions proceedings are not put on the record.

And if you take a look at the TREAD Act, it's set up in our early warning reporting system. It has been criticized twice by the inspector general. And opening it up is a good thing, but there's a fundamental problem with it that the inspector general and the

Center for Auto Safety agree on. The categories in it are so broad, you don't know what is being turned over by the manufacturers.

Second, the manufacturers only have to submit summary data, except for field reports. So, you don't know what's behind the records. And if you take a look at the recent example of the Toyota 4Runner, where NHTSA has now opened a timeliness query on a recall done in 2005 for a fractured steering relay rod, the agent—Toyota has submitted a complaint—a summary complaint under EWR. And it entered it as rollover and power train. It didn't enter it as rollover and steering. And when we obtained the records, independently through a product liability lawsuit, we found that it was a fractured steering rod. But, the—here's the problem—the agency never requested from Toyota the underlying record. And it could have spotted, in 2005—or 2004, when the report was done, that there was a problem. With Toyota's sudden acceleration, there are 301 EWR summary reports in the record, but only 15 of them have been sought by the agency.

For the Jeep Grand Cherokee, which we're working on right now because of fuel tanks, there are 26 summary reports of fire-related crashes, where claims have been filed. The agency has not requested any of those records. So, how do we know what's there, unless you get it? And, there's—and because there's no oversight, and there's no record, you can't do anything with it.

So, when we—and when we take—

The CHAIRMAN. Is this the last-year—

Mr. DITLOW.—a look at these records—

The CHAIRMAN. Mr. Ditlow?

Mr. DITLOW.—too—

The CHAIRMAN. Are these—

Mr. DITLOW.—here's what's happening with electronics. The—when we do open an investigation, the manufacturers are now submitting, electronically. Where does it—but the electronic record, which is a—nonconfidential—is not made public by the agency. It's shipped over to Ashburn, Virginia, to a data-collection center, where you've got to pay \$80 per CD to get a copy of it. And all the agency would have to do is push the button, upload it to the website, where they keep all the other investigatory files, and then the public could meaningfully participate in these investigations.

So, what—so in summary, what I'd like to suggest is that the bill is a good bill. The agency is a good agency. It's underfunded, it's understaffed, it's outmanned by the automobile industry. The public doesn't have an opportunity, in defect proceedings, to monitor how well the agency does. It does, in standards. So, we want to have a level playing field between accountability and responsibility, on the part of defects, at the agency level, as we do with the standards. And if we end up with the bill going forward, leveling that playing field, then the public will have confidence that the vehicles that are being sold are safe. We can go back to the levels of previous vehicle sales, but they'll be safe vehicles. We won't have these recalls popping out of nowhere to damage a brand and cost consumers their lives.

Thank you.

[The prepared statement of Mr. Ditlow follows:]

PREPARED STATEMENT OF CLARENCE M. DITLOW, EXECUTIVE DIRECTOR,  
CENTER FOR AUTO SAFETY (CAS)

Mr. Chairman, members of the Subcommittee, thank you for the opportunity to testify on the proposed Motor Vehicle Safety Act of 2010. I am Clarence Ditlow, Executive Director of the Center for Auto Safety (CAS) which was founded by Consumers Union and Ralph Nader in 1970 to be a voice for consumers on auto safety.

The Center has watch dogged the National Highway Traffic Safety Administration (NHTSA) and the auto industry for 40 years. The National Highway Traffic Safety Administration is a wonderful agency with a vital mission but it is woefully underfunded, understaffed and outgunned by the industry it regulates. To expect today's NHTSA to adequately regulate the trillion dollar auto industry is like asking a high school basketball team to beat the LA Lakers. Ford's third quarter 2009 income was \$35.5 billion compared to NHTSA's annual vehicle safety budget of less than \$200 million.

**Independent Test Facility:** Unlike such other public health and safety agencies as FDA's Center for Biologics Evaluation and Research, NHTSA doesn't even have its own research facility. Instead it must rent space at the Transportation Research Center (TRC) owned by Honda which is a test facility used primarily by auto companies who like to rub shoulders with NHTSA. Lacking state-of-the-art facilities at TRC, NHTSA produced a test report in EMI induced sudden unintended acceleration (SUA) that had no recorded test data or procedures. The first NHTSA Administrator, Dr. William Haddon, long sought a test and research facility owned by NHTSA as priority because it would give the agency the ability to do its own research to discover emerging problems and to support its investigations and compliance testing. It's time to make Dr. Haddon's dream come true and raise NHTSA's research capability to that of other regulatory agencies by creating an independent test facility combined with the Center for Vehicle Electronics and Emerging Technologies created under § 101 of S. 3302.

We deeply appreciate the effort that went into drafting the proposed Motor Vehicle Safety Act of 2010. Consumers and auto companies alike will benefit from fundamental reforms to the National Traffic and Motor Vehicle Safety Act. All too often auto companies with their focus on short-term profits and sales have failed to incorporate advanced safety features and recall vehicles with known defects. They prefer instead to meet the minimum safety standards issued by NHTSA and take the chance that a strapped regulatory agency will not order a recall. When exposed by crashes spotlighted in the news and by such emerging technologies as cell phone calls or videotapes, auto companies lose billions in sales and brand damage while consumers lose their lives. It's a no-win situation for both.

Whether it's the Chevrolet Corvair in the 1960s, the Ford Pinto and the Firestone 500 tire in the 1970s, the Audi 5000, Chrysler minivan tail gate and GM pickups with side saddle gas tanks in the 1980s, the Ford Explorer and Firestone Wilderness & ATX tires in the 1990s, and Toyota sudden acceleration in the 2000s, there's a common thread: Non-existent or out-of-date and inadequate safety standards coupled with enforcement efforts playing catch up to an industry striving to avoid recalls. If the industry wins the bet and the agency never catches up, individual companies can save hundreds of millions of dollars in avoided recalls as Toyota bragged about in sudden acceleration. If they lose and contain the loss at NHTSA, the worst case scenario is a fine of \$16.4 million. If the defect goes public, the cost to the auto companies is far greater in lost sales and reputation. But as history has shown, only one or two defects go public every decade. What goes unsaid is that the innocent bystanders, consumers, pay with their lives.

What can be done about this: First and foremost we have to go back to the basics of the original safety legislation in the 1960s and 1970s which envisioned adequate funding for enforcement and safety research including the agency's own research and testing facility instead of a leased facility owned by a regulated manufacturer. The original legislation included a strong check and balance in the form of a transparent regulatory mechanism and a public right to petition and sue for unsupported denials of petitions and closing of defect investigations.

*Judicial Review:* One of the leading enforcement cases brought by NHTSA, *U.S. v. General Motors Corp.*, 518 F.2d 420 (D.C. Cir. 1975), (Kelsey Hayes Wheels) would have never had happened but for a mandamus challenge brought by Ralph Nader over the closing of a defect investigation with the small recall of 50,000 GM pickups with camper bodies on which the wheels failed. The investigation began based on a request from Mr. Nader to open an investigation. *Id.* at 435. The recall of the camper body pickups was a compromise settlement by the agency. *Id.* at 436. Mr. Nader challenged the settlement in U.S. District Court and obtained an order reopening the investigation. *Id.* at 437. Upon reopening the investigation upon the

order in *Nader v. Volpe*, Civ. No. 960-70 (D.D.C., filed Mar. 31, 1970), NHTSA sought and obtained the recall of all 200,000 GM pickups with Kelsey Hayes Wheels.

The 1974 Vehicle Safety Amendments codified the public right to petition for a defect investigation seeking a recall just as Ralph Nader had done in the Kelsey Hayes Wheels case. The judicial right to challenge denials continued until the decision in *Center for Auto Safety v. Dole*, 846 F.2d 1532 (DC Cir 1988) holding that NHTSA's decisions to deny defect petitions are judicially unreviewable because there is no "law to apply." *Id.* at 1535. During the 15-year period in which the right to seek judicial review of the denial of a defect petition was unquestioned, this was the only litigated case. During the 8 year period prior to 1974 when there was judicial review of such requests to open investigations as Mr. Nader's in the Kelsey Hayes Wheels case, only the Kelsey Hayes case was litigated. So, in the entire 23-year history of the right to judicial review to challenge denials of defect petitions and requests to open investigations, there were only two litigated challenges. This is scarcely a burden on agency resources but rather a very valuable check and balance against unsupported agency defect actions.

*Public Investigations and Information:* In the early days of the agency from 1966 through the early 1980s, defect investigations and defect information were an open book at NHTSA. There were public lists of all investigations. Investigatory files were open as provided by the Freedom of Information Act. Warranty information, lawsuits, claims, field reports and complaints submitted by manufacturers in investigations were routinely available. Consumers and safety groups could go to NHTSA's Technical Reference Division and obtain copies of any consumer complaint, Technical Service Bulletin (TSB) or other dealer communication filed with the agency under what is now 49 U.S.C. § 30166. Safety groups could monitor investigations and rebut manufacturer arguments. Records of meetings with manufacturers during investigations were routinely kept. This transparency resulted in investigations that resolved defect issues and resulted in single recalls. Investigations did not linger for years and result in multiple sequential recalls. Such was the case with *Ford Cruise Control Deactivation Switch fires* which took 11 years from the date of the initial investigation and 6 recalls before all 16 million Fords with defective switches were recalled.

Beginning in the mid-1980s and culminating after Early Warning Reporting was established, NHTSA gradually closed the door on public defect investigations and defect information. When the agency went from a paper record keeping system to an electronic and Internet system for defect investigations and defect information, consumers and safety groups got the short end of the deal. Dealer communications including Technical Service Bulletins (TSBs) which used to be in public files are no longer readily available, if available at all. The agency now places only sketchy and inaccurate summaries of a small fraction of all dealer communications and TSBs on its website.

*Electronic Investigation Files Unavailable at NHTSA:* NHTSA today requires manufacturers to submit most information in defect investigations in electronic format. Instead of placing the information on the Internet or in public files at the Technical Reference Division (now Technical Information Services), the agency sends the defect records to the National Crash Analysis Center (NCAC) in Ashburn VA which has no public facility for reading files as did Technical Reference. Instead one must pay \$80 per CD for investigatory files with there being multiple CDs per investigation. The cost of obtaining information on the Toyota sudden unintended acceleration (SUA) investigations in the 2000s is nearly \$1,000—if one can find the information. For most consumers and consumer groups, what was once readily available is practically unavailable today. *This thick pile* is just an index to all the electronic investigatory files only available from NCAC. Soon all detailed investigatory file manufacturer submissions will be in electronic format and unavailable from NHTSA. Since there are no confidential materials in the electronic files at NCAC, NHTSA should send them to its already existing investigations website instead.

*EWR Data Too Broad and Not Public:* When the TREAD Act was passed in 2000, Congress required NHTSA to set up an Early Warning Reporting System (EWR) that required manufacturers to submit information on deaths, injuries, warranty claims, complaints and field reports. From the consumer and safety group perspective, EWR made a bad situation worse. Until Public Citizen filed a FOIA lawsuit, no information obtained under EWR was public. Now the agency releases the summary information on death and injury reports but it is so vague as to be useless.

EWR submissions by manufacturers and NHTSA summary reports on passenger vehicles are grouped into 20 component categories so broad one doesn't know what the report is. *E.g.*, one category covers the fuel system—is this the fuel filler neck,

the fuel rail, the fuel injection, the throttle body, the evaporative canister, the fuel tank, the electronic control unit that controls fuel metering or what?

steering system engine and engine cooling system exterior lighting structure wheels	suspension system fuel system visibility latch seats	service brake system power train air bags vehicle speed control fire	parking brake electrical system seat belts tires rollover
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In the recent case of the Toyota 4Runner steering rod relay recall, 05V-389, for which NHTSA has *opened a timeliness investigation* on May 10, 2009, Toyota coded a clear steering rod relay fracture that led to a rollover crash with 3 injuries as rollover and power train but not steering. In a *September 2004 Audit of EWR*, the DOT Inspector General found that EWR can't identify steering defects and NHTSA Administrator Runge agreed to that finding, defects. In contrast to the 22 specific components categories for passenger cars and trucks under EWR, consumer complaints from VOQ's can go into 1200 different categories (that's too many but 22 is too few). (Attached is the consumer complaint list for VOQ's.)

For the past 7 months, the Center for Auto Safety has been filing FOIA after FOIA to open up the secret workings of the EWR system. Our first FOIA for lists of all EWR inquiries and files resulted in *NHTSA asking us to pay \$55,000* in advance for the information. After 6 months of negotiations, NHTSA gave us a list of death and injury inquiries made to manufacturers. What NHTSA didn't give us and what we still don't know are: (1) what the agency did with the records obtained under the inquiries—*i.e.*, did they open and close an internal investigation or evaluation without making it public, (2) was there any follow-up with the manufacturer and (3) the actual death records themselves.

*NHTSA Fails To Request Most Death and Injury Reports:* What we do know by comparing the summary EWR reports to the EWR inquiries is shocking. NHTSA doesn't even request specific death and injury records from the summaries submitted by auto companies in the broad EWR reporting categories where there are known major defects. Here are three examples:

*Toyota SUA*—most likely component vehicle speed control with fuel system, power train and electrical other possibilities. 301 reported incidents of death and injury—only 16 records requested leaving 286 unrequested.

*Jeep Grand Cherokee Fuel Fed Fires*—most likely components are fire-related and fuel system. 26 reports of fire related deaths and injuries—no records requested.

*1990-95 Toyota 4Runner and 1993-98 T100 steering*—most likely components steering, suspension, rollover. 5 reports of steering related deaths and injuries, no records requested.

During the same time that Toyota provided the 301 summary EWR speed control death and injury reports, the agency had multiple defect investigations and petitions pending to which the reports were relevant but apparently ignored. The Center for Auto Safety has a *defect petition* pending since last October on fuel fed fires in 1993-04 Jeep Grand Cherokees which have had 279 deaths in fuel fed fire crashes with over 70 deaths clearly due to fire. Under EWR, Chrysler has submitted 26 summary reports of fire related deaths and injuries. Our EWR FOIA showed that NHTSA has not requested the underlying death and injury report for any of the 26 EWR summary reports. The public record of our defect petition does not show any communication between the agency and Chrysler, something that used to be made public on an ongoing basis in past defect petition when the agency was more open. For the Toyota 4Runner, NHTSA did not have an open investigation when Toyota announced Recall 05V-389 *based on reports in Japan a year earlier* with a claim that there were no cases in the U.S. which could have been disproved then by asking for the death and injury reports behind Toyota's EWR summary reporting but NHTSA failed to ask. A complicating factor is EWR reporting requirements only go back 9 model years from the reporting quarter so almost all 4Runners were not subject to reporting when EWR started in 3rd Quarter of 2003. The reporting requirement should be extended to the average 12 year life of a vehicle.

*Defect Death Reports Should be Mandated and Public:* Unless a defect investigation in the form of a Preliminary Evaluation or an Engineering Analysis is opened, the public does not have any access to NHTSA's analysis of EWR data. One thing is clear—*NHTSA has made hundreds of information inquiries on deaths under EWR which are not made public.* We have gotten access to only one EWR inquiry so far—Ford Explorer rollover deaths labeled as DI06-Explorer. The records which consist of non-confidential claims records, police reports, lawsuits, and newspaper articles

cover over 300 deaths through 2005. But despite the 300 deaths, there is no indication of what NHTSA did. This is all the more of a mystery because the total Explorer rollover deaths after the TREAD Act took effect are more than before the TREAD Act became law. The agency just doesn't like the public to see what it's doing behind closed doors.

Death reports based on an allegation of a defect are the most significant records covered by EWR today. The number of death reports is low. The documents consist of public records so there is no issue of confidentiality. The vast majority of recalls do not involve deaths. Where there are defects involving deaths, there is normally a recall. Death reports should be treated just like field reports—the actual document that the manufacturer receives of a death claim or notice that alleges or proves the death was caused by a possible defect should be required and made public. Otherwise NHTSA can sit on the summary numbers and never request the actual claim or notice information received by manufacturer as it did with Toyota SUA and Jeep Grand Cherokee fires. In addition to death reports, EWR should be expanded to include lawsuit complaints which are one of the most detailed sources of information available on safety defects.

*Private Meetings:* One big abuse in defect investigations not addressed by S. 3302 is the meeting between manufacturers and NHTSA for which there is no record other than a list of attendees. These meetings often occur at the conclusion of an investigation where the important decisions are made and are attended by former NHTSA employees representing the manufacturer. They frequently include presentation of documents by *either* NHTSA or the manufacturer on why there should or should not be a recall. In the case of the Toyota Sienna SUA investigation, EA08-014, that led to the Safety Improvement Campaign 09V-023 (*i.e.*, less than a Safety Recall), a meeting attended by former NHTSA Chief Counsel Erika Jones, Chris Tinto and Chris Santucci (former NHTSA staff) *has only the list of attendees and nothing else.*

The single best example of a NHTSA private meeting occurred in the Chrysler minivan liftgate investigation. In September 1993, a young girl in Virginia was killed when the rear liftgate latch failed on her family's Dodge Caravan, the liftgate opened and she was ejected from the rear. NHTSA opened a Preliminary Evaluation which got upgraded to a Engineering Analysis in January 1994. By October 1994, 30 children had died, and many more had been permanently injured due to the minivan liftgate latch and seat system safety defects, which were well-known inside Chrysler. Paul Sheridan, the head of Chrysler's Minivan Safety Leadership Team had already made several major presentations to upper Chrysler management recommending that the minivan be recalled and the safety defects be repaired at no charge to minivan families. On November 17, 1994, NHTSA held a private meeting with Chrysler at which NHTSA showed Chrysler its low speed crash tests showing the tailgate popping open and child dummies flying out. NHTSA told Chrysler "The latch failure is a safety defect that involves children." Yet at that meeting NHTSA agreed not only to drop its request for a safety recall but also to deny any FOIA requests for the crash tests predicting it would be months before the tests could be pried loose. Yet there is nothing in the public investigatory about the agreement. Instead it was *revealed in the attached internal Chrysler memo* produced in discovery in a lawsuit and released from protective order when the case went to trial. These meetings are not about data submissions by manufacturers. They are about secret deals to close investigations without recalls that ultimately result in deaths and injuries to consumers.

To correct this, we recommend adding a section "o" to 30166 reading:

*(o) Records of Meetings in Investigations.—If a manufacturer meets with representatives of the Secretary of Transportation during or in the course of an investigation, the Secretary shall keep public minutes of the meetings including records of any presentations or evidence presented by either the Secretary or the manufacturer. Any information provided to the Secretary pursuant to this subsection shall be disclosed publicly unless exempt from disclosure under section 552(b) of title 5.*

*Whistleblower Protection:* The Chrysler minivan investigation demonstrates the strong need to provide whistleblower protections for employees working in the auto and related industries who blow the whistle to NHTSA. Paul Sheridan who is here today tried to get Chrysler to recall the minivans and fix not only the liftgate latch but also the seat back structure. Chrysler responded by disbanding Sheridan's Safety Leadership Team. At this point Sheridan announced his intention to report his safety defect concerns, to NHTSA. Alarmed by Mr. Sheridan's intention, Chrysler waited until the Christmas holidays to raid Mr. Sheridan's office files, fired him without notice and obtained an ex parte "muzzle order" which threatened him with

arrest if he disclosed what he knew about Chrysler safety defects. Undaunted Mr. Sheridan provided his sworn testimony to NHTSA. In an effort to intimidate him Chrysler then amended their Michigan lawsuit against him, alleging “damages” totaling \$82,000,000. This amount stands as an all-time record claimed against a former employee. Ultimately Chrysler dropped its claims in exchange for Mr. Sheridan dropping a state whistleblower lawsuit but needless to say Mr. Sheridan incurred untold sums in legal expenses and personal trauma.

*Recall Database:* NHTSA itself should be required to maintain a database of recall information by VIN—what is more important than a list of vehicles subject to a recall by VIN is a list of vehicles by VIN that have not yet been repaired under a recall. Some manufacturers already give that information to companies like Carfax where inputting a VIN to be checked will turn up outstanding recalls. As the Federal agency to go to on vehicle safety, NHTSA should get that information from manufacturers. In the 1980s the Federal Trade Commission required some manufacturers to publish free indexes of TSBs and were allowed to charge a nominal fee for posting and handling for providing individual TSBs. Section 302(c) of the discussion draft is silent as to whether manufacturers can charge for access to TSBs. Some companies already charge for such access with Toyota having a \$400 annual fee. This section should be modified to require the dealer communications be free for a specific vehicle upon the consumer entering the VIN.

*Funding:* The Center for Auto Safety supports increased funding for NHTSA of \$500 million per year. If appropriations in this amount are not available, then we support the user fee as the way to get funding for NHTSA to levels more adequate to its mission. In the short-term, NHTSA should be given funding to purchase its own research and test facility as Congress intended to do more than 40 years ago in the 1970 Vehicle Safety Amendments. One particular area that is underfunded that could expose defects like Toyota SUA earlier is the National Analysis Sampling System (NASS). The current budget is just over \$15 million and investigates only 4,000 crashes per year. This compares with a budget of around \$10 million per year in the early 1980s providing about 10,000 cases. The original design would have produced nearly 19,000 cases per year which, at current costs, would require a budget of around \$60 million.

Had NASS been operating at its original design size, the agency could have spotted the problem with Firestone tires on Ford Explorers much earlier. The savings in life and limb from that discovery, even a few months earlier, alone would have been sufficient to cover the extra cost of NASS at its full design size. Explorers were introduced in 1990 and the defective Firestone tires were on some of the earliest models. If the excessive Explorer rollovers resulting from failures of Firestone tires could have been spotted by the mid-1990s, it could have saved hundreds of lives and at least \$1 billion for Ford and Firestone.

*Enhanced Safety Authority:* The Center for Auto Safety fully supports increasing the civil penalty to \$25,000 per violation and lifting the cap on civil penalty to match other enforcement agencies such as the Environmental Protection Agency which also regulates the motor vehicle industry. We also support the imminent hazard provision which is present in other regulatory agency such as the Food and Drug Administration. Missing from the discussion draft is criminal penalties which are common in other statutes for knowing and willful violations of the Act.

*Vehicle Electronics and Safety Standards:* The Center for Auto Safety fully supports the provisions in Title I. We recommend that the Event Data Recorder (EDR) provision be changed to require both rulemakings to be completed in 3 years and to give manufacturers that presently do not have an EDR that meets the requirements in the present voluntary standard the option of going to the advanced EDR a year earlier than required and skip the minimal EDR. All of the rulemakings required by Title I would benefit from deadlines for issuing proposed rules as well as final rules.

*Conclusion:* This legislation provides a unique opportunity to not only reduce the unacceptable toll of death and injuries on the Nation’s roads but also provide stability to the auto industry which suffers from lack of public confidence and sales when preventable defects such as Toyota sudden unintended acceleration occur. The Federal Government through the National Highway Traffic Safety Administration should lead the way to vehicle safety and not clean up afterwards.

MINI/VAN LATCH ISSUEProposed Agreement with NHTSA1. Crash Test Video and the Public Record

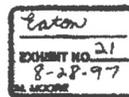
- NHTSA has agreed that they will deny all FOIA requests to place their investigative files, including the crash test video, on the public record and that the Department of Justice will defend any lawsuits seeking to compel production under FOIA.

We would agree with NHTSA that their engineering analysis will remain open while we conduct the service campaign to provide them additional bases to argue that release of the materials would interfere with their investigation.

- The Department of Justice says there is less than a 50/50 chance of keeping the video off the record for the full duration of the investigation, i.e. the Campaign, if there is a court ruling. Given the possibility that a lawsuit could be filed at any time, they anticipate that the legal process would take at least four months, regardless of the outcome.

2. Service Action Only - No Recall: NHTSA has agreed that a Chrysler service campaign would fully satisfy all of their concerns and they would give full public support to such an effort. The critical elements that differentiate the service campaign from a recall (mostly reflected in the two attached letters) are as follows:

- no admission of defect or safety problem;
- stated purpose of the campaign - to assure peace of mind in light of media coverage;
- campaign does not count as a NHTSA action - not included in NHTSA recall numbers, no Part 573 or Part 577 letters;
- statements to owners, the public and NHTSA assert that no defect has been found; and
- NHTSA acknowledges that replacement latch is not a 100% solution.



TD000110

3. Chrysler Announcement: Chrysler controls publication of its action with the following provisions:
- Chrysler goes first with its own statement and reads approved NHTSA statement supporting Chrysler's action;
  - Chrysler characterizes campaign as being solely to ensure the peace of mind of its owners, i.e. "your concern is our concern";
  - Letter from Martinez to Chrysler and NHTSA press statement praise Chrysler action as fully satisfying all of NHTSA's concerns and state that Chrysler is a safety leader;
  - NHTSA officials acknowledge publicly that there has been no finding of defect and that there will be none; and
  - NHTSA officials acknowledge that owners should not be concerned over the delayed implementation of the action and that they can best protect themselves by keeping seat belts buckled at all times.
4. Additional Provisions: The following points have been requested by NHTSA and appear to be reasonable:
- The letter to owners makes reference to the NHTSA hot line phone number;
  - Latch replacement will be offered as part of any routine minivan servicing (once replacement latches are available);
  - Chrysler will submit six quarterly reports on the progress of the campaign (helps to support defense of FOIA requests); and
  - NHTSA can make reference to the service campaign in response to owner inquiries.

TD000111

The CHAIRMAN. Thank you, sir.  
Mr. Stanton, you are the President and Chief Executive Officer of the Association of International Automobile Manufacturers.

**STATEMENT OF MICHAEL J. STANTON, PRESIDENT AND CEO,  
ASSOCIATION OF INTERNATIONAL AUTOMOBILE  
MANUFACTURERS, INC. (AIAM)**

Mr. STANTON. Thank you, Mr. Chairman.

AIAM and its member companies appreciate the Committee's efforts to improve motor vehicle safety, and understand the intended benefits of the bill. We also fully support the Committee's proposal to provide additional engineering and related resources to NHTSA, including improving the agency's vehicle safety database, to provide greater accessibility. AIAM also believes that NHTSA must be

given the necessary time and flexibility in its rulemakings so it can make good decisions. Similarly, manufacturers require sufficient lead time to engineer tests and produce vehicles that will meet the new standards.

We are concerned that the rulemaking mandates in the bill predetermine matters currently under active investigations and not yet fully analyzed by NHTSA. As a general matter, it would be more appropriate to direct NHTSA to complete its investigations as soon as possible, and issue rules based upon a full and comprehensive analysis of these important safety issues.

Regarding the nine mandated rulemakings in the bill, we defer to NHTSA's judgment as to the feasibility of the deadlines for issuing the final rules, as specified in the bill. However, we note that the deadlines for many rulemaking mandates appear to be unreasonably short and provide insufficient lead time for implementation. Short deadlines can adversely affect the quality of the final rule. And prior to issuance of a final rule, NHTSA often finds it necessary to conduct research to address issues that first arise during the rulemaking process. From our perspective, if the short deadlines adversely affect the quality of the final rules, we all lose.

With regard to the effective date specified in the bill, we note that, while some of our members already equip their vehicles with technologies contemplated in the legislation—for example, brake override and EDRs—others do not. For those manufacturers who do not currently employ these technologies, especially some of the small-volume manufacturers, these lead times are just not feasible. Even those companies that currently have the technologies, may also need sufficient lead time, because there are no assurances that the technologies that they employ will meet the requirements of the final rule.

In addition, the bill does not provide for the new requirements to be phased in, nor does it provide for phase-in incentives to promote early deployment, where feasible. It is generally more efficient for manufacturers to implement new technologies at the time of model changes so that the new items can be better integrated than would be the case with an add-on technology or approach.

It is also important that NHTSA be given time and flexibility to develop data-based technology-neutral standards, and to specify realistic, achievable lead time for implementation. In the case of the brake override standard, we support NHTSA's efforts to develop a safety standard to address unintended acceleration, but believe there are some technical issues that will need to be considered during the rulemaking. For example, some vehicles still use mechanical, rather than electronic, throttle-control systems. So, the application of an electronic override may be impracticable for these vehicles. And for vehicles with manual transmissions, a brake override system may not be necessary, since the clutch pedal provides a way for quickly removing power from the driving wheels.

Also, implementation of a brake override may be more complicated in some vehicles than others because of the way the throttle, brake, and electronic systems are currently designed.

These issues can be properly vetted by following the agency's adequate—giving the agencies adequate time to review input provided through the rulemaking process. And make decisions that

will lead to the performance-based standard appropriate for the different vehicle types and technologies available today and in the future.

With respect to the proposed corporate-responsibility requirement, which is section 307, we have concerns that this requirement could significantly chill the speed of the safety investigation practices used by some AIAM members, and introduce nonsafety experts into the process. The current practice, used by some of our members, separates safety-related decisions from financial considerations, and intentionally excludes these executives. We are concerned that the proposal might have the unintended consequence of introducing financial considerations inherent when you have senior officials involved into the safety decisionmaking process.

Under existing law, manufacturers are already legally responsible and accountable for submitting accurate information to NHTSA. Providing false or misleading statements to the Federal Government is strictly prohibited. We do not believe that requiring a senior officer to certify responses to safety investigations and other submissions to NHTSA is necessary or practicable. However, if the Committee insists on some sort of senior-officer certification, consideration should be giving to limiting the scope of this certification to formal responses to NHTSA's defect determinations. Additional considerations should also be given to allowing a corporate officer specifically charged with safety matters to certify such submissions.

Mr. Chairman, my written testimony addresses most of the issues in the bill. I would be happy to answer any questions.

[The prepared statement of Mr. Stanton follows:]

PREPARED STATEMENT OF MICHAEL J. STANTON, PRESIDENT AND CEO,  
ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. (AIAM)

Chairman Rockefeller, Ranking Member Hutchison, and members of the Committee, thank you for the opportunity to speak with you today regarding S. 3302, the "Motor Vehicle Safety Act of 2010". My name is Michael Stanton, and I am President and CEO of the Association of International Automobile Manufacturers, or AIAM. AIAM is a trade association representing 15 international motor vehicle manufacturers who account for 40 percent of all passenger cars and light trucks sold annually in the United States. AIAM members have invested over \$40 billion in U.S. vehicle plants, component manufacturing facilities and R&D centers and directly employ 90,000 Americans. More than half of all vehicles sold by AIAM members in the United States are made in the United States.

AIAM and its member companies appreciate the Committee's efforts to improve motor vehicle safety and understand the intended benefits of the bill. Having NHTSA consider additional Federal Motor Vehicle Safety Standards to address certain issues raised by recent recalls is an important goal. We also fully support the Committee's proposals to provide additional engineering and related resources to NHTSA, including improving the agency's vehicle safety database to provide greater public accessibility. However, AIAM believes that NHTSA also must be given the necessary time and flexibility to study these important safety issues so that it can make analytic, data-based, technology neutral decisions. Similarly, manufacturers require sufficient lead time to engineer, test and produce vehicles that meet any new standards.

We are concerned that the rulemaking mandates in the bill pre-determine conclusions as to matters currently under active investigation and not yet fully analyzed by NHTSA. As a general matter, it would be more appropriate to direct NHTSA to complete its investigations as soon as possible and issue rules based upon a full and comprehensive analysis of these important safety issues.

With respect to the proposed Corporate Responsibility requirement (Section 307), we have concerns that this requirement could significantly chill the speed of the safety investigation processes employed by some AIAM members and introduce

those who are not safety experts into the process. The current process employed by some AIAM members separates safety related decisions from financial considerations and intentionally excludes these executives. We are concerned that the proposal might have the unintended consequence of introducing financial considerations (inherent when highest ranking executives are involved) into the safety decision-making process.

We also note that under existing law, manufacturers are already legally responsible and accountable for submitting accurate information to NHTSA. Providing false or misleading statements to the Federal Government is strictly prohibited (18 U.S.C. Section 1001). AIAM does not believe requiring a senior officer to certify responses to safety investigations and other submissions to NHTSA are necessary or practicable. Consideration should be given to limiting the scope of this certification by restricting it to formal responses to NHTSA's defect determinations. Further, consideration should be given to allowing a corporate officer specifically charged with safety matters to certify submissions.

We defer to NHTSA's judgment as to the feasibility of the deadlines for issuing the numerous final rules, as specified in the bill. However, we note that the deadlines for many rulemaking mandates appear to be unreasonably short and provide for insufficient lead time. Short deadlines can adversely affect the quality of the final rule, potentially placing the agency in the position of having to decide whether to rush completion of a proceeding or miss the statutory deadline and have to explain the delay to Congress. Prior to issuance of a final rule NHTSA often finds it necessary to conduct research to address issues that first arise after publication of a proposed rule, as a result of public comments submitted to the agency. From our perspective, if the short deadlines adversely affect the quality of the final rules, consumer and manufacturer resources used to comply with the rule may be misallocated. Moreover, short deadlines tend to limit opportunities for public comment, potentially impairing the ability of interested stakeholders to assist in the development of an effective final rule.

With regard to the effective dates specified in the bill, we note that while some of our members already equip their vehicles with several technologies contemplated by this legislation (for example, brake override and EDRs), others do not. For those manufacturers who do not currently employ these technologies, especially some of the small volume manufacturers, the effective dates specified in the bill are simply not feasible. Even those companies that currently have these technologies, however, also need sufficient lead-time because there are no assurances that these current technologies, which may vary from company to company, will be employed consistent with the mandates in the anticipated final rule. More often than not, complexities in achieving compliance with a proposed standard first become apparent during the rulemaking proceeding as a result of public comment and further research and analysis by the agency. This new information may demonstrate a need for greater lead-time than was initially anticipated. Without the appropriate lead-time, successful implementation of the rule would be compromised.

In addition, the bill does not provide for the new requirements to be phased-in, nor does it provide for phase-in incentives to promote early deployment where feasible. It is generally more efficient for manufacturers to implement new technologies at the time of full model changes, so that the new items can be better integrated than would be the case with a purely "add-on" approach. Phase-in periods for new standards accommodate the integration of new technology as part of the model redesign process, generally resulting in superior compliance measures being implemented at lower cost for consumers and manufacturers. Phase-in periods also provide time for suppliers to design, test, and ramp up production capacity for new or significantly modified components so that all of their customers can meet the requirements of new safety standards within the given lead-time.

AIAM's comments on specific provisions of the bill are as follows—

*Sec. 101. Electronics and engineering expertise.* The creation within NHTSA of a "Center for Electronics and Emerging Technologies" is an appropriate response to the rapid movement of the industry toward electrification of vehicle systems (generally, to improve fuel efficiency) and the adoption of a wide range of advanced technologies.

*Sec. 102. Vehicle stopping distance and brake over-ride standard.* AIAM supports NHTSA rulemaking to develop a safety standard to address unintended acceleration through brake-override technology. AIAM recommends that NHTSA be given more time to develop the standard and the flexibility to determine the details and lead-time of the standard based on the agency's analysis of the issue and input provided during the rulemaking proceeding. Also, as currently written, the bill directs NHTSA to issue a safety standard that would "prevent" unintended acceleration in passenger vehicles. Given that the instances and causes of potential unintended ac-

celeration are uncertain, it would be more appropriate to focus legislation on means to “address” this issue. In addition, some vehicles sold in the U.S. (and elsewhere in the world) use mechanical, rather than electronic, throttle control systems. This section of the bill should preserve that design option by limiting provisions in Section 102(a)(2)–(4) to those vehicles in which an electronic throttle control system has been installed. Likewise, it is not clear that there is a need for a brake over-ride in vehicles with manual transmissions, since the clutch pedal is a way of disengaging the engine from the transmission, thereby removing power from the driving wheels. For this reason, the brake over-ride standard should not be applied to manual transmission vehicles, or NHTSA should be given discretion to identify types of vehicles or technology for which the standard does not apply.

*Section 103. Pedal placement standard.* The considerations noted with regard to Section 102 apply here as well. The ramifications of changes in pedal placement are more complex than might be initially apparent. NHTSA should be allowed the discretion to determine whether a standard is appropriate or feasible. Challenges include balancing the conflicting demands on pedal placement that, on the one hand, would suggest a larger separation between brake and accelerator to reduce the likelihood of pressing them simultaneously and, on the other hand, would suggest placing the pedals close together which would be expected to reduce braking time in emergency situations. Driver comfort is another issue and will be different for shorter, taller, younger, and older drivers. Currently, the variety of vehicles, as well as the availability on some vehicles of adjustable pedals, lets people select a vehicle that is comfortable for them to drive safely. Pedal placement can also affect the performance of a vehicle in a crash; it will affect the position of the driver relative to the steering wheel and airbag module which in turn could drive changes to the design of a vehicle’s airbag system. Pedal placement also has an effect on driver injuries, not only to lower extremities but to other body regions as well since crash forces travel up through the legs to the hips and the rest of the body. In addition to potential changes to vehicles’ safety systems, movement of pedal locations in vehicles could involve significant redesign of the floor pan and other vehicle components and should be undertaken at the time of full model changes, if found to be a cost-effective means of addressing the unintended acceleration matter.

*Section 104. Electronic systems performance standard.* In late March 2010, NHTSA announced a research study with the National Academy of Sciences’ National Research Council to examine the broad subject of unintended acceleration and electronic vehicle controls. This work is expected to be completed in about 15 months. Additionally, NHTSA has brought in NASA engineers and other experts in subjects such as electromagnetic compatibility as part of a shorter-term review of the systems used in Toyota vehicles to determine whether they contain any possible flaws that would warrant a defect investigation. The study is expected to last through at least late summer and include NASA experts on computer-controlled electronic systems, electromagnetic interference and software integrity. While it would be inappropriate to pre-judge the outcome of this work, it would be appropriate for Congress to codify the need for expedited study of these matters and to direct the agency to consider rules to address whatever concerns are found, including the ones identified in the bill. Since it is premature to judge the precise scope of whatever needs emerge from the study process, it would be inappropriate to establish deadlines for issuing final rules and for achieving compliance. The study process should be allowed to run its course and the need for adoption of rules and the content of such rules should be determined after the completion of the studies.

*Section 105. Keyless ignition systems standard.* This matter is the subject of ongoing work by the Society of Automotive Engineers (SAE). It was specifically requested by NHTSA in order to develop a consensus standard. The SAE committee, which has set a deadline of August 2010, should be allowed to proceed with its work. If Congress deems it necessary, it would be appropriate to specify a deadline for completion of that work and the adoption by industry of a voluntary agreement consistent with the SAE criteria. Congress could specify that if this process is not completed in a timely fashion and in a manner acceptable to NHTSA, NHTSA would then issue a rule.

*Section 106. Transmission configuration standard.* Transmission shift lever sequence is currently regulated by Federal Motor Vehicle Safety Standard 102. It would be appropriate for Congress to direct NHTSA to conduct an expedited review of this standard under its existing Regulatory Review Plan and issue rules to address any shortcomings in the current standard that are identified in the review.

*Section 107. Vehicle event data recorders.* We do not object to making the requirements of the current EDR rule, which is currently scheduled to go into effect beginning September 1, 2012, on an “as equipped” basis, mandatory for all passenger vehicles. (A petition currently before the Agency requests an additional year lead-

time). However, sufficient lead time must be given for implementation since not all manufacturers currently have EDRs in their vehicles and some may not have planned to add EDRs to all of their models. We are concerned that the part of this section directing the Secretary of Transportation to initiate rulemaking to revise the existing requirements for EDRs is excessively prescriptive. We do not object to directing NHTSA to consider the specifications listed in the bill, but the selection of new specifications should follow analysis by the agency and a notice-and-comment rulemaking process. As with the other mandates in the bill, the agency should be given flexibility regarding lead-time that is provided for compliance. This would allow the agency to balance the safety benefits of monitoring and recording additional data elements against the resulting cost and increased complexity. In addition, in the event that information is retrieved by a government safety agency under paragraph (d)(2)(C), the vehicle manufacturer should also receive access to the information, much as is done currently with information derived from on-board diagnostic systems. The section should also include a general prohibition on tampering with EDR information with associated civil penalties.

*Section 201. Civil penalties.* We understand the desire to increase the amount of civil penalties but object to an excessive increase that creates a system where penalties have little direct relationship to violations. Also, providing a cap on maximum penalties, as is the case under current law for most Federal regulatory regimes, provides some degree of assurance that penalties would not reach a level that would risk bankrupting a manufacturer and result in a significant loss of jobs. We urge that a cap be retained and would be pleased to work with the Committee to determine the appropriate penalty amount. It should be noted that civil penalties are not the primary factor in determining the conduct of manufacturers. The harm to a manufacturer's reputation from the publicity, as well as the increase in tort exposure surrounding safety noncompliance or defect events, has a major impact in the marketplace. This provides a greater incentive to avoid these situations. Last, we urge that the bill allow the agency to retain discretionary authority on setting appropriate penalties.

*Section 202. Imminent hazard authority.* We agree with the concept of providing NHTSA new authority to address "imminent hazards." However, such authority should be carefully circumscribed and defined to assure that this severe remedial approach is reserved for appropriate cases in which there is a high likelihood of imminent death. The language extends the authority to situations that "may" involve death or serious bodily harm, a standard that could be met in a wide range of routine enforcement cases, given the nature of automobile crashes. Moreover, unlike the recently amended Consumer Product Safety Act, it does not require that NHTSA first go to court to obtain an imminent hazard order and there is no timeline for a prompt administrative hearing. The only remedy under the bill is for a manufacturer to go to the Federal appeals court; a procedure that can take several years. The agency should develop guidelines and procedures, consistent with constitutional due process protections, for invoking the authority, and those guidelines should be subject to notice and comment and appropriate judicial review. In sum, given the severe consequences to a manufacturer, its workers and dealers of closing a production facility, the Committee should reconsider the process and criteria provided in the bill for exercising imminent hazard authority to ensure that such authority is reserved only for situations involving a substantial number of vehicles and in which there is a high and imminent likelihood of death or serious bodily harm.<sup>1</sup>

*Section 301. Public availability of early warning data.* We oppose the expansion of the information categories that could be made public under paragraph (d) of the bill. We note that current confidential early warning information is fundamentally vehicle quality data that often has little relationship to safety but has substantial competitive value. Access to information of this type would assist companies in evaluating the effectiveness of competitors' technology, while potentially avoiding the expense and risk of developing and marketing that technology themselves. The release of any additional categories of early warning information would be harmful to manufacturers and is likely to spawn frivolous lawsuits. In 2008, NHTSA looked at this issue and completed a rulemaking which we believe struck the proper balance between confidentiality and public disclosure. In addition, to the extent that any data is publicly released, provisions must be made to redact consumer identifying information and vehicle VINs.

*Section 303. Consumer Notice of Software Updates and other Communications with Dealers.* Manufacturers currently provide copies of all Technical Service Bulletins (TSB's) and other dealer and owner communications to NHTSA and this in-

<sup>1</sup>We also note that the notification in paragraph (3)(A)(iii) should go to "owners," not "purchasers," since some vehicles will have been resold by their original purchasers.

cludes software updates for all previously sold vehicles. AIAM would support having these documents easily available and accessible to the public on the NHTSA website. Manufacturers already make available to independent repair shops and other after-market service companies website access to such information. This information is the same information provided to dealers. Some of our members also make TSB's and other dealer communications available to the public on their websites. Consequently, AIAM does not believe a mandate requiring manufacturers to provide such information on their websites is necessary, especially if NHTSA makes these communications easily available and the manufacturer can simply provide a link on their website for the public to the NHTSA site. AIAM also believes that the requirement to use "plain" language and where such language should be placed on a TSB is overly prescriptive and burdensome, especially when many of these software updates are not safety related.

*Section 306. Whistleblower Protections For Motor Vehicle Manufacturers, Part Suppliers, and Dealership Employees.* As a matter of public policy, AIAM supports protecting employees from retaliatory discharge for reporting safety-related defects. We have substantial concerns, however, about the process and standards in this Section. We believe that such matters should be handled by the Secretary of Labor consistent with its procedures. Instead, Section 306 has the Secretary of Transportation handling discharge or discrimination complaints. We believe NHTSA's resources and time should be focused on motor vehicle safety and leave these matters to DOL where such expertise lies and where a process is in place to handle whistleblowers discrimination complaints related to numerous Federal statutes, including Sarbanes-Oxley, the Surface Transportation Assistance Act and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). The recently amended Consumer Product Safety Act also refers whistleblower complaints to the Secretary of Labor.

*Section 307. Corporate responsibility for NHTSA reports.* Under current law, the vehicle manufacturer or its U.S. agent is legally responsible and accountable for submitting accurate information to NHTSA. Providing false or misleading statements to the Federal Government is strictly prohibited (18 U.S.C. Section 1001). AIAM does not believe requiring a senior officer of the U.S. company to certify submissions to NHTSA is necessary or practicable, and in fact may be counterproductive to the intended benefits. The safety concerns, analyses, and judgments are extremely complicated. It is an iterative process requiring engineering expertise and judgment as well as the analysis of data from a variety of sources both within and outside the company—including suppliers and affiliates. A senior executive, especially one based in the United States, must rely on the expertise and knowledge of others with the skills required to assess the accuracy and rigor of engineering and complicated data analyses, since such individuals are generally not experts in vehicle safety. Successful approaches to safety ensure the integrity of the decision-making and reporting process by eliminating the presence of senior officers who do not have this expertise and also have fiduciary responsibilities beyond vehicle safety.

In addition, requiring senior executives to have such an intimate role in reporting is likely to have the unintended effect of slowing down safety-related decisions and introducing additional layers to the process. It is not uncommon for NHTSA to make a series of information requests of varying degrees in scope. If each of these responses to the agency, no matter how minor, must be certified and signed by "the principal executive officer or officers residing in the United States," the agency's investigation process could be significantly delayed and it may not have the benefit of the greater knowledge of trained safety executives.

This does not mean that the U.S. company is not legally responsible for the accuracy of its submissions but that responsibility rests on the corporation as a whole not one U.S. senior executive. Requiring the "principal senior executive" to certify a submission, as opposed to requiring the person more directly responsible for handling the company's safety and regulatory affairs, may unintentionally breach the wall between the responsibility for responding to safety issues and the sales/finance responsibility, which many have built to minimize the impact of financial considerations on voluntary recall decisions.

If the Committee nevertheless insists on some sort of senior officer certification, consideration should be given to limiting the scope of this certification by restricting it to certain major submissions and/or allowing other corporate safety officials to sign. In addition, the potential liability cap of \$250 million is grossly excessive as applied to an individual corporate officer and presents unduly burdensome practical constraints on a manufacturer. The assessment of penalties for "incomplete" submissions is a vague and highly subjective standard. AIAM would be pleased to work

with the Committee to establish a more reasonable and productive scope of individual penalties.

*Section 307. Corporate Responsibility for NHTSA Reports—Criminal Penalties.* In addition to our other concerns regarding certification of NHTSA submissions by the “principle executive officer residing in the United States,” AIAM does not support expanding the current criminal penalty provision. The new provision adds potential additional criminal exposure by including not only violation of Section 30166 but also Sections 30118 and 30119, the general defect reporting provisions and adds additional penalties to those already provided under Section 1001 of title 18. We believe the current criminal penalty provision, which includes criminal penalties and up to 15 years of imprisonment is adequate to handle such matters.

*Section 308. Anti-Revolving Door.* AIAM supports strong conflict of interest rules for Federal employees but believes that these rules are too onerous and will result in the best candidates—for example, electrical engineers, experienced attorneys, etc.—deciding not to work for NHTSA. NHTSA’s work is too important to risk this result. It is too broad, as well, as it applies not just to matters that the employee has been involved with in the last 3 years, but prohibits a former NHTSA employee to even advise a manufacturer on motor vehicle safety compliance matters, even if the employee’s work for the manufacturer does not directly or indirectly involve communications or interactions with NHTSA. It is not appropriate to only apply such restrictions to NHTSA employees and let other Executive Branch agencies (and Congress) have a lesser standard. Finally, this provision is very one-sided because it only applies to motor vehicle manufacturers, an ex-employee of NHTSA can immediately go and work for a non-governmental organization or a plaintiffs’ product liability law firm.

*Section 309. Deadlines for rulemaking.* This section provides helpful flexibility to allow necessary additional time to complete rulemaking proceedings, as conditions warrant. Similar flexibility should be provided to the agency to allow additional compliance lead-time and phase-in schedules as appropriate.

Thank you for the opportunity to present AIAM’s views.

The CHAIRMAN. Thank you, Mr. Stanton. We’re very happy to see you.

Ms. Claybrook.

**STATEMENT OF HON. JOAN CLAYBROOK, PRESIDENT  
EMERITUS, PUBLIC CITIZEN; AND FORMER ADMINISTRATOR,  
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION**

Ms. CLAYBROOK. Thank you so much, Mr. Chairman. Really appreciate the opportunity to be here. My name is Joan Claybrook, and I—

The CHAIRMAN. You know a little bit about NHTSA, I think.

[Laughter.]

Ms. CLAYBROOK. I’m sorry?

The CHAIRMAN. You know a little bit about NHTSA, I think.

Ms. CLAYBROOK. I know a little bit about NHTSA, thank you.

Since I left office, in 1981, Mr. Chairman, more than a million Americans have lost their lives on the highway, in vehicle crashes, and many more have suffered horrible injuries. The cost to the Nation of just the fatalities is \$6 trillion, not adjusted for inflation.

In the last 18 months, we have witnessed some terrible failures of regulation, whether it has been in the massive failure in the financial regulation area, whether it has been with Toyota, whether it has been in the coalmine area where a regulatory agency is smothered with revolving-door lobbyists, and now with the oil rigs fouling our Gulf of Mexico, and the huge impact this has had on small businesses.

I mention these because this law that you are trying to pass is extremely important, and it will make a huge difference, in terms of the ability of this agency to do its job. And when you have good

regulation and enforcement, regulated companies take fewer risks with public safety and the environment and with the public's money.

So, I strongly endorse your bill. I'm going to comment on only a few sections, because of time.

First is section 107, dealing with the event data recorder. And we're concerned that there are some missing elements in this rule. First, it should be a performance standard, and not a specific standard just for event data recorders. And I say this because that's what the underlying statute that NHTSA administers—requires. And so, I think it ought to be systems that do the job that an event data recorder does, but not necessarily specify an event data recorder, so that we could move into technology development, such as wireless systems, at some future point in time. So, I urge you to consider that.

And also, to have only one rule, rather than two, as this bill specifies—I think you could shorten the time—to enlarge the data elements that must be recorded to include rollover, which is one of the most deadly types of crashes. And under the bill, as written, it's optional, not required. That kind of crash kills 10,000 people a year.

And also, to require a single uniform access system for downloading and recording the location of a crash, to facilitate immediate medical assistance. This is a really important provision. Cell phones today, if you call 911, they know your location. And so, for medical assistance that comes from the whole notification process, such as OnStar, if you don't know your location, then you can't get that immediate medical help, which is so critically important. And so, I believe that all of those changes should be made, if possible.

And, in addition, we would like to see NHTSA get the data that comes off of these event data recorders, with protection for privacy. And my reason for saying this is this. NHTSA has very limited data systems. It's very expensive to get this information. But, when the EDR-type data is downloaded, if NHTSA got it, as well, could get it in a wireless way, then it would have real-time on-road information to help it do the kind of job it needs to do, in sort of—in terms of setting standards and finding defects. And it would have to set up a new system—a new database at the agency. But, right now it's totally inadequate, their data systems.

I know that Mr. Stanton has supported improving NASS. It's extremely expensive to do these individual-acts investigations, which is what NASS is. So, to have this online data would be fabulous for the agency. And it's a forward-looking way of treating the EDR, but I think it's something that could really improve the future for the agency.

On enforcement authority, I strongly support the civil penalty provisions and imminent hazard authority. But, we urge, as well, that criminal penalties be added to the NHTSA law. The criminal penalties are in statutes covering motor carriers, hazardous materials, aircraft, oil pipelines, water safety, railroad safety, clean water, food and drugs, cosmetics, solid waste, clean air, mine safety, occupational safety and health, consumer product safety, consumer product hazardous substances, securities antitrust, vehicular

homicide. This is just a short list of all the other statutes that have them. And I think that, in terms of having the top brass pay attention, as you're interested in with corporate accountability, that's what makes them pay attention, if they think they could go to jail, if they refuse to do a recall. And I think that this recent steering-rod issue that came up with Toyota is a perfect example of the problem, where they did a recall in Japan, they didn't do one in United States for another year. And they misled the agency, they lied to the agency. So, I think that we ought to have that added.

The transparency provisions, I won't discuss in detail, because Mr. Ditlow has just done that in his testimony. But, we urge that greater consideration be given to improving transparency. NHTSA has, unfortunately, over the years, developed a great deal of secrecy that should not exist. And I think that it would make a huge difference if the Committee could turn its attention to improving the transparency.

On the funding, this agency gets a \$132 million a year for its vehicle safety program. We deeply appreciate that this bill would vastly increase the funding. It needs to be done. I think the goal should be \$500 million a year in 4 years. While the bill heads in that direction, doesn't quite get there. And we hope that you would consider that.

And then, finally, we do endorse the revolving door and whistleblower provisions. But, we also are very concerned, because NHTSA's only testing capacity is at a Honda-owned facility, and we think that's a conflict of interest. And we would like to see the Committee address this and have the agency have its own facility some other way, and not be dependent on one where it's 20 percent of the use of that facility and other motor vehicle manufacturers use it as well as Honda, all in the same facility. We think that for a regulatory agency, this is inappropriate.

Thank you so much, Mr. Chairman, for the opportunity to testify.  
[The prepared statement of Ms. Claybrook follows:]

PREPARED STATEMENT OF HON. JOAN CLAYBROOK, PRESIDENT EMERITUS, PUBLIC CITIZEN; AND FORMER ADMINISTRATOR, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Mr. Chairman, members of the Committee, my name is Joan Claybrook and I am pleased to be asked to testify today concerning proposed motor vehicle safety legislation to enhance the authority and capacity of the National Highway Traffic Safety Administration in the U.S. Department of Transportation to protect the public. I am President Emeritus of Public Citizen and a former Administrator of the National Highway Traffic Safety Administration (NHTSA).

In the last eighteen months we have witnessed corporate executives take huge financial risks with investors money and a massive failure of regulation in the financial sector that has upended our economy, caused people to lose their savings, their jobs, their homes and forced many into bankruptcy. The effects will be tearing at the fabric of our society for years to come.

In the past few months the American public has witnessed more spectacular examples of corporate excesses and of the failure of regulation to moderate corporate misbehavior, resulting in unnecessary deaths, injuries, and environmental and economic harm. The year 2010 began with the shutdown of Toyota production until repairs for a sticky accelerator could be made after Toyota notified Canadian and European authorities about the problem last year but failed to notify the U.S. Department of Transportation. The company was recently fined \$16.4 million, the maximum under current law.

This revelation followed a horrible crash of a runaway Toyota built Lexus last August while the occupants were on a cell phone begging the 911 operator for help.

They crashed at almost 100 mph, killing all four occupants. Shortly thereafter Toyota recalled over 5 million vehicles for the so-called floor mat problem (which many believe is an electronic problem that is still being investigated by the Department of Transportation). Toyota officials boasted in an internal memo last summer that in 2007 it had avoided a major recall for its runaway vehicles and saved the company \$100 million. Over 50 people are dead because of runaway Toyotas and many others injured.

ABC television 2 weeks ago revealed that Toyota also lied to NHTSA in 2004 about U.S. customer complaints it received concerning its trucks and 4-Runner steering rod breakage (causing a complete loss of steering control). Toyota denied knowing about any U.S. complaints and thus refused to conduct a recall in the U.S. after it carried out one in Japan. NHTSA did nothing when it received Toyota's notice of the Japanese recall even though the vehicles were identical. Toyota finally initiated a U.S. recall a year later in 2005. With the media revelations of Toyota's law violations, NHTSA is now conducting an investigation.

In early April, a horrible coal mine explosion at the Massey Energy Upper Big Branch coal mine in Montcoal, West Virginia killed 29 miners. This mine had been cited just weeks before the disaster for numerous safety violations, including problems in ventilating the mine and failure to prevent a buildup of deadly methane gas. The mine company denied there were any ventilation problems shortly before the blast. The mine owner, Don Blankenship, is a well known opponent of mine regulation. In 2006 a subsidiary of Massey pleaded guilty to 10 criminal charges at the Sago mine that killed two miners and the company paid a \$2.5 million criminal fine. As the families and the Nation mourned the most recent mine deaths, the FBI has begun an investigation of criminal offenses under the Federal Mine Safety and Health Act. According to the *Washington Post*, "More than 200 former Congressional staff members, Federal regulators and lawmakers are employed by the mining industry as lobbyists, consultants, or senior executives, including dozens who work for coal companies with the worst safety records in the Nation." Regulation of mining operations and enforcement of violations has been weak for years.

Then on April 20, a British Petroleum (BP) oil rig exploded in the Gulf of Mexico, off shore from New Orleans and its fragile wetlands, marshes and estuaries. Eleven workers were killed, others injured, fire ensued, the rig collapsed, and oil started leaking at 40,000 gallons a day. It is now estimated by the Coast Guard to be a raging torrent of oil pouring out of the drilled hole a mile deep in the water at a rate of more than 200,000 gallons a day and BP for a month has not been able to stop it. The blowout preventer designed to seal the well was activated by workers but did not work nor did the failsafe switch. The huge oil slick will far exceed the spill of the *Exxon Valdez* oil tanker in Alaska. It threatens wildlife all along the Gulf Coast, where some 30 percent of U.S. fish and shell fish are harvested. The rest of the Nation will feel the impact of higher prices for these products. But thousands of workers and small business owners along the Gulf Coast are now being shutdown, who knows for how long, because their products are awash in oil. The Coast Guard is responsible for supervising the clean up but regulation of oil drilling by the Interior Department is minimal as the *Wall Street Journal* recently documented. Also, in Federal legislation passed after the *Exxon Valdez* debacle, oil industry lobbyists secured very low limits on company liability (economic liability is capped at only \$75 million).

Mr. Chairman, enactment of your vehicle safety legislation in the next months before Congress adjourns is crucial. Since I left the NHTSA in 1981, more than one million Americans have lost their lives in motor vehicle crashes and many millions more have suffered serious injuries. Applying the DOT cost value of \$5.8 million per fatality, the cost to the Nation of this loss of life over 30 years amounts to nearly \$6 trillion, not adjusted for inflation. While the number of annual deaths has dropped in the last few years because of the recession, if history is our guide, they will rapidly climb back as the economy recovers. These numbers do not include the cost of the horrible injuries in car crashes from brain injury, quadriplegia, paraplegia, epilepsy, burns, and the resulting bankruptcies, orphaned children, divorces, and increased government health care, unemployment and other social assistance costs. The most recent figure for the total annual cost of crash injuries in 2000 was \$230 billion a year. In the past 10 years those economic costs surely have increased dramatically.

These examples of regulatory failures, corporate malfeasance and profits before safety, and the extraordinary loss of life in auto crashes every day set the backdrop for our discussion of the need for amendments to the National Traffic and Motor Vehicle Safety Act. With strong regulation and enforcement, regulated companies take fewer risks with the public's safety, environment or money. NHTSA has been far less effective that it can and should be. Your legislation reflects the importance

of reenergizing the agency, and helping it achieve its primary goal of securing public safety on the highways. We deeply appreciate your effort in preparing this legislation. I will focus my comments on the four main sections of this important bill to give NHTSA the regulatory heft and direction it needs to do its job:

*I. To require the issuance of key safety standards that update and enlarge the agency's oversight of electronic systems in motor vehicles;*

*II. To enhance the authority of the NHTSA to enforce the law;*

*III. To increase transparency, accountability and integrity at NHTSA so that the public can play a greater role in overseeing what the agency is doing, or failing to do, and to assist the public in protecting itself;*

*IV. To provide greater resources for an agency that is responsible for 95 percent of the Nation's transportation deaths but that receives only 1 percent of the U.S. transportation budget. NHTSA's FY 2011 budget request for its motor vehicle safety programs is a paltry \$132 million.*

Mr. Chairman, I will not comment on every provision in the proposed legislation, but will highlight those that I believe need the most support or adjustment, and in addition I will submit more technical amendments to the staff.

#### **Title I. Vehicle Electronics and Safety Standards**

I support the provisions in this title but urge that the bill include deadlines for issuance of proposed rules as well as final rules as this committee saw fit to do for the rollover safety standards in the 2005 SAFETEA-LU legislation. This is needed to make sure that the agency does not wait to act until the last minute, missing the deadline for the final rule.

I particularly want to discuss vehicle Event Data Recorders (EDRs), Section 107. I have a few suggestions I think are critical to the viability and utility of this provision. I also commend to the Committee the EDR legislation developed by Representative Jackie Speier (D-CA) which is more comprehensive and supported by consumer groups. In particular with regard to Section 107, I recommend the following:

First, under Section 30102 of the existing law, motor vehicle safety standards are minimum standards for "motor vehicle or equipment performance." To require an "event data recorder" is not really a "performance" standard. And given the dramatic developments in motor vehicle electronic advancements and particularly wireless communications, I urge that the bill be amended to require an "EDR or other system" so that manufacturers are encouraged to innovate. For simplicity in my testimony I will refer to "EDR," but that should be considered shorthand for a performance standard.

Second, the time to accomplish these two rulemakings, in subsections 107(a) and (b), is too long and unnecessary given the existence of NHTSA's voluntary standard, the current state of EDR technology and installation of EDRs by the industry. The bill requires one rulemaking to mandate installation of minimal EDRs and a second to upgrade the requirements. Both objectives can be achieved with a single rulemaking in 3 years, 18 months to issue a final rule and 18 months lead time, rather than a total of 5 years, 3 years to issue the rule and two for lead time, as contained in S. 3302.

Third, at a minimum, I also urge that NHTSA be required to mandate recording of all the data elements listed now in its voluntary standard unless there is a strong reason not to do so. Also, collection of rollover data should not be optional or truncated. Data collection of the full rollover event must be required. Rollover crashes are a major source of auto crash deaths, with some 10,000 deaths and almost 20,000 severe injuries resulting each year. There is no reason to make collection of data for such critical crashes optional or limited to only the first two events, other than the fact that the auto companies have been lobbying medical societies, NHTSA and CDC to downgrade the importance of rollover crashes. But in fact, if you are in a rollover crash, the risk of serious injury approximately doubles compared to other crash modes.

Fourth, the language in Sec. 107(b)(5) and (b)(6) should require a single, universal or uniform access port. It appears that the wording of subsection (b)(6), "to facilitate universal accessibility", is intended to achieve that goal. The wording of the provision should, however, more clearly state that a universal data port design is required to ensure that any downloading tool will be compatible and result in the elimination of the need for a unique and different download tool for each EDR, which is very expensive, wasteful and confusing burden for police agencies and others.

Fifth, I also urge that Section 107(c)(4) be deleted. Recording the crash location is absolutely essential for getting medical care immediately to crash victims, as

GM's On Star and the BMW's crash notification system now do and most vehicles will in the near future. Any emergency response system transmitting EDR data would have to include the crash location because it assures faster and more effective medical care. Crash location is also critical for subsequent crash investigation and reconstruction, as well as for future research using the crash data from EDRs. At present, if you call 911 on your cell phone, your location can be identified. Including crash location in EDR data is far less intrusive and will save lives. On balance, identifying the location of the crash to save lives and reduce injuries far outweighs abstract arguments for keeping it secret, particularly with other strong privacy standards and protections.

Sixth, the bill should be amended to require that the data collected by the EDR be automatically transmitted electronically to a NHTSA database (with privacy protections for those involved in the crash as NHTSA routinely requires now in all its data collection). GM's On Star and BMW now regularly collect this data electronically and use it for evaluation of their vehicles. Electronic collection of EDR data by NHTSA would expedite the collection process and reduce the cost of collecting this data, allowing the agency to obtain the data without waiting for the physical examination of the vehicle. EDRs can lose data due to tampering and inept physical downloading. Handling by intermediaries increases the chances that EDR data will be corrupted. It will be far less expensive and far more reliable for NHTSA to receive real-time data electronically and directly from actual crashes at about the same time as the crash notification systems alert medical help.

Currently, NHTSA spends over \$15 million a year to investigate crashes weeks after they occur as part of the National Automotive Sampling System (NASS), but the number of crashes investigated is only about 4,000, far fewer than needed for statistically robust data. NHTSA's crash data program is too small for the agency to conduct its mission. Specifically, the agency requires detailed data on a large, representative number of crashes that occur on U.S. roads to diagnose safety problems, to identify safety defects and noncompliance with safety standards, and to evaluate the degree to which its standards and programs are achieving their goals.

Crash investigations do collect far more data per crash than a real time EDR system would, but the EDR data would provide a high quality basis for selecting which crashes to investigate and would reveal the state of highway safety in this country. EDR data and crash investigations would complement each other, giving NHTSA more robust and statistically valuable data. Getting such data will also assist the agency to oversee the EDR program and improve it because it will be constantly looking at the data collected. In short, the agency is totally thwarted and cannot do its job with inadequate and outmoded data. Any more band aids are a waste of lives, time and money. The agency needs to enter the 21st Century and be able to collect and analyze real time crash data received electronically. The agency should be directed to undertake immediately a complete review and redesign of its crash data systems by 2011 showing how it could collect and use real-time electronic crash data by 2015.

NHTSA should require such electronic collection systems either as part of the EDR rule, or as a separate requirement. With some manufacturers now collecting such data for themselves, it should not be difficult to make sure such data are routinely transmitted to a NHTSA database.

Finally, the bill should require manufacturer or government officials that retrieve EDR data from a vehicle to automatically provide the vehicle owner with a copy within 20 business days.

## **Title II. Enhanced Safety Authorities**

### *1. Civil Penalties*

I heartily support the increase in civil penalties of \$25,000 per violation (as at the Environmental Protection Agency (EPA) emissions program) without any mandated maximum. One of the NHTSA's serious problems is that the auto industry has not felt any pressure to comply with safety standards or recall vehicles because the agency had no real tools to punish them if they disobey the law. The agency's penalties for violation of fuel economy standards have no maximums, and there is no maximum on EPA's vehicle emissions penalties. With NHTSA's maximum of \$5,000 per violation (\$1,000 until the 2000 Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act) and maximum for any case of \$16.4 million (\$1 million in the law prior to TREAD), the agency until the recent Toyota \$16.4 million fine had imposed a total of only \$8,273,496 in fines from 1966 through 2009. No wonder the auto companies view NHTSA as a toothless tiger. It is important to evaluate both sides of the ledger, and to realize that since there is no limit on the damage a manufacturer can cause with its operations, so there should be no limit on the penalties the Secretary can impose, justified by the facts of a case.

By comparison with auto safety enforcement, California last week fined Sempra Energy \$410 million for gouging the state on energy contracts signed during the energy crisis there a decade ago. Last week the Justice Department announced Johnson and Johnson has agreed to pay more than \$81 million in a case accusing them of illegally promoting the epilepsy drug Topamax for psychiatric uses. And in February BAE Systems, a large defense contractor, agreed to pay \$400 million to resolve allegations it misled the Defense and State departments in its activities in relation to the Foreign Corrupt Practices Act a decade ago. By any reasonable measure, NHTSA's piddling fines for behavior that can and has caused death and injury are far too low.

### *2. Imminent Hazard Authority*

I also strongly support the imminent hazard authority. To assure due process for a violator, I suggest NHTSA be required to use the same procedures it uses in determining a regular safety defect with an informal agency hearing. If a manufacturer objects it could seek judicial review in the U.S. Court of Appeals which should be required to conduct an expedited hearing and response.

### *3. Criminal Penalties*

Finally, I strongly urge the Committee to include criminal penalties for knowing and willful violations of the Act. Criminal penalties are standard in many consumer protection and other regulatory statutes for knowing and willful acts. In the transportation regulatory agencies there are numerous authorities for criminal penalties. For example:

- Motor carriers who knowingly and willfully violate certain motor carrier laws are subject to up to 1 year of imprisonment.
- Persons, who misrepresent the contents of a container with hazardous material, or tamper with the labeling of hazardous materials, are subject to 5 years of imprisonment.
- Persons operating certain aircraft may receive up to 3 years of imprisonment for knowingly and willfully forging, altering, displaying or selling fraudulent registrations or certificates.
- Persons who damage an oil pipeline sign or marker are subject to up to 1 year of imprisonment.
- Persons who knowingly and willfully violate vessel operation and waterfront safety requirements commit a felony punishable with up to 6 years of imprisonment.
- A person who knowingly and willfully falsifies a report required under the Railroad Safety Act is subject to up to 2 years imprisonment.

In addition, environmental, worker and consumer protection laws regularly authorize criminal penalties, including the Consumer Product Safety Act that this committee amended in 2008 to make its criminal penalty provisions effective. For example,

- The Clean Water Act provides that anyone who knowingly violates provisions regarding disposal or discharge of effluents or knowingly introduces a hazardous substance into a sewer system or public treatment facility is subject to up to 3 years of imprisonment.
- The Food, Drug, and Cosmetic Act provides that anyone who introduces adulterated or misbranded foods, drugs, devices or cosmetics into interstate commerce can receive up to 1 year of imprisonment.
- The Solid Waste Disposal Act provides that anyone who knowingly transports or disposes of hazardous waste without a permit can be sentenced to up to 5 years of imprisonment.
- The Clean Air Act provides that anyone who knowingly releases any hazardous air pollutant into the air can receive up to fifteen years of imprisonment.
- The Mine Safety Act provides that any operator, including corporate officers, who knowingly violates or fails to comply with mandatory health and safety standards, is subject to up to one year of imprisonment.
- The Occupational Health and Safety Act provides that willful violations of any standard that cause the death of an employee are punishable by up to 6 months of imprisonment.
- The Consumer Product Safety Act provides that anyone who manufactures, sells, distributes or imports a consumer product that does not conform to the applicable product safety standard can receive up to one year of imprisonment.

- The Consumer Product Hazardous Substances Act provides that anyone who, with intent to defraud or mislead, introduces misbranded or banned hazardous substances into interstate commerce can receive up to one year of imprisonment.

In addition, a driver who participated in an illegal street race that killed eight people is subject to criminal penalties. Goldman Sachs is subject to criminal penalties by the Securities and Exchange Commission for securities fraud. Antitrust violations can be criminally prosecuted. Why not NHTSA?

There is no reason why NHTSA should not also have the authority to seek criminal penalties for persons who knowingly and willfully violate the Act, especially because these actions result in death and injuries and so many lives are at stake. Such prosecutions would have to be brought by the Justice Department after a thorough review of the evidence in the case. The Justice Department does not bring many such cases each year. But it would be a strong deterrent to auto companies knowingly and willfully violating the law. And it would change the way the top brass views the company's regulatory obligations. Disclosures about how Toyota, the largest auto manufacturer in the world, specifically and knowingly and willfully refused to conduct safety recalls and in fact boasted about saving the company \$100 million dollars by falsely narrowing the scope of a recall, more than justify this provision.

I also ask that legislation delete section 30170 (a)(2) of title 49 the provides a safe harbor for persons who violate 18 U.S.C. 1001 with the specific intent of misleading the Secretary of Transportation about vehicle safety defects that have caused death or injury. This subsection allows a person to recant and correct their violation to avoid any penalty if he/she did not know that the violation would result in an accident causing death or serious bodily injury. This provision completely undercuts our general criminal code and provides a special exception for people misleading and lying to NHTSA. It does not apply to any other government agency.

### **Title III. Transparency, Accountability, and Integrity**

I support all of the provisions in Title III of the bill. They make excellent improvements to help the public learn about NHTSA's programs with greater openness and accessibility. The bill encourages the public and manufacturers, dealers and mechanics to report safety problems to the agency, and helps to encourage the integrity of the government's auto safety program.

However, in addition to the provisions in the bill, we would urge the Committee to adopt the following provisions which are essential to achieve these goals:

#### *1. Judicial Review of Rejections of Defect Investigation Petitions*

We strongly urge the Committee to include, as the House bill does, authorization for judicial review when a public petition for a recall investigation is rejected by NHTSA. Giving the public the authority to challenge an agency rejection of a defect petition is essential. As we now know, NHTSA on a number of occasions turned down safety defect petitions from Toyota owners for an investigation of their runaway vehicles. The owner had no recourse when his/her petition was rejected, and NHTSA did nothing to protect the public. It is clear that greater public involvement would improve NHTSA's attention to consumer complaints and concerns.

It is highly unlikely that this provision will be used often because it is costly to bring such suits, but it should be available for the times when citizens have done their homework and are ready to press the case. During the 22 years when such authority was available (before a court ruling in 1988 indicating that such suits were not authorized by the NHTSA statute), only two cases were brought. One of the cases brought to light an important defect that the agency had not fully investigated, and may have saved a number of lives.

Also the standard is very high to be successful in such a case. It is not unlike the provision in the Federal Election Commission law that authorizes a challenge of the dismissal by the Commission of a complaint or failure to act on it. The U.S. Supreme Court has upheld that specific authorization for review of the dismissal of a complaint. A precedent for the provision in the bill is found in two antidiscrimination statutes concerning particular actions that shall not be deemed committed to unreviewable agency discretion. To assure that the agency is responsive to the public, which suffer death and injury from vehicle defects, such authority should be granted. In the same way that the auto companies are asking for due process for imminent hazard decisions, and are allowed to challenge agency defect enforcement decisions, we are asking for fair treatment for consumers harmed by rejection of safety defect petitions.

## *2. Reporting Law Suits under Early Warning*

The statute should require NHTSA to distinguish claims or consumer complaints made to manufacturers by the public, and which the manufacturers are required to disclose to the agency (under the TREAD Act Early Warning Reporting requirements), from lawsuits filed in court. Currently, manufacturers are not required to separately report the number of filed lawsuits that assert a product defect even though these documents are public records in our courts. Since lawsuits are reported together with other consumer claims, as a single number, the number of lawsuits is not known. The number of lawsuits related to a particular alleged defect should be reported separately because lawsuits are an order of magnitude more credible and substantiated than general consumer letters that suggest a possible claim against a manufacturer. In terms of early warning, both the agency and the public should know how many claims are full-fledged lawsuits and how many represent a general consumer request for compensation.

## *3. Fix Vehicle Defect Categories under Early Warning*

As a part of the Early Warning Reporting rulemaking required under Sec. 301(b), the bill should require the agency to either eliminate the potential vehicle defect categories now used by manufacturers when they report a potential safety defect, or vastly expand the number of categories so that the public can distinguish what specific part of the vehicle is a potential problem. The existing 24 categories are too vague and generalized and do not inform the public about what problem is being reported. Also, because the categories are vague, manufacturers can use one category in one report and another category in another report concerning the same problem to undermine the whole purpose of consistent reporting under the Early Warning Reporting system. For example, in the Toyota runaway vehicles, the manufacturer's early warning report can reference a problem with the transmission, the engine or the brakes. If the vehicle rolls over, they can even use that category as well. Spreading reports of the same problem over several reporting categories is currently permitted but undermines the purpose of the Early Warning Reporting system. Such game-playing should be not possible. Also there is a need for instructions on how to report any category. Perhaps the best remedy is to have the manufacturer report the exact problem without any broad categories.

By comparison, for the VOQ (vehicle owner questionnaire) filed by consumers with NHTSA when they report a possible defect, there are 1200 possible vehicle defect categories consumers can review to select the one that best describes the potential defect in their vehicles. Why don't manufacturers, who know a lot more about the problems they are reporting, have to be as precise? The bill needs to correct this problem.

In 2004, the DOT Inspector General issued a scathing report on NHTSA's implementation of the early warning requirements in TREAD. It complained particularly about NHTSA's overly broad vehicle defect categories manufacturers would use for their quarterly filings and about other issues. The bill should require that this report be updated.

## *4. Make Public Manufacturer Reports of Deaths*

We also urge that the underlying reports of deaths from manufacturers be required to be public. Such information comes to manufacturers in the form of consumer letters, newspaper articles, lawsuits, field reports, etc. These documents should be publicly available at NHTSA. As it now stands, it is impossible for the public to exercise any real oversight of NHTSA decision-making to act or not act on such information without access to this specific documented information. To be useful, the numbers of deaths and injuries should also be aggregated by make and model and alleged defect.

## *5. Collect Names and Addresses of Aftermarket Tire Purchasers*

Sellers of aftermarket tires are not been required to record the names and addresses of buyers and report them to the manufacturer so that owners can be notified by mail or Internet if there is a recall involving their tires. This provision was eliminated from the law in 1982 at the request of independent aftermarket tire sellers who did not want the manufacturers to have access to information about their purchasers which would allow manufacturers with retail company stores to compete with them. But this of course undermines the ability to provide notice to the owners about a defective tire. With the Internet and electronic record keeping so readily available now, this requirement should be reinstated with the data and recall notices managed by an independent operator just as R.L. Polk does for auto purchaser names that it secures from state motor vehicle administrators.

#### 6. *Fully Document Ex Parte NHTSA Meetings with Interested Parties*

A major problem with transparency at NHTSA has been private ex parte meetings manufacturers have with the agency about particular defects or pending rule-making. Too often NHTSA writes only cursory notes about the meeting, mentioning the attendees but rarely stating the substance of the meeting or attaching the materials used at the meetings, including power point presentations, hand outs, etc. Thus the public is essentially kept in the dark. In addition, these notes often are not put in the docket until months after the meeting occurs.

The Center for Auto Safety has discovered summaries of such meetings at NHTSA prepared by manufacturers and revealed later in litigation that bear no resemblance to NHTSA's so-called notes of the same meeting. The purpose of the ex parte rule at regulatory agencies is transparency but at NHTSA it has been completely undermined. We ask that the bill require that detailed minutes of the entire discussion at ex parte meetings be prepared with all materials handed out by either the company or NHTSA put into the docket within 2 weeks of a meeting. Incidentally, when consumer organizations take part in such meetings we make our materials fully available for the agency docket and have no objection to complete written minutes of our discussions being placed in the public docket.

#### 7. *Assure Public Access to Defect Information Through the Internet*

NHTSA policies deter consumers from readily getting information such as manufacturer technical service bulletins or specific defect investigatory material by charging huge fees under FOIA or through contractors hired to collate and distribute information. Since much of this information comes to NHTSA electronically, the agency should be required to put any electronic information on the web to save the agency the time of dealing with requests and the public the time and cost of making specific requests and having to pay for them.

#### 8. *Revolving Door*

Recently Senator Barbara Boxer (D-CA) introduced legislation, S. 3268, to limit the revolving door between NHTSA staff and the auto industry. We commend her for this work. It requires a three-year cooling off period before an agency employee could work for or represent a motor vehicle company on NHTSA matters. It is a very reasonable bill and we have urged the House Committee to include it in its draft legislation. As the press revealed several months ago, a large number of former NHTSA officials, including Administrators (the top Presidential appointee), deputy administrators, general counsels, and chiefs of the enforcement, rulemaking and research divisions, as well as technical staff have left NHTSA over the years to be employed by vehicle and equipment manufactures as consultants, lobbyists, attorneys or on staff. This results in staff currying favor with regulated companies while at NHTSA, it encourages former employees to advise companies about how to avoid or influence NHTSA regulatory decisions, and undermines the integrity of the agency's work. Obviously this is a real problem and needs to be addressed. We appreciate the Committee including the Boxer provisions in the bill.

#### 9. *Whistleblower Protections*

The Congress has recognized the need to provide whistleblower protections for employees working in public transportation, commercial vehicle employees, and selling products regulated by the Consumer Product Safety Commission. We support the Committee's inclusion of Whistleblower Protection in the Senate bill.

#### 10. *NHTSA's Vehicle Regulatory Test Facility Is Owned by Honda*

NHTSA does not own its own test facility, yet it must conduct crash barrier and car to car tests all the time to do its job. NHTSA operates its testing activities in a facility owned by Honda Motor Company, which as a matter of principle and fact compromises the agency's integrity.

In 1978, as NHTSA Administrator, I agreed to lease space for NHTSA testing programs at a vehicle test facility built by the State of Ohio in East Liberty. At the time NHTSA conducted minimal equipment tests—but not vehicle tests—at a building in Riverdale, Maryland. There was no crash test capacity or test track. With no money allocated by Congress to build a facility, and time-consuming contracts required for each testing program we initiated, we agreed to what was then our only option.

In the 1990s, Honda Motor Co. became the owner of the East Liberty test facility and ever since NHTSA has been leasing the space from an auto manufacturer. This is an unacceptable conflict of interest. If Toyota was the company that owned the test facility, this arrangement would have been widely acknowledged as untenable. But every year the agency conducts tests on Honda vehicles as well as others at

the Honda owned test facility which is also rented by other manufacturers and used by Honda.

This facility is used by about nine auto manufacturers which is far more than it is used by NHTSA. At present, NHTSA uses approximately 23 percent of the facility's capacity. Manufacturers conduct 78 percent of durability and dynamics operations compared to 4 percent for the government, 64 percent of the impact laboratory operations compared to 33 percent for the government and 51 percent of contract services offered by the facility compared to 49 percent for the government.

Honda disagrees that there is a conflict because, it claims, it has hired a third party, Ohio State University, to manage the facility and the finances. This use of an intermediary entity does not eradicate the fact that Honda is the owner that completely controls the facility, economically benefits from owning it, and along with other vehicle manufacturers, makes use of the same facility as the agency. This is not a particular criticism of Honda. But NHTSA is a government motor vehicle regulatory agency that must operate independently, and have its own facilities as do other government agencies. Because a number of companies use the Honda facility, and this bill will require more testing, it is doubtful there will be unused capacity at the facility if NHTSA were to relocate its testing activities to an independent location.

S. 3302 should require NHTSA to move its motor vehicle testing activities and approximately 30 employees within 2 years to a location which it controls. The cost of making this move could be paid for by allocating the \$16.4 million penalty paid by Toyota this year. This is new money not in the President's budget. It is inappropriate for NHTSA to conduct tests and research affecting the industry it regulates and its public safety mission at a facility owned by the auto industry. I urge the Committee to include in the legislation a requirement that NHTSA move its test facility to a new independent location funded by the Toyota penalty.

#### **IV. Funding**

For years the NHTSA motor vehicle safety program has been on a starvation diet. Its current budget is a paltry \$132 million, less than the cost of minor government programs. It needs to be built up to at least \$500 million annually. Beginning with this Fiscal Year (FY) 2011, it should be doubled. We are very pleased the bill allocates \$200 million for FY 2011, but the increases for FY 2012 and FY 2013 are far too small, amounting to only \$40 million in each year. These authorization levels are the same as in the House draft bill, which includes in addition a vehicle safety user fee paid by vehicle manufacturers.

I realize that the vehicle safety user fee will bring in new money beginning in 2012, and more in subsequent years, and that such a user fee is in operation at the Food and Drug Administration (FDA). I do have concerns that it might cause manufacturers to exercise even more ownership leverage over the agency than they do now. And I believe the small amounts of funding we are discussing for this crucial agency can more than be met in the Federal budget.

My major concern is that the NHTSA's budget reaches \$500 million in funding in the next 4 years, either with Federal appropriations and the user fee or through Federal appropriations alone. My preference would be solely through Federal appropriations. But the absence of a user fee should not be a rationale not to increase the Federal appropriations. This agency has been undercut and undermined as have many regulatory agencies by industries that want to cut costs at the expense of the public. But their complaints have been shown to be short sighted and costly for so many American families who suffer the consequences of regulatory failures as the opening paragraphs of my statement today show. In fact, effective regulatory agencies that are properly funded are so cost effective and they are crucial to assuring our standard of living and way of life in America. I urge the Committee to assure this small agency is given the funds needed to do its job—which are but a footnote in the Federal budget.

#### **Conclusion**

Thank you very much Mr. Chairman and members of the Committee for this opportunity to testify. This important legislation needs to be enacted into law. A decade ago, after the Ford/Firestone debacle, the Congress passed legislation and thought it had fixed the problems at NHTSA. But time has revealed that the TREAD Act and the underlying statute need major improvements to upgrade the agency's regulatory authority, to increase transparency, to enhance enforcement powers, to add much needed resources and to protect its integrity. Recent months have shown how important these powers are to prevent massive numbers of preventable deaths and gruesome injuries. The public is fed up with regulatory failures that harm so many citizens and communities. Let's do it right this time and set an

example. When regulation works well, the companies as well as the public benefit. We look forward to swift movement of the legislation.

The CHAIRMAN. No, thank you very much, with all of your experience. Well, you all have a lot of experience.

Your bringing up the coal mines is a very fast way to get right into my soul.

[Laughter.]

The CHAIRMAN. And what was interesting to me, frankly, about the four of you is that two of you, who sort of do protection for a living—or did, and do—and the two of you, who are more on the production side, representing automobile companies, that efforts toward safety ran into complaints such as, you know, “Oh, it’ll cost,” or, “But, there’ll be deadlines.”

And in one specific case, when you—we were talking—you were talking about—Mr. Stanton I believe it was you—the brake override; the bill requires it. In fact, the bill doesn’t require it. The bill says that it allows it as a potential solution. But, the bill does require that the car be able to stop in a certain amount of footage, time, whatever is decided on.

But, it’s always interesting to me—I mean, I’ve done this so much with coal mine operators and coal miners. And one is, sort of, putting the brakes on—the former putting the brakes on, because it’ll cost; or because we don’t know, how long it’ll take; or that there are small manufacturers and big manufacturers, and everything has to be the same for everybody, or nothing can be the same for everybody, and therefore, everything will take more time, so slow down.

And then, what occurs to me is that this country’s going through a lot of transformation right now and we’ve discovered that we have fallen behind in a lot of areas.

I mean, this coal mine incident in West Virginia is absolutely stunning in its implications of—not only about coal companies and the demand for—in one case, there’s a CEO demanding production levels every 2 hours, every single day. And I assume that means through the night, because coal mines don’t stop operating, for the most part, depending on the market.

But, philosophically, I guess what I’d like to ask each of you—this’ll be my only question on the first round. When you look at NHTSA, when you talk about a culture of secrecy, well, you know, culture of secrecy is much, I think, deeper in coal mining than it is in carmaking. On the other hand, you also mentioned that being part of the problem with NHTSA. And I’m interested in how you react to what kind of a job NHTSA’s doing. Granted, most Americans can’t tell you what it is. This is like this oilspill. MMS suddenly appeared on the American scene. Nobody knows what it does, and it turns out they don’t really do very much.

[Laughter.]

The CHAIRMAN. But, talk to me about what you each, individually, feel about the job that NHTSA is doing and where you think it ought to be stronger, or is—pushing too hard, or whatever. Understanding that we’ve been through a period, in our last 10 years, where regulation was not a top priority, so that under a new administration, I think, it’s a greater priority, one which two of you may not welcome. But, I just—I would be interested to hear.

Mr. MCCURDY. Mr. Chairman, thank you for the question.

And I'm glad someone has asked that, because, in our opinion, NHTSA is not broken. Can it be funded better? Yes. Does it need resources? Yes. Can it improve some capabilities? Absolutely. We support that. As in our statement, there are a number of things in this bill we support—brake override and others.

But, to your philosophical question, is where I'd like to go, if I could. NHTSA has adopted, recently, the—more of the public health approach. And that is, you address the area of the biggest concern—the biggest problem. And it's like triage, you go and you affect it. That's why we support the DADSS effort for trying to develop technologies to prevent drunk drivers from getting behind the wheel, because that is the principal source of death in this country.

NHTSA did a study in 2005. What was the principal death—or cause for—it's a causal crash study. Over 94 percent were driver errors. You know, you and I both know that we have individual responsibility. And I get into a car; I have a responsibility to, not only my passengers and myself, but to those other folks on the road. And I need to understand capabilities of that car, and how to operate it safely. And that's not mentioned very much.

As far as—

The CHAIRMAN. Mr. McCurdy?

Mr. MCCURDY. Yes.

The CHAIRMAN. In that I have 2 seconds left; can we give Mr. Ditlow one quick shot at that? And I'll go back to it in my next round.

Mr. DITLOW. With NHTSA—I mean, if you look at—it's underfunded. You've got to fund it more. If you look at every major crisis we've had—Ford/Firestone, Toyota's sudden acceleration—we've had an old and outdated standard, that they didn't have money to do adequate research on, independent research on, and then issue new rules. We like the agency. It needs more funds. And it needs to recognize that its mission is to protect the public.

The CHAIRMAN. All right.

I want to welcome Senator Thune.

I'm very glad you came, sir. And the intelligencia at the dais has just put their statements in the record.

[Laughter.]

**STATEMENT OF HON. JOHN THUNE,  
U.S. SENATOR FROM SOUTH DAKOTA**

Senator THUNE. OK. Thank you, Mr. Chairman.

I would be happy to join in that pattern here, and submit my statement for the record.

[The prepared statement of Senator Thune follows:]

PREPARED STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

I would like to thank the Chairman and Ranking Member for holding today's hearing.

In light of the historic Toyota recalls and the unfortunate and preventable deaths associated with unintended acceleration, I think it is appropriate for Congress to respond with additional instruction for the auto industry that will protect consumers from this type of design flaw in the future.

However, I think any additional regulation should be as focused as possible on fixing the problem at hand.

New regulations should not duplicate existing regulations, and auto manufacturers should have an appropriate amount of time to retool manufacturing lines and test new vehicle designs to comply with the new regulations.

Additionally, I believe it is important that this committee and the National Highway Transportation Safety Administration work closely with the automakers as we enact new laws that protect consumers.

Effective communication with the key stakeholders will result in legislation that protects consumers from further defects and allows manufacturers to build cars as efficiently as possible.

I am pleased that Administrator Strickland has agreed to join us today. I am also pleased that witnesses representing consumer groups and foreign and domestic automakers are going to join us as part of the second panel.

We must all work together on new consumer protections that respond to the Toyota recalls and ensure this scenario is prevented in the future.

Senator THUNE. And I do appreciate your holding today's hearing, and giving some examination to the legislation, and an opportunity for the stakeholders to all come and give us their views.

I'm interested in knowing, with regard to the regulations that would be—come as a result of this legislation, whether the automakers that are represented here believe that there would be enough time to comply—and, to adequately test any new designs that are required, and retool manufacturing lines. What is a sufficient amount of time to do the things that you would have to do to comply with the new regulations, pursuant to this law, if it were to become a law?

Mr. STANTON. Let me take a first cut at that. Our concern is, is that the rulemaking—the legislation should not prejudge the outcome of the rule, so that, as NHTSA goes through the rulemaking process, we all learn what is the right thing to do, what's the complexity of the fixes or the standards that are going to be promulgated, and then the implementation schedule. And that becomes very important for the manufacturer.

And we found, in looking at the bill, that it is, in our view, overly prescriptive. It picks what the final rule will be. And it doesn't provide enough lead time for manufacturers to go ahead and implement it on—in a normal or orderly basis.

And we're not saying that the—that it's not important. It's not saying that we don't want to make our vehicles just as safe as possible. But, what I was trying to say in my statement is that we want to do it right. And these cars are more and more complicated today than they have ever been. Rulemaking is more and more complicated. And it's really important that we take enough time to get it right. We all want it right, at the end of the day. And we'd like it as soon as we can get it. But, we don't want to do it wrong.

Senator THUNE. Do you have a sense or a feel for what amount of time that would be?

Mr. STANTON. Usually, on a new standard, it's 3 to 4 years for models from the time that they actually come off the drawing board to the time that they're in production. So, usually you try to phase it in over a time period like that. And then, traditionally, you don't like to put it in—if it's expensive change or regulation, you generally don't want to try to do it in the last year of a model production. So, you'd like the flexibility to go one more year.

Now, if it's a safety issue, it's a little bit different. It's much more important to make the implementation. And we certainly want to

work with the agency to make sure that they get implemented correctly and quickly.

Mr. MCCURDY. Senator, if I may, just on one point. The—a number of the provisions that we support, such as brake override, automakers are deploying that, as we speak. So, there is some experience. And so, I think that timeline, in this rule, would be less.

But, it's—in this bill, there are a number of rulemakings. And it's—so, it's the volume of those. And it's not a question of slow-down versus—in my opinion, it's more a question of overreach.

So, if we address the problem that is the basis for the hearing—and that is the sudden, unintended acceleration—there is a way to address that. And I think it can be done, working with NHTSA, you know, in a very cooperative and very, you know, expeditious manner.

But, some of the other provisions, because they are duplicative—pedal placement, for instance—it's not as simple as just saying you have to have a certain distance. You have to look at redesigning the floors, the structure of automobiles. There are lots of different models. And, in fact, we don't think that's going to actually address the problem, which is what the hearing's about.

Senator THUNE. What do you think is a reasonable amount of time for electronic onboard recording device, to record pre-accident data? Is there—that sort of—

Mr. MCCURDY. To enact—we support EDRs.

Senator THUNE. Right.

Mr. MCCURDY. And as I indicated before you arrived, sir, that Senator Udall has a bill that we actually think is a good approach. There's a voluntary effort, again. EDRs are being deployed by a number of manufacturers. I think there's a way to get there. We're talking probably 2 to 3 years, max—

Senator THUNE. Right.

Mr. MCCURDY.—to do that. And, again, a large number of those vehicles are already there. So, it's a standard for how you would do it.

Senator THUNE. And what you're saying, though, is that you don't need legislation to do all this, that this is—

Mr. MCCURDY. NHTSA is moving.

Senator THUNE. These are things—

Mr. MCCURDY. We can—

Senator THUNE.—that are being done now.

Mr. MCCURDY.—work with NHTSA to have those rulemakings.

Senator THUNE. What would you be looking at in cost per vehicle to implement these new regulations? In other words, what are we looking at, in terms of additional cost that would be passed on to consumers?

Mr. STANTON. Yes. We have not done a cost estimate. We don't know exactly what the final rule would require. So, without knowing that, it's hard to estimate what the cost would be.

Mr. MCCURDY. And, again, there are—since there are a number that we support, I'm not—I don't believe cost—

Senator THUNE. Right.

Mr. MCCURDY.—is the issue. But, with EDRs, there are some who've talked about a black box, equivalent to what's in an aircraft. The Administrator, when he spoke earlier, said if you had the

survivability requirements, recording data requirements, they could—equipment costs, it could be \$20,000. That's the cost of the car.

Senator THUNE. Right.

Mr. MCCURDY. So, it's—again, it's depending on how you try to address the problem. We think there is an effective way to do it without, again, going too far.

Senator THUNE. OK.

Mr. DITLOW. All right. And I'd like—Senator, I'd like to add that, when you look at things like the event data recorder, we don't need the capability of an airline “black box”—for example, we're not going to recover a car from the bottom of the sea. And some of the features we're talking about is just taking advantage of the type of microprocessors that's already in there, recording the data, and expanding the data that's being recorded. So, these are not major cost items that we're looking at, in that area.

Mr. MCCURDY. With all due respect, the—when the bill requires that survivability—the conditions it must survive, it sounds more and more like an aircraft recorder than it does existing technologies, which we think could address the issue.

Mr. DITLOW. Well, I think we can agree to—you know, in the rulemaking, get closer together on what level of survivability we need. And—

Mr. MCCURDY. I'm just responding to what's in the bill—

Mr. DITLOW. Right.

Senator THUNE. Right.

Mr. MCCURDY.—not the—

Senator THUNE. Right.

Mr. MCCURDY.—rulemaking.

Senator THUNE. Right. Yes, it always becomes a little more complicated when you get to the rulemaking process. So—

Well, I see my time's up. Thank you, Mr. Chairman.

Thank you all.

The CHAIRMAN. Thank you, Senator Thune.

Senator Pryor.

Senator PRYOR. Thank you, Mr. Chairman.

Mr. McCurdy, since we were asking you questions a moment ago, let me ask you another question on another subject. And that's the Early Warning Reporting Data base. Are there improvements that we need to make to the Early Warning Reporting Data base?

Mr. MCCURDY. We think that the data that can be provided to NHTSA is not only helpful to—from not only consumers, but also to manufacturers. So, there are ways to improve it. And we would work with the Committee to address that.

Senator PRYOR. And how much of the data do you think should be made available to the public?

Mr. MCCURDY. Well, there is a difference between proprietary data that manufacturers provide, on a very confidential basis. And NHTSA does a good job protecting data, that's company-specific, that would not apply to consumers as a whole. And I think you have to be careful with that balance. But, there is a balance that could be achieved.

Senator PRYOR. Let me ask, if I can, Ms. Claybrook, do you think that we have found that balance on how much information's available to the public?

Ms. CLAYBROOK. I don't. Our concern is that the data is pretty close to useless right now, the way it comes in.

As Mr. Ditlow said, the categories—there are 24 categories that the manufacturers use to report the particular vehicle problems. If you look at what the consumer has to report to NHTSA when they fill out a vehicle complaint about defect, it has 1,200 categories. So, there has to be someplace between the 24 categories that the manufacturers report and the 1,200 the consumers have to use when they report.

The consumer reports are very specific. You can really understand what they're talking about. But, with the manufacturers, it could be brakes or steering or—very broad categories, so that you have absolutely no idea what that they're actually reporting.

And, in addition, the reports on deaths that come in are the most important information. And all of that is kept secret by NHTSA, and some of it's newspaper clippings, some of it's publicly filed lawsuits. We think that, to the maximum extent possible, that information ought to be made public, so that we really have a greater understanding of what's being reported.

And I'd say, finally, the manufacturers are supposed to report claims. That is, someone writes in and says, "You owe me money because my car harmed me." And then, in other cases, that is what's filed as a lawsuit. And there's a big difference between a lot of miscellaneous claims and a lawsuit. And if I think that there's a defect in a car, and I look it up on the Web page, and it says there are seven lawsuits versus a bunch of miscellaneous claims, I know that the lawsuits make a lot of difference, compared to these miscellaneous claims. I think the lawsuits ought to be segregated out so we know, for each report that comes in, how many lawsuits have actually been filed. In some cases, there'll be none; in other cases, there will be one; other cases, there'll be 10.

Senator PRYOR. Right.

Mr. McCurdy, I think you had a response to that. And then I have other questions.

Mr. MCCURDY. Yes. And, just quickly, I think there are FOIA requirements here that we have to be mindful of. And the only comment I had—I couldn't resist—when I was Chairman of the Intelligence Committee, we used to always admonish those that collected data, that we can be data rich but information poor. It's how you use the data, and it's how NHTSA can organize and use it and report it, to actually improve the information for both consumers, the agency, and manufacturers.

Senator PRYOR. Ms. Claybrook, let me ask you about another matter, the imminent hazard authority, that's in the bill. And do you think that NHTSA should have the authority to stop further sales of a vehicle if a defect creates an imminent hazard that could lead to deaths or serious injuries?

Ms. CLAYBROOK. I do. I agree with Mr. Strickland's statement today, where he said that they—you need to finish the job, not only to have notification of the public, but also the authority to require a recall. I believe that—one of the issues that has been raised by

the manufacturers—and on this I have a certain agreement with them—is that there’s not enough due process built into this provision. I think that it ought to follow the way that NHTSA handles recalls, in terms of process. And that is, that they have a public hearing—and they could have it much faster, under imminent hazard, because it’s so imminent—and then they make a decision. And the manufacturer is then in the position of either initiating a recall or objecting. If they object, the Attorney General has to go to court.

I think that that’s the process that ought to be followed with imminent hazard, just as the way it is with defects, only much faster.

Senator PRYOR. Mr. Stanton, would you like to respond to that?

Mr. STANTON. Yes. I thought it was very interesting that Mr. Strickland talked about how unique this would be, and how unusual it would be. And I—we all agree with that completely.

Our concern is—and we’ve talked about this before—is the due process. In the Consumer Product Safety Act—the agency can go to court, the district court and get a ruling. You could get something like a temporary restraining order, but you would have the ability for the manufacturer then to have a process, be heard, and then appropriate action.

Senator PRYOR. Mr. Chairman?

The CHAIRMAN. Thank you, Senator Pryor.

I want to get back on this—the culture question. And it’s—endlessly fascinates me, because I haven’t been through this as much as some of you. But, it really is interesting. I mean, that those who produce want things to slow down. Those who use the product want to be safe. I think America has made a decision that it wants to be safer. And I think that’s not just 9/11.

Which, Mr. McCurdy, I was also Chairman of the Intelligence Committee, and it’s a—you know, the way that we have, in fact, not improved the sharing of intelligence, even with the Director of National Intelligence, is just fascinating to me, because it talks about the culture of the intelligence community, which does not want to share. Even with the Director saying, “You have to do it,” you really don’t get much.

The FBI’s not very good at it, for example, because they have people who are trained to make arrests, and they’re lawyers, and they have long yellow pads, and they don’t surveil willingly.

And so, the culture is really important, because these are people who have been there for a long time, and they do things the way they do things. And a new Administrator comes in and—maybe full of fire and have different ideas, but it doesn’t necessarily mean that the culture changes.

And I don’t want to seem like I’m beating a dead horse, here, but I really am interested in what you, all four, feel. What the culture of NHTSA is, and compared to—example—Ms. Claybrook, when you were running it, which was, you said was some time ago, but nevertheless there are probably some people who were there then who are—

Ms. CLAYBROOK. There are some—

The CHAIRMAN.—still there—

Ms. CLAYBROOK.—there are some—

The CHAIRMAN.—now.

Ms. CLAYBROOK.—that are still there.

The CHAIRMAN. Yes. And, in whatever order, I'd be interested.

Ms. CLAYBROOK. Well, I'll go next, since you raised my name.

I think that this is an agency that looks at itself as being under siege. That's the culture of the agency. It has the manufacturers batting away at them all the time for every initiative that they take. The Secretary of Transportation goes crazy when some big thing comes up and they are caught unaware. It's an agency that has 1 percent of the money in the Department of Transportation, and has to deal with 95 percent of the transportation deaths.

So, it's grossly underfunded. It always has been, since the day it was enacted into law, in 1966. It tries to be a scientific agency that works with data and information, but it has never had the money to really get that data that it needs in order to be firm and have the ability to make its decisions and not be challenged. It does have a culture of secrecy. At Public Citizen, we sued probably 10 times, because they—even the early warning data, they tried to keep all of that secret.

And it's—I think it's an agency that has grown out-of-date, because it hasn't updated its standards, and it hasn't been able to hire new people. And, as we know, from the Toyota case, it doesn't even have software engineers here in Washington. And its—electrical engineers are not electronics engineers, so that—they're missing a lot of expertise.

That's why this bill is so important, Mr. Chairman, because it deals with some of the secrecy issues. It deals with accountability issues. It puts on the table some important safety standards that they should issue—should have issued, in some case, long ago. It gives it more money.

There's—in the defects area, which Mr. Ditlow mentioned, there is an imbalance in the way they handle the public with regard to defects, versus the way they handle it with regard to safety standards. Safety standards, all the information's on the website. You don't have to move out of your desk to get the information. But, for defects it's like a battle royal to get almost anything, whether it's early warning data; whether it's manufacturer submissions; whether it's the \$80 disks that you have to pay for, just to get information that they submit.

So, I think that that's one of the really important things that you have the opportunity to fix in this bill.

The CHAIRMAN. So, what happens in culture, when people have been somewhere for 30 years? I mean, it also fascinates me. I admit I'm being a little too philosophical, here. But, in CMS, which is the Center for Medical Services, which is all of Medicare and all of Medicaid—and there's a terrific new person who's going to be running that, I hope. And he's very ambitious about it, but is very worried about the culture.

In other words, when the 4,000 people in Baltimore come in to work every day, and they've got a stack of paper that they left last night, here, and they've got another one here, and they've got one here, and they've got one right in front of them. And they're all claims, and they have to respond. After you've done that for a while, you kind of lose fire.

And, granted there are other jobs in HHS and CMS, and all the rest of it, that are going to make important decisions—how much people get reimbursed for this, that, or the other thing.

But, it's really hard, isn't it, when you have traditional, established agencies, with a lot of—not that NHTSA has a lot of employees, but it has some—employees who have been there for quite a while, to get them to do things differently? And, just having a new director or a new administration doesn't necessarily make things happen.

Mr. Ditlow, how do you respond to that?

Mr. DITLOW. The—one of the cultural issues that I see—

The CHAIRMAN. Can you pull that a little closer?

Mr. DITLOW. Yes.

One of the cultural issues that I see is that the agency is too exposed to the industry. They go to SAE conferences, but they don't go to consumer conferences. They begin to understand the problems of the industry, and not so much the problems of the consumer.

And—but, on the other hand, they don't—they're trying to do something for the consumer, and they're saying, "Well, this is the best that we can get." And they want to move on to the next case, and try to get something for the consumer there, when they're just not doing enough for the consumer.

And then they have to, in the research facilities, rub shoulders with automakers who want to know, "Well, just what are you doing over there?" And you're relying on the resources of a Honda, of a research facility that's not your own.

So, I can see, with this agency not only being hunkered down, but just isolated from the consumer. So, one of the things that you need to change the culture is to broaden the exposure of the agency. To begin the—

The CHAIRMAN. Do you—

Mr. DITLOW.—understanding—

The CHAIRMAN.—invite them to your meetings?

Mr. DITLOW. What's that?

The CHAIRMAN. Do you invite them to your meetings?

Mr. DITLOW. Yes. Oh, absolutely.

The CHAIRMAN. And they just reject the invitations?

Mr. DITLOW. And—what we—in terms of the broader meetings, yes.

But, they should have a requirement that, when they go to a Society of Automotive Engineers Conference, that that be open to the public, and not prohibited by excess fees that the SAE charges, when the agency can walk in for free. So—

Ms. CLAYBROOK. In other words, consumers have to pay to go to those meetings, and often can't afford to do so, even the few who follow this agency intimately.

I think that the—another program that I had, when I was Administrator, Mr. Chairman, was that I paid the costs for consumers to come participate in agency proceedings. It's something that the Federal Trade Commission did for a while, and this was something that was sort of popular in the 1970s. And then, it faded away and was stopped.

But, if you helped consumer groups across the Nation—and there are wonderful consumer groups concerned about this, like

KidsAndCars, that's in Kansas—they can't afford to come to agency meetings, that are public meetings, to participate, to communicate. To submit comments to the docket is really an expensive proposition. And if you have, you know, a lawyer or two, like Clarence and myself, who can sit down and read the stuff and do it, fine. But that's about it.

So, I think that if you really wanted to change the culture of the agency, not only would you get rid of some this secrecy so that it would be more accessible to the public, and people would be more interested in it, and the agency would be more aware that it was being watched by the public, but you would bring the public back into the agency itself.

And that program cost, that I had, was all of \$125,000. I mean, it was nothing. Even if you had it now, today, at \$500,000, it was minuscule to pay the cost that made such a difference in—and people came from PTAs, from drunk-driving groups. It was fabulous. The ones that came—even some of the police—we—you know, State Police, we brought in for some meetings. So, that's another way of changing the culture.

The CHAIRMAN. I thank you.

And I apologize to the senior Senator from Arkansas, because I've gone 4 minutes over my time.

Senator PRYOR. Thank you, Mr. Chairman. No apology is necessary, obviously.

But, let me ask, if I may, Mr. Ditlow—in your opening statement, you refer to Mr. Sheridan, who's sitting there behind you. And I am curious about your views of whistleblower protections. Do you think that the law should clearly provide for whistleblower protection for auto industry executives, production workers, dealership employees, and mechanics? And would that be helpful to NHTSA, and therefore the public, in discovering potential vehicle defects?

Mr. DITLOW. That's one of the most essential provisions of the legislation, because there are people, like Mr. Sheridan, who have tried to change the industry from inside. And they know that vehicles are coming off the assembly line with defects and inadequate structure in them, such as the seatbacks that collapse. And yet, they have—if they complain, they know that they're facing, not only ostracism within the company, if they stay—lack of promotions—but, ultimately, they could just be fired, as Mr. Sheridan was. If they actually go to the agency, they could be sued for damages. It's a terrible frustration.

And I can remember one Ford engineer, who was loyal to Ford. I mean, absolutely a spectacular engineer. And he was so torn by the fact that the transmissions in the vehicles, that shifted from park into—didn't hold in park, and went into reverse—he ultimately committed suicide because he just couldn't cope with what was happening to the public, and yet being loyal to his employer.

Senator PRYOR. And, I guess I'll go ahead and ask Mr. Stanton. I could really do either you or Mr. McCurdy. But, let me hear from Mr. Stanton, if I may, on whistleblower protections and if you think that we should have a law that clearly states what the whistleblower protections are. And, if not, what other ways can we encourage people to come forward with information?

Mr. STANTON. You know, we're—our organization is supportive of whistleblower laws. I think the only concern we had is, is that it's written in the bill as being in—within the Department of Transportation; we think it ought to be within the Department of Labor and the body of law that surrounds that.

Senator PRYOR. OK.

Mr. McCurdy.

Mr. MCCURDY. I would agree with Mr. Stanton.

Senator PRYOR. Mr. McCurdy, let me ask you, on the keyless ignition systems, which are becoming more and more common in vehicles, it's my understanding that your association, or the Alliance, believes that we don't need a standard there, or you don't like the provision in the bill. Tell me—

Mr. MCCURDY. The—

Senator PRYOR.—where you are on that.

Mr. MCCURDY.—as written in the bill, but—we believe there can be a standard for ignition—keyless ignition. And I think NHTSA can develop that rule. I think where we found the bill overly prescriptive is when it was starting to actually—in previous versions, to tell how the—how it would look, the—in, you know, very, very specific, itself—just prescriptive.

We think there is a way. I think, in—keyless ignition's part of the future. And I think it's something that there can be a standard developed.

So, we're not opposed to the standard and would work with both the Committee and NHTSA to—

Senator PRYOR. And also on the gearshift provision?

Mr. MCCURDY. Neutral. There is a current standard, Section 102 of the Motor Vehicle Safety Standard, that addresses the location of "neutral" so it's recognizable. Again, having—Congress, developing a prescriptive provision on how to align these, we think, goes a bit far. There is a rule there. There's a standard. If it needs to be clarified, then that's something that we would work with NHTSA on.

Senator PRYOR. And my last question is about event data recorders, that we talked about earlier. You've mentioned, a couple times, that you like Senator Udall's bill better than the Chairman's bill.

[Laughter.]

Mr. MCCURDY. I knew you were going to say that.

Senator PRYOR. Not just the Chairman, but the Chairman of the relevant committee.

The CHAIRMAN. I—

Mr. MCCURDY. The full committee, yes.

Senator PRYOR. So, I—

The CHAIRMAN.—did the best I could.

[Laughter.]

Senator PRYOR. And, I am curious to hear what you think the differences are there, and why you prefer just a regular Senator's bill over the Chairman's.

[Laughter.]

Mr. MCCURDY. Having been both a regular member and a non-regular member.

The—well, Senator Udall's been working on this for some time, actually prior to the Toyota incident. So, we think there's—again,

there's—it's probably less prescriptive. I'm not—you know, I support Congress providing this oversight and doing its best to promote safety. I think there are limits on how prescriptive we can be. Certainly, I'm not in a position to—I rely on engineers and data-driven—to make some of these determinations. And so, I think it's the less-prescriptive nature.

And, again, when you look at some of the requirements, I think there's a difference in cost that would be—and you're right, Senator, manufacturers are concerned about cost. And there's a culture. And I would hope that you'd ask unanimous consent that you have more time, because I'd like to answer some of your culture questions about NHTSA. But—

[Laughter.]

Mr. MCCURDY.—since we produce one out of ten jobs in America, and this is a highly competitive market, that safety is a top concern, and safety sells, and vehicles are safer today than ever before, because consumers are concerned about their safety. And we, as consumers, are concerned about our safety.

So, again, we support the bill. And, if I may—if I can answer his question?

Senator PRYOR. Sure. I'm finished—

Mr. MCCURDY. You know, too much of this is, kind of, rearview-mirror prescription by some in the advocacy community, but, I would tell you, there are so many things we are working with them on.

I, too, like to introduce representatives from National Federation of the Blind, where we're working on an issue called “quiet cars.” We have an agreement—we had issued a release, today, saying that we believe, for safety, that—and there has—doesn't have to be a death in order for us to take action—that we can reach out to consumer groups, and others, to improve safety. And this is an example.

We're working closely with NHTSA on the DADSS program, for developing technologies to address drunk driving. We worked with this committee and staff, and Mr. Strickland in his previous position, on KidsAndCars—brake transmission safety interlock. We worked on a voluntary basis.

So, there's a lot of forward-leaning work, here, by this industry. And I'm not here to defend NHTSA, and I've only been in this industry 3 years, but I would tell you I've been impressed by the people and the level of professionalism there. And I think they are data-driven.

And just one data point. If you look at the last 15 consecutive quarters of reductions in fatalities in this country, there are fewer than 20,000—20,000 less than when Ms. Claybrook was director of NHTSA.

[Laughter.]

Mr. MCCURDY. And so, this declining trend is a positive trend. Is it enough? Heck, no. Absolutely not. There are too many fatalities. But it stressed the real problems—drunk driving, distracted driving. We're working—we support a bill to ban texting while driving, to ban cell phone uses on pneumatic devices—hand-held devices. That's—we actually would work with you on your bill, Mr. Chairman, and believe that's a good approach to address safety.

And I would tell you, that will do more, quickly, to address a very, very serious safety issue in this country.

The CHAIRMAN. I think, over all, that, in fact—happily, that safety sells. And I think that's an advantage that automobile companies should take advantage of, and do take advantage of.

I mean, just this committee—I've been on it for 25 years, and I just feel a little happier now than I used to. And one of the reasons, we've really kind of committed ourselves to safety and protection of people who otherwise can't protect themselves. And there are ways that you do that. I mean I stole, from Henry Waxman, the idea of getting independent investigators. It just has—a world of good.

I mean, we have authority over the health insurance industry. Health insurance industry is a particular target of mine, because I'm extremely interested in healthcare, and have been for a long time. And it's just unbelievable what, in a relatively short period of time, we have been able to reveal, through oversight and investigation. I mean, they're free-floaters, and boy do they love their jobs. And they're happy all the time, because they're always after somebody. But, they have to do it fairly, because otherwise it doesn't pass test on the Committee, and that would be bad.

But, I really care about this. I mean, I do think that, in the rush of success, economically in America, for such a long period of time, that we relaxed on a lot of things. And I think some administrations relaxed on a lot of things. And I know that's the case in coal mining, and you can count it. And I know that corporate executives can make a difference.

I remember, when I was Governor of West Virginia, we had too many deaths in the coal mines, and I was trying to figure out ways to lower that. And you can pass laws, and that helps. But then people have to carry out those laws. And so, what I did is, as the CEO, so to speak, of the—and happily, there was no Lieutenant Governor—see, it was a wonderful situation—so that I would go to the meetings that our mine inspectors would have. And when they discussed why a miner or several miners had died, I'd go to those meetings. And just the fact that I was there rippled throughout the State, at least the mining part of the State, and things changed, and deaths went down.

I mean, I do think the CEO—that's why this signing-off certification thing, to me, is very important. Because if—to involve—you have to find a way to take the top management and make them a part, legally, of safety. They are, of course, because they produce the cars and they make decisions and the board makes decisions and all the rest of it.

But it is really easy, in coal mining, to “short sheet,” so to speak, and to go around corners. I mean, it's a hidden world—99 percent of West Virginians have never been down a coal mine, underground, and never will, because it's a sort of a secret world, and it's out there in the distance.

Well, Detroit is different, because it's a much more, in a sense, sophisticated industry, and is subject to the scrutiny of purchasers. You don't really, you know, size up a lump of coal for its color or safety or whatever. I mean, that's the cleaning up at the stationary

source problem, that the coal faces very, very strongly. And we have to overcome that. And can, if we have time.

[Laughter.]

The CHAIRMAN. That's where I get into my limits thing. Or I guess I identified a little bit with you, because it takes time to—

Ms. CLAYBROOK. Sure.

The CHAIRMAN. There are technologies that'll take the carbon out of coal—95 percent, in fact—which is cleaner than nuclear. You know, whether—what everyone feels about it is—it's not known as a dirty producer of energy.

So, I just wanted to say that to you, generally. I mean, this is—this committee is invigorated.

Mark Pryor is the chairman of the Safety Committee. He's very, very active. And I don't move nearly quickly enough for his taste.

[Laughter.]

The CHAIRMAN. And I like that.

But, you know, with the health insurance industry, I mean, we've really been able to make some major changes in them. And many more will come as a result of the health bill, and just the power of watching over people, if you take it seriously. And that's what NHTSA's meant to do.

And, by the way—then I have one question, and then everybody can go home—when we had the Toyota hearing, I hope you did notice that we had a double hearing. It was an all-day hearing. The morning hearing was only about the work of NHTSA. It wasn't about Toyota at all. It was about the work of the Federal agency responsible for safety in this country. And then, the afternoon hearing was about Toyota. Most people didn't notice that. But, it was both, and for a very deliberate reason. And Mr. Strickland knows that. And he knows that we're watching very carefully what he does, like I'm sure all of you are, too.

I want to ask one question, which just plain fascinates me. I read—and I'll—either Mr. Stanton or you, Mr.—David. In this alcohol—and in the—that's such a huge factor—and that there are emerging technologies which can sense it or you can—if you push the “on” button, which is a subject in and of itself; you have an “on” button, and that becomes a problem, because people, when they just keep pushing it, thinking they'll slow the car down, or whatever. But, that can measure their alcohol level, evidently.

Can you explain to me some of the things that are going on in this? Because it's very exciting to me.

Mr. MCCURDY. Yes. Yes, Mr. Chairman, since we're providing about \$5 million of funding from my association to support that effort, in partnership with NHTSA.

It's a research program. It's exploring technologies, outside the realm of just the automotive sector, looking at aerospace, defense, healthcare, other areas, to see what technology might be available that could help us detect the blood alcohol level, breath, or others—a number of means to prevent a person who's impaired, above a certain level, from actually engaging the automobile.

The CHAIRMAN. It turns itself off.

Mr. MCCURDY. Well, it would not allow it to be turned on in the first—

The CHAIRMAN. Turned on.

Mr. MCCURDY.—place. And you're right——

The CHAIRMAN. What's an——

Mr. MCCURDY.—keyless——

The CHAIRMAN.—example of——

Mr. MCCURDY.—ignition——

The CHAIRMAN.—that?

Mr. MCCURDY. I mean, there are a number of things. It could be breath-based. I actually had my key—I think I gave it to one of my staff, because—but, you know, there are tactile—potential technologies. There's breath. There's—and there are ways to sort through the automobile. This is very early stages, and is something that we want to explore.

What we would encourage the Congress to look at—there is legislation, Senator Udall—sorry he's not the chair, but maybe the Chair would like to take it—to increase the funding——

The CHAIRMAN. He's on the Committee. We kind of like him.

Mr. MCCURDY. I know.

[Laughter.]

Mr. MCCURDY.—to actually increase the funding for this research program, to take it beyond just the voluntary effort at the, you know—for us, it's a large amount of money—but, to expand it, to see if there are those out there.

There's no immediate fix, but certainly it's—there is some promise out there. And, again, it would address the biggest single cause of fatalities in this country. And that's what we'd like to work with Congress and with the Administration to try to address.

But, we'd be glad to come in and give a very detailed briefing on, again, the exploration, where it is. This is the second year—third year of this effort. And, you know, it's a challenge. It's a—but it's a good, scientific kind of challenge——

The CHAIRMAN. It sure is.

Mr. MCCURDY.—an engineering type of challenge. And I think it holds some significant promise.

But, again, we can't overpromise, and we can't raise the expectations unrealistically. It will never get beyond the personal responsibility issue, and those who serve the alcohol, and those that consume the alcohol. We support the ignition interlocks, or the locks for those who are convicted, first time. We think those are significant areas. We're working with States on that, as well. So, there's a lot of both enforcement things we can do, before or in conjunction with, but at the same time we need to look at all the different potential solutions. And, Mike has——

The CHAIRMAN. All right.

Ms. CLAYBROOK. Mr. Chairman, could I make one comment?

The CHAIRMAN. Of course.

Ms. CLAYBROOK. You've been very eloquent on your discussion of safety. And I don't want this hearing to close without saying that the major advances in motor vehicle safety standards that have occurred in the last 20 years have been as a result of legislation coming out of this committee. Starting with the ISTEA bill, in 1991; the airbag legislation, in 1998; the TREAD Act of 2000; and the 2005 legislation on rollover; plus the Gulbransen law for child safety—NHTSA has been pushed hard by this committee to issue those

standards. And, but for that work, I don't think that those would have happened, at least certainly not as quickly.

And there are many more things that the agency can do that are not in this legislation, but this legislation is really important. And I hope that the recommendations that Mr. Ditlow and I have made, in addition to the ones that the industry have made, will certainly be given serious consideration, because there are some important improvements that could be made.

One of the issues of accountability that is in the House bill, but not in the Senate bill, would allow a petitioner to the agency to seek judicial review if their petition were turned down. And one of the things that happened with Toyota was that five or six petitions were filed with the agency, excellent petitions. They were turned down, and there was no recourse. So, those are the kind of accountability issues.

But, this committee has been terrific on what it's done. And thank you so much.

The CHAIRMAN. Thank you very much.

Senator Pryor, do you want to offer a prayer of some sort?

[Laughter.]

Senator PRYOR. Benediction.

The CHAIRMAN. Actually, I'm really happy, because why I was late in getting here in the first place is because we failed to invoke cloture on, doing more to have Wall Street be more sensitive to Main Street. We're missing a Senator, and we think that we can get it, when we do it tomorrow.

But, one of the things that I really feel good about—there are three people on this committee staff who worked for a very long time trying to save the Federal Trade Commission, which, once again, is one of those groups that nobody's ever really heard of. But, the original underlying bill, sort of, sets up in the Federal Reserve, that consumer safety unit. And I was just trying to figure out how they would do that, and time limits and things of that sort became very interesting to me on that. And I wasn't satisfied. And the FTC has been doing this for 100 years, and doing it very well, and we work very well with them. And so, that, hopefully, will be in the bill. And that's one of those very, very important things, with the work that we do, and particularly the work that they do. It can make a big difference.

So, I think we're all headed in the same direction. And there's nothing wrong with a little grumbling and a little griping—

[Laughter.]

The CHAIRMAN.—from any or all parties. And we have to find a way to do this, and to do it fairly, and to do it strongly.

I guess I adjourn the hearing, right? Senator Pryor?

The hearing is adjourned.

And thank you very much. And, again, I apologize.

[Whereupon, at 6:23 p.m., the hearing was adjourned.]

## A P P E N D I X

PREPARED STATEMENT OF HON. KAY BAILEY HUTCHISON, U.S. SENATOR FROM TEXAS

Thank you, Mr. Chairman, and thank you for providing this opportunity to hear testimony about S. 3302, the Motor Vehicle Safety Act of 2010, which you introduced earlier this month.

Toyota's recall of more than six million vehicles to address problems with unintended acceleration in a number of different Toyota models has renewed this committee's attention and commitment to improving vehicle safety. In early March, the Committee held an all day hearing on the many issues surrounding the recalls, including the multiple investigations closed by the National Highway Traffic Safety Administration (NHTSA) without resolving concerns about unintended acceleration, and whether the problem could have been identified and corrected earlier.

The hearing highlighted failures on the part of both Toyota and NHTSA, and suggested that additional action *may* be needed by Congress to prevent this type of situation—which has been linked to more than three dozen fatalities on our Nation's highways—from recurring.

Since the hearing, the Department of Transportation (DOT) has intensified its investigations into unintended acceleration and vehicle electrical systems, and for the first time levied the maximum civil penalty allowed by law, \$16.4 million, against Toyota for waiting too long to notify DOT of its accelerator pedal problems.

This committee has placed a strong emphasis on both consumer protection and transportation safety. I applaud the Chairman for taking the initiative to introduce legislation intended to address many issues identified during our oversight hearing and subsequent fact gathering. I do have some initial concerns with certain provisions of the bill, but I hope today will serve as a first step toward reaching a consensus on how we can work together to clarify and improve the legislation in order to allow it to move forward with strong bipartisan support.

Let me be clear: I support sound vehicle safety legislation. In fact, I have been working with Senator Brown and members of this committee to advance comprehensive motorcoach safety legislation, which was reported out of this committee last December. That legislation includes several vehicle safety requirements, including safety belts and stronger roofs, which I hope will pass the Senate and become law during this session of Congress.

One of my concerns is the short time frames and compressed schedule for developing and implementing rules. We must ensure that we allow time for analysis and comment to avoid unintended consequences.

It is also important that new standards be fully researched. As I mentioned, DOT is actively pursuing its research into vehicle electrical systems. It would make sense to use the results of those studies to shape any new vehicle electronics system standards so that they have a strong foundation in science.

I believe we can pass legislation that will improve safety without unintended consequences. I know the Chairman shares my view, and I look forward to working with him on this important issue.

I thank all of the witnesses for appearing today and look forward to a constructive conversation.

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PREPARED STATEMENT OF HON. TOM UDALL, U.S. SENATOR FROM NEW MEXICO

Senator Rockefeller, thank you again for your leadership in protecting consumers and for your legislation to improve vehicle safety for all Americans.

Motor vehicle safety is critical and your bill, Mr. Chairman, addresses a number of issues and shortcomings highlighted by recent vehicle recalls. I am pleased to be a co-sponsor of this important legislation.

I am particularly pleased that your bill includes a requirement for event data recorders in all vehicles under 10,000 pounds. Event data recorders provide a report

of a vehicle's operating statistics, such as the throttle position and speed of the vehicles, during the last seconds before and immediately after a crash.

They serve a similar function as the "black boxes" that are in airplanes, by documenting critical information leading up to an incident. Unlike "black boxes," however, an EDR does not record the voices of the vehicle occupants. It simply preserves the vehicles internal operating data.

EDRs are an important tool for crash investigators to determine the cause of crashes and whether those crashes are a result of vehicle malfunctions.

In 2006, the National Highway Traffic Safety Administration (NHTSA) created a framework for the type of information to be recorded by event data recorders in light duty vehicles. But it stopped short of requiring the recorders. If a vehicle manufacturer installs an event data recorder in a car, it must comply with the NHTSA requirements. Yet there is no requirement that the manufacturer install the recorder in the first place.

NHTSA's 2006 rule further requires the manufacturer to ensure that a tool to read the recorder is commercially available. Unfortunately today, while there are many such tools commercially available, there is no one universal tool. This creates a challenge for investigators who must carry a suitcase of readers with them on investigations. This is an unnecessary burden that should be addressed.

Earlier this year, I introduced the VEHICLE Safety Improvements Act of 2010 that requires all vehicles manufactured for sale in the United States to be equipped with an EDR and that a universal tool be developed to read the EDR in all vehicles regardless of make or model. I am pleased to see that the Motor Vehicle Safety Act includes these provisions for passenger cars.

Although EDRs will not prevent crashes, the data they provide after a crash will help to identify the cause of the crash and, in the case of a vehicle malfunction, help to identify solutions to improve vehicle performance.

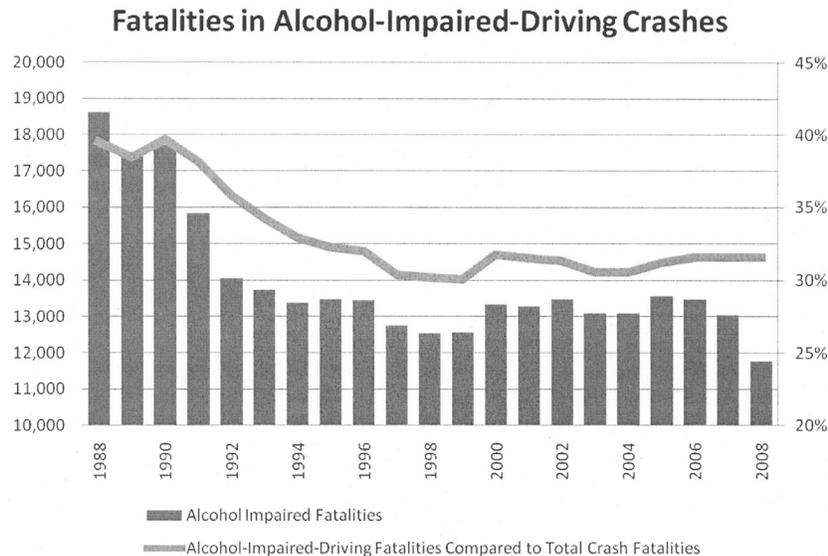
While EDRs can only diagnose and help prevent future crashes, NHTSA and leading automakers are developing vehicle safety technologies to prevent crashes in the first place. Their Driver Alcohol Detection System for Safety (DADSS) program is often described as a "Manhattan Project" to end drunk driving within our lifetime.

Senator Corker and I introduced the S. 3039, the ROADS SAFE Act, to authorize and increase funding for this exciting research and development effort. I believe our bipartisan legislation falls within the scope of the Committee's current work to improve motor vehicle safety.

Tragic drunk driving crashes often prompt communities to do more to prevent drunk driving. This was the case in my home state of New Mexico back in 1992, when a drunk driver killed a mother and her three girls on Christmas Eve. He was speeding 90 miles an hour, going the wrong way down the highway. This crash helped change attitudes in my state—but it should not take a tragedy for us to do more to prevent drunk driving.

In 2008, drunk driving killed 11,773 Americans, including 143 people in New Mexico. That is an average of 32 people killed every day by drunk driving. This unacceptable death toll is all the more shocking when you consider that each one of those deaths was preventable.

The United States has already made significant progress. Compared to twenty years ago, our roads are much safer today. Yet even as the overall number of people killed on our roadways has declined, drunk driving still accounts for one third of all traffic fatalities, as shown in the chart below based on data from NHTSA's Fatality Analysis Reporting System:



It is even more worrisome that a drunk driver has just a two percent chance of being caught. In fact, one study found that a first-time drunk driving offender has, on average, driven drunk 87 times before being arrested. This is unacceptable. Something must be done to prevent these drivers from getting on the road in the first place. The good news is that there are potential technologies out there that could do just that.

New safety technology has already transformed the automobile and saved countless lives. For example, air bags and anti-lock brakes are now standard features in many vehicles. These safety devices are built into the car and are unobtrusive to the driver. Such technologies are an important reason we have fewer traffic fatalities today.

Now imagine a future with vehicles that could detect whether a driver is drunk when he or she gets behind the wheel, before he or she even starts their car. There would be no drunk driving crashes if it were impossible for impaired drivers to drive. If such technology were widely deployed in cars, an estimated 8,000 lives could be saved every year.

I realize that many might think this is a farfetched idea. Yet consider that vehicles today can already give driving directions thanks to GPS satellite navigation devices. Some cars can even parallel park themselves.

New Mexico and other states require convicted drunk drivers to use an ignition interlock; a breathalyzer device they blow into before their vehicle's engine will start. The success of ignition interlocks for preventing repeat drunk driving offenses suggests that a better technology could be used to prevent all drunk driving.

In 2006, Mothers Against Drunk Driving convened an International Technology Symposium in Albuquerque. The goal of the meeting was to review efforts to develop advanced ignition interlocks technology. In 2008, NHTSA partnered with leading automakers to explore the feasibility of in-vehicle technologies to prevent drunk driving. The recent progress of this cooperative effort fuels optimism that such technology could be deployed within 5 to 10 years.

Clearly, such advanced technologies must win widespread public acceptance in order to be effective. They must be moderately priced, absolutely reliable, and unobtrusive to sober drivers. They should be set at a level that would not prevent a driver whose blood alcohol content (BAC) is less than the legal limit—which state laws set at .08 BAC for most drivers—from operating a vehicle. The aim is to stop drunk driving—not discourage responsible social drinking. A recent Insurance Institute for Highway Safety poll found that 64 percent of Americans believe that advanced alcohol detection technology that is reliable and prevents an impaired driver from operating a vehicle is a good idea.

The ROADS SAFE Act would authorize \$12 million in annual funding for 5 years for the DADSS program. DADSS is a public-private partnership between NHTSA and the Automotive Coalition for Traffic Safety. The goal is to explore the feasibility, potential benefits, and public policy challenges associated with using in-vehicle technology to prevent drunk driving.

This increased Federal funding to combat drunk driving is a smart investment in public safety. Drunk driving has direct and indirect economic costs in terms of damaged property, medical bills, and lost productivity. In economic terms, drunk driving costs \$129 billion dollars per year. Of course, such monetary costs cannot be compared to the value of saving 8,000 lives every year.

The ROADS SAFE Act is supported by a wide range of organizations representing automakers and advocates for the prevention of drunk driving, including:

- Advocates for Highway and Auto Safety;
- Alliance of Automobile Manufacturers;
- American Academy of Pediatrics;
- The Century Council;
- Distilled Spirits Council;
- General Motors;
- Governors Highway Safety Association;
- Mothers Against Drunk Driving;
- National Safety Council;
- Nationwide Insurance; and
- Safe Kids USA.

Chairman Rockefeller, I am particularly pleased that a number of my colleagues from this committee are co-sponsors of the ROADS SAFE Act. Given the broad backing and bipartisan support for this bill, I am hopeful that the ROADS SAFE Act will become an important part of the Committee's overall effort to improve motor vehicle safety.

Thank you.

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#### PREPARED STATEMENT OF THE NATIONAL AUTOMOBILE DEALERS ASSOCIATION

Mr. Chairman, the National Automobile Dealers Association (NADA) represents approximately 17,000 franchised automobile and truck dealers who sell new and used motor vehicles of all makes and models and who engage in service, repair, and parts sales. Together they employ approximately 1,000,000 people nationwide, yet most are small businesses as defined by the Small Business Administration. NADA appreciates the opportunity to submit testimony to the Senate Commerce, Science and Transportation Committee regarding S. 3302, the Motor Vehicle Safety Act of 2010.

##### **A. Unintended Acceleration**

NADA supports a performance-based mandate designed to enable motor vehicle operators to stop their vehicles under full throttle conditions. NADA suggests that the Committee consider a requirement that NHTSA study possible reduction strategies for "unintended acceleration," including motorist education.

##### **B. Event Data Recorders (EDR)**

NADA supports a mandatory EDR requirement for new passenger vehicles based on the requirements set out in 49 CFR Part 563. It is important that such systems be fully accessible to dealership service facilities in order to facilitate vehicle maintenance and repair. Furthermore, NADA would support language indicating that state laws governing EDR data privacy are not preempted by Federal law.

##### **C. Imminent Hazard Authority**

Dating back to the mid-1960s, NHTSA in conjunction with vehicle manufacturers have utilized the existing defect and noncompliance identification and notification process to adequately address "hazards" arising out of specific motor vehicle defects or noncompliances, however "imminent." Where necessary, NHTSA and vehicle manufacturers have issued "stop sales" orders for new vehicles and, in extreme situations, "stop operation" orders for new and used vehicles. New vehicle dealers have played an important role with respect to both purchaser notifications and defect/noncompliance remediation.

In addition to the generally redundant nature of this new authority, NADA is greatly concerned that it could impose unwarranted constraints on franchised new vehicle dealers that would not likewise be imposed on independent used vehicle only dealers or on private sellers.

#### **D. Civil Penalty Authority**

NADA has concerns regarding raising the existing civil penalty authority by five times and removing the maximum liability cap. NADA supports raising, but not eliminating the liability cap. Without a liability cap, the Secretary of Transportation could potentially fine an automobile manufacturer out of business, or out of the American market. NADA believes that any increased civil penalty authority should be tailored to apply to violations of particular immediate concern, and not to each and every potential violation of the statute.

#### **E. Transparency and Accountability**

NADA would support a more user-friendly vehicle safety database searchable by vehicle identification number (VIN), but only if it could be managed to ensure accurate, real-time data. NHTSA's existing *SaferCar.gov* website currently serves as an excellent source of vehicle safety information including data on defect and non-compliance recalls. With respect to a recall sticker mandate, NADA suggests that such sticker be unobtrusive enough to discourage its removal by the motoring public.

NADA does not object to NHTSA making safety-related communications available on its public, one-stop-shop website (*i.e.*, *safercar.gov*), but fails to see any need for a redundant mandate for individual OEM websites. Assuming that it may be appropriate for safety-related software upgrades and modifications to be made publicly available, non-safety-related information is outside the bounds of this legislation and should not be required.

NADA finds the whistleblower protection language to be subject to potential abuse by employees who are otherwise involved in or potentially involved with justifiable, disciplinary actions unrelated to any whistleblower retaliation. NADA requests to work with committee staff to find language that achieves the Committee's goals and minimizes potential abuses.

NADA supports the anti-revolving door language in Sec. 308 of the bill, provided it is expanded to include not only automobile manufacturers, but also auto-related trade associations, non-profits, think tanks, public interest organizations related to auto safety and fuel economy, and plaintiffs' product liability law firms. Moreover, EPA should also be covered under this section, as EPA now regulates fuel economy along with NHTSA, and fuel economy has an impact on highway safety.

#### **F. Conclusion**

The Committee has a proud history of improving highway safety. The reason funding for drunk driving has tripled since 2005, and the reason safety belt use is at a record level, is due in large measure to the bipartisan work of this committee. Senators who serve on this committee are aware that what counts ultimately is lives saved and injuries prevented on our Nation's roads. Accordingly, NADA recommends that the Committee require NHTSA conduct an analysis on this legislation to ascertain how many lives this bill will save and how many injuries it will prevent. If NHTSA's analysis finds that the lives saved and injuries prevented are not significant, the Committee may want to consider alternatives that better reduce fatalities on our Nation's roads in a meaningful way prior to a committee vote.

Mr. Chairman, thank you for the opportunity to share NADA's views on S. 3302.

AUTO SAFETY DESIGN  
*Potomac, MD, May 18, 2010*

To: U.S. Senate Commerce Committee  
To: Committee on Energy and Commerce, U.S. House of Representatives

#### **Recommendations for the Motor Vehicle Safety Act of 2010**

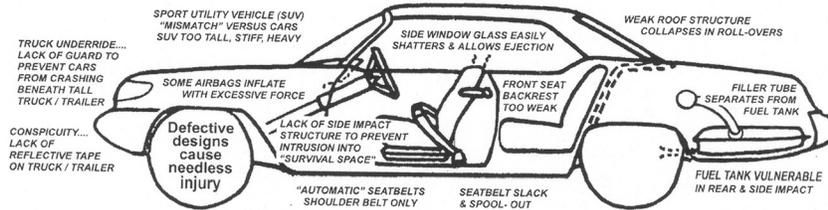
I am strongly supportive of the Motor Vehicle Safety Act of 2010. From my perspective of 40-plus years in the trenches of auto safety, I have long felt that NHTSA needed to proceed more vigorously in its defect investigations. The public needs to be regularly informed of vehicle safety defect issues that may involve their own vehicles, and be invited to submit their comments about the issues they are experiencing. And the automakers need to be fully forthright with NHTSA and the public, rather than too-often hiding behind a policy of conceal and deny and delay.

*Recommendation 1: Documents Should Not Be Concealed*—Too often, what automakers were telling NHTSA was not consistent with what the automaker's internal

documents were showing . . . yet those documents were often withheld from public view and from NHTSA and Congress because of so-called “protective orders” that prohibited those documents from being used outside of the particular product-liability case in which they were produced (often after lengthy legal battles).

Therefore, there should be a provision in the proposed law that allows such safety-related documents to be given to or obtained by Congress, NHTSA, and the public if those “protective order” documents concern vehicle safety matters. This would be analogous to a Freedom of Information Act request . . . and, importantly, where the public safety merits outweigh the corporate secrecy rationale.

*Recommendation 2: Monthly Videos about Defects*—NHTSA should release a monthly video, with a companion written overview, that describes those defect issues and investigations that are newly underway, or major ones that are continuing. The videos should be provided, via satellite link and also by sending DVDs, to the TV news stations across the Nation. If the video gives a 60-to-90 seconds update on auto safety defects, then the viewing public will be regularly advised about vehicle safety issues that may affect their own vehicles (and which may be linked to adverse incidents or actual accidents).



The feedback from the public would be highly beneficial to NHTSA in further pointing out the extent of any defect issue being investigated, and would help point to new defect issues as well. (NOTE: I personally know how important and useful this would be. I used to produce and present my own Auto Safety Reports twice-a-week on KABC TV News in Los Angeles, for 7 years. When I periodically showed the many latest NHTSA investigations, the public response was amazing and supportive.)

*Recommendation 3: Get Rid of Private Contractors*—Too many times, when I’ve needed copies of NHTSA’s crash tests and other materials, all developed with public funds, the private contractors charged exorbitant fees (and the copy quality was often poor). In the old days, NHTSA employees made the copies, or you could even make them yourself. It was quicker and more efficient and much less costly. Some of these crash test films and videos, and the related documents, can now be downloaded (often with some difficulty) from the Internet . . . but the system must be made much more comprehensive and also much easier to use.

*Recommendation 4: Require NHTSA to Undertake Ruling for Sideguards on Trailers*—Sideguards on trailers would prevent the deadly “truck underride” hazard in which passenger cars crash deeply beneath the tall sides of long trailers. About 225 Americans die each year inside underride accidents. European trailers have sideguards . . . but not here in America! NHTSA and the U.S. trailer manufacturers have both been asleep on this urgent need for 40 years! Finally, please demand that NHTSA start rulemaking to require sideguards on all U.S. trailers. Even if NHTSA starts rulemaking right away, it will still take many years before all of America’s 4 million trailers are equipped with this critical safety feature.

*Please refer to the following two-page attachment for further information about the need for sideguards, including suggested language for a Congressional mandate.*

*Thank you for introducing the Motor Vehicle Safety Act of 2010.* I am available to be of further service on behalf of this legislation and for other vehicle safety matters as well, so please don’t hesitate to contact me.

Sincerely,

BYRON BLOCH,  
Auto Safety Expert.

## ATTACHMENT

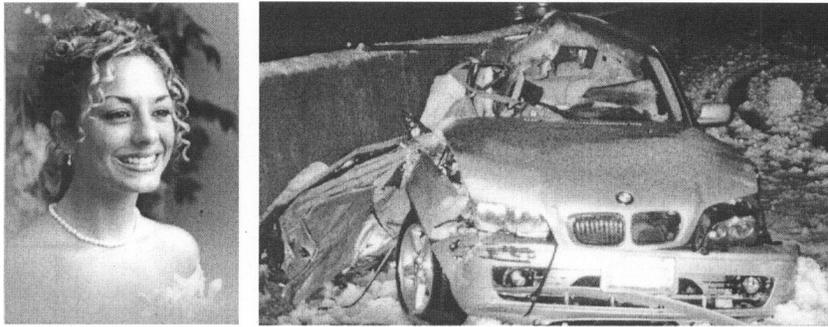
**An Urgent Plea to Congress . . . . .**

**TRUCK SIDE UNDERRIDE ACCIDENTS ARE NEEDLESSLY KILLING AMERICANS BECAUSE  
OUR TRAILERS LACK SIDEGUARDS**

**THIS HAZARD CAN BE EASILY SOLVED WITH A CONGRESSIONAL MANDATE TO REQUIRE  
SIDEGUARDS**

By Byron Bloch, Auto Safety Expert—May 2010

Roya Sadigh, age 26, was tragically killed on Thanksgiving eve 2004 when her car, in which she was the seatbelted passenger, skidded on a snowy road. The BMW crashed into and “underrode” beneath the tall open side of a large trailer . . . and its large rear wheels crashed into her “survival space.” With a simple sideguard, similar to those on European trailers for many years, or like the drop-center feature of U.S. moving vans, her car would have been safely deflected away from the trailer, underride would have been prevented, and she would have survived. Every year across our nation, hundreds of Americans are killed or paralyzed in these side underride tragedies. It is overdue time to stop this senseless killing. It is time for our government and the industry to finally take action.



*There is a compelling public safety need for all American trailers to be designed and equipped with side guards to prevent cars, SUVs, pickups, and vans from crashing deeply beneath the trailer's tall open sides. Following a U.S. Congressional Hearing in 1991, at which Mr. Bloch testified, NHTSA was directed to engage in rule-making for a more effective REAR guard, which they issued in 1995. But there is no equivalent mandate for SIDE underride guards. The U.S. trailer manufacturers and trucking companies have continuously refused to voluntarily equip their vehicles with this critical safety feature. And NHTSA, the National Highway Traffic Safety Administration, continues to ignore this issue as well. Ironically, full-panel sideguards of aerodynamic design have been demonstrated to increase the tractor-trailer's fuel efficiency, and are light-weight and economical. There are thus many advantages even beyond safety and crashworthiness.*

*It is now up to the U.S. Congress . . . the members of both the House and Senate . . . to demand that NHTSA and the trailer manufacturers and trucking companies finally act in a constructive safety manner. Here is our suggestion for what Congress should enact . . .*

Congress hereby directs the National Highway Traffic Safety Administration (NHTSA) to engage in immediate rulemaking to require that all new trailers manufactured as of November 24, 2011, be designed with or equipped with side guards for the purpose of preventing passenger vehicles (cars, SUVs, pickups, vans) from crashing beneath the sides of the trailer in what is known as an “underride” accident.

Such underride prevention guards or measures can be designed as an integrated feature of the trailer from its inception, or it can be a separate structure that is securely attached to the trailer. Such side underride prevention guards must be of sufficient strength and design to effectively prevent a passenger vehicle from penetrating or underriding beneath the trailer in validation or compliance crash testing at least at 40 miles per hour (preferably at 50 mph), at a perpendicular or 90-degree angle to the side of the trailer, with the 4,000-lbs. moving barrier and selected passenger vehicles as the test device impacting into the side of the stationary target trailer. There shall be no intrusion into the “survival space” of the passenger vehicle.

Further, Congress hereby directs the Federal Motor Carrier Safety Administration (FMCSA) which states that it is “focused on reducing crashes, injuries, and fatalities involving large trucks and buses” to engage in immediate rulemaking to require that all existing trailers, and any from other nations that will be allowed to legally operate on American highways, must be equipped with side underride prevention designs or guards that will effectively prevent passenger vehicles from underriding beneath the sides of those trailers. Performance requirements for compliance must be the same as those issued by NHTSA that apply to new trailers, and will become effective as of November 24, 2011.

*If Congress fails to act constructively in a prompt manner, then I ask that President Barack Obama and Vice President Joe Biden issue an Executive Order on behalf of accomplishing what Congress will have failed to do. Sideguards are critically needed to prevent the continuing side underride epidemic.*




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BYRON BLOCH,  
*Truck Underride Safety Expert,*  
[www.AutoSafetyExpert.com](http://www.AutoSafetyExpert.com).

Byron Bloch respectfully requests the opportunity to testify in-person at any Congressional Hearing on the subject of Truck Underride Hazards and the Need for Side Underride Guards on all trailers operating on American roads and highways. Thank you.

BIOLOGUE  
*Chapel Hill, NC, May 20, 2010*

Hon. TOM UDALL,  
 U.S. Senate,  
 Washington, DC.

Hon. BOB CORKER,  
 U.S. Senate,  
 Washington, DC.

Dear Senators Udall and Corker:

I compliment you on your bill S. 3039, "To prevent drunk driving injuries and fatalities . . ." and write in strong support of it.

As the former Administrator of the National Highway Traffic Safety Administration (2001–2005), I give my wholehearted endorsement to a new, technologically-based approach to solving the problem of impaired driving in the U.S. While I was Administrator, I advocated for funding of this research using Intelligent Transportation System funds, but a higher priority was given to infrastructure-related research, as it continues to be today. This experience dictates the requirement that this additional research funding be directed specifically to NHTSA if innovative technological approaches are ever to be brought to bear on impaired driving.

As you are aware, NHTSA has been contributing from its limited research budget to a cooperative effort with the private sector known as DADSS—Driver Alcohol Detection Systems for Safety. While the effort is making progress, a stronger investment from the public sector is needed. Any cost/benefit analysis would support greater investment by the public, recognizing that direct cost to the U.S. taxpayers from impaired driving is over \$50 billion per year. Whether the \$12 million called for in S. 3039 is the right number or not needs to be fleshed out in detail prior to the appropriations process. I would ask that you stand firm on authorizing at least this amount as negotiations play out.

Prior to joining NHTSA, I practiced and taught emergency medicine and trauma care for 17 years. Each alcohol-related crash is a tragedy, compounded by the fact that each one was preventable. I am grateful for your forward-thinking and stand ready to assist you with your bill in any way I can.

Sincerely,

JEFFREY W. RUNGE, MD  
*President.*

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PREPARED STATEMENT OF HON. SUSAN MOLINARI, CHAIRMAN, THE CENTURY  
 COUNCIL IN SUPPORT OF S. 3039—THE ROADS SAFE ACT OF 2010

The Century Council was founded in 1991 and is an independent, national not-for-profit organization headquartered in Arlington, Virginia. Funded by America's leading distillers (Bacardi U.S.A., Inc.; Beam Global Spirits and Wine, Inc.; Brown-Forman; Constellation Brands, Inc.; DIAGEO; Hood River Distillers, Inc.; Pernod Ricard USA; and Sidney Frank Importing Co., Inc.), the Council is dedicated to developing and implementing programs that fight drunk driving and underage drinking. To date, we have hosted more than 2,000 community events to launch our programs across the Nation bringing them to millions of parents, youth, educators, law enforcement officials and traffic safety professionals.

In 2006, The Century Council committed its support for the exploration of advanced technologies to prevent drunk driving. The Century Council believes that development of technology to prevent drunk driving holds great promise if it is moderately priced, absolutely reliable, set at the legal BAC limit of .08 percent blood alcohol concentration (BAC), and unobtrusive to the sober driver.

We are pleased to reaffirm this longstanding position by supporting S. 3039, The ROADS SAFE Act of 2010. This legislation would significantly increase Federal funding for the ongoing exploration of advanced technologies to prevent drunk driving led by the National Highway Safety Administration (NHTSA) and the auto industry. If our Nation can develop technology to prevent people from driving drunk while preserving the rights of drivers below the legal .08 BAC limit, it has the capacity to save thousands of lives each year.

The Century Council is proud of its nearly 20 year commitment to fighting drunk driving and our many partnerships with groups like AAA, the National Transportation Safety Board, the National Association of Drug Court Professionals and the National District Attorneys Association, among others. Through these efforts we have worked to reduce drunk driving especially among repeat offenders and people who drive at high BAC levels of .15 percent or above. For these drivers, The Century Council also favors tiered systems that mandate more severe penalties, treatment, and aftercare.

We are proud to support your efforts and look forward to working with you.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO  
DAVE MCCURDY

*Question 1.* Mr. McCurdy, in your statement, you urge Congress to set aside funding for the research and development of vehicle technologies to end drunk driving. The Alliance of Automobile Manufacturers also endorses the ROADS SAFE Act to support this effort, which has the potential to save more than 8,000 lives per year. Could you explain to this committee how automakers and NHTSA are working together to develop new technologies to prevent and potentially eliminate drunk driving?

Answer. In February 2008, the Automotive Coalition for Traffic Safety (ACTS) entered into a 5-year, \$10 million<sup>1</sup> cooperative research agreement with NHTSA to explore the feasibility, the potential benefits of, and the public policy challenges associated with the more widespread use of a range of technologies to prevent drunk driving. This effort seeks to develop in-vehicle alcohol detection technologies that are less intrusive than ignition interlocks with the hope of greater public acceptance for installation in vehicles. Specifically, this effort seeks to develop alcohol detection technologies that are less intrusive than ignition interlocks with the hope of greater public acceptance for installation in vehicles. Specifically, this effort seeks to develop alcohol detection technologies that will quickly and accurately measure a driver's blood alcohol concentration (BAC) non-invasively. These technologies might ultimately be a component of a system that could prevent a vehicle from being driven when the device registers that the driver's BAC exceeds the legal limit. Such devices ultimately must be compatible for mass production at a moderate price, meet acceptable reliability levels, and be unobtrusive to the sober driver. The program seeks to assess the current state of impairment devices, and to support the development and testing of prototypes and subsequent hardware that 1 day may be installed in vehicles.

Universal deployment of current technology (breathalyzers) as a preventative measure is not a good option because drivers are required to provide a breath sample every time they start the vehicle. To be acceptable for use among the general public, many of whom do not drink or drink and drive, in-vehicle alcohol detection technologies must be far less intrusive. Advanced technologies are needed that can rapidly and accurately detect a driver's BAC. Such devices should be seamless with the driving task, therefore they must be non-intrusive, reliable, durable, and require little or no maintenance. The technological challenges are substantial, however, the potential benefits to society are compelling, with the potential to save more than 8,000 lives annually, according to the Insurance Institute for Highway Safety.

*Question 2.* What progress in this research and development effort do you hope to see in the coming months and years?

Answer. The Cooperative Research Program being pursued jointly by ACTS and NHTSA is divided into two phases. The specific objective of Phase I is to develop a proof-of-concept (POC) prototype intended to represent a device ultimately capable of rapidly and accurately measuring a driver's BAC non-invasively within the time and accuracy constraints established by the Program. POC prototypes will be available for testing beginning in June/July 2010. The focus of this testing will be on evaluating these devices for speed and accuracy using standardized procedures capable of measuring to the stringent accuracy requirements established. Limited human subjects testing will also be conducted at this stage.

The Phase II effort is intended to result in the practical demonstration of one or more alcohol detection subsystems suitable for continued development and subsequent integration into a motor vehicle. Pending the timely completion of Phase I, Phase II which is scheduled to run for 24 months—is expected to begin in January 2011.

*Question 3.* Event data recorders provide critical information in the event of a crash. This information can serve to determine whether a vehicle malfunction was to blame. Currently the law does not require manufacturers to install event data recorders. What percent of the fleet has an event data recorder?

Answer. During its EDR rulemaking proceeding, NHTSA estimated that 64 percent of 2005 model year passenger vehicles (GVWR less than or equal to 8,500 pounds) had EDRs. More recently, NHTSA Administrator David Strickland testified that approximately 85 percent of new light passenger vehicles are equipped with an EDR. It is not known what percentage of these EDRs conform with the requirements of NHTSA's voluntary EDR rule (49 CFR Part 563) which takes effect Sep-

<sup>1</sup> Costs are shared between NHTSA and ACTS on an equal basis. Automakers providing funding for this effort to ACTS are: BMW, Chrysler, Ford, General Motors, Honda, Jaguar Land Rover, Mazda, Mercedes-Benz, Mitsubishi, Nissan, Porsche, Toyota, and Volkswagen.

tember 1, 2012. It should be noted, however, that several Alliance member companies have chosen not to implement EDR technology in their vehicles to date. For these manufacturers, a new rule requiring EDR implementation will require substantial vehicle electrical and electronic modifications to develop EDRs and, consequently, adequate leadtime to make such modifications.

*Question 4.* Do you have an estimate on how long it will be before all vehicles have an event data recorder?

Answer. If conformance with NHTSA's existing EDR requirements is mandated, all new light passenger vehicles (GVWR less than 10,000 pounds as currently defined by S. 3302) could be equipped with an EDR no later than 2016. This would allow those manufacturers that currently do not have EDRs sufficient time to redesign and reconfigure their vehicles to include EDRs. However, if revised EDR requirements are mandated, all or virtually all existing EDRs would need to be redesigned. A much longer timeline would be needed if this were the case. Full compliance with any newly promulgated requirements would not be possible any sooner than 4 to 5 years following issuance of the final rule. Rulemaking itself is likely to take at least 3 years.

*Question 5.* Could legislation requiring installation of event data recorders lead to new vehicle safety advances?

Answer. Yes. Automakers perform thousands of safety tests on their vehicles each year, and the government and groups like IIHS also perform crash tests that provide invaluable insights. In addition, automakers, NHTSA and other organizations investigate thousands of real-world crashes each year in order to improve our understanding of the causes and consequences of vehicle crashes. EDRs provide additional valuable data in such investigations. EDRs enhance auto safety by providing a better understanding of crash events and injuries, as these examples demonstrate:

*Regulatory Priorities:* Objective data from EDRs help improve the quality of NHTSA's data bases (FARS, NASS) that form the basis for rulemaking. Often, these data bases include subjective information from crash investigators. Real-world data can help regulators and automakers better address the top safety priorities.

*Safety Trends:* A large database of real-world performance can help identify safety trends, resulting in an accelerated deployment of emerging technologies for crash avoidance. For example, this database may identify possible defects for investigation or document that new technologies are producing dramatic real-world results.

*Medical Treatment:* More knowledge on the anatomy of a crash can help trauma centers treat patients better and quicker. Not all injuries are visible to the eye, but information on crash forces can lead doctors to look for internal injuries associated with certain types of crashes.

*Emergency Services:* When coupled with Automatic Crash Notification systems, EDR data can help prioritize emergency response. Getting paramedics to crashes 9 minutes sooner can save an estimated 1,000 to 3,000 lives per year. EDR data can also guide emergency dispatchers to send the most appropriate personnel and equipment to a crash site.

*Improved Vehicle Safety Performance:* Many variables are involved in a crash, and special crash investigators can spend weeks gathering information and assessing what occurred. This information is useful to auto safety engineers. EDRs can help show how an advanced airbag system responded to the weight of the person in the seat and whether an airbag inflated appropriately for the severity and for the angle of impact of the crash.

*Roadway Safety:* EDR data has the potential to help identify roadway circumstances requiring attention. For example, if a series of crashes in a specified location demonstrate certain braking patterns, a surface or visual impediment may be identified by crash investigators.

*Question 6.* In addition to requiring event data recorders in light duty vehicles, could requiring event data recorders in medium and heavy duty vehicles enhance motor vehicle safety?

Answer. The Alliance only represents manufacturers of light duty vehicles. Consequently, it has no opinion regarding whether event data recorders should be installed in medium and heavy duty vehicles. A subset of Alliance membership manufactures medium and heavy duty vehicles. These are: Ford, General Motors, Mercedes-Benz, and Toyota.

PREPARED STATEMENT OF LAURA DEAN-MOONEY, NATIONAL PRESIDENT,  
MOTHERS AGAINST DRUNK DRIVING (MADD)

Thank you Chairman Rockefeller, Ranking Member Hutchison and members of the Committee for your highway safety leadership. Mothers Against Drunk Driving (MADD) commends your efforts to save lives and prevent injuries on our Nation's roads.

This year marks the 30th anniversary of MADD. Since our founding in 1980, drunk driving fatalities have dropped by over 40 percent. We are proud of our successes, but as we reflect on 30 years of safety advocacy we must recommit to the elimination of drunk driving. There is much left to do, as far too many continue to drive impaired. Drunk driving is no longer socially acceptable, yet it is still tolerated.

The public is now well aware of the human consequences of drinking and driving because MADD has shared stories like mine with the Nation. Yet in 2008 there were 11,733 fatalities involving a driver or motorcycle operator with at least a .08 BAC, and nearly half a million injuries due to alcohol-related traffic crashes. Alcohol involved crashes represented 32 percent of all highway fatalities, and most importantly represent real-life tragedies.

I became involved with MADD after my husband, Mike Dean, was killed in Texas by a drunk driver, leaving me to raise our 8-month-old daughter alone. On November 21, 1991, Mike left a business meeting in Oklahoma and drove to the Dallas-Fort Worth area to visit his family.

At 7:15 p.m., a drunk driver going the wrong way on a Texas highway met Mike's car head on, killing him instantly and simultaneously making me both a grieving widow and a single mom. The offender, who died at the crash scene, had a BAC of .34 and was driving with an almost empty bottle of whiskey in his car.

For more than 17 years, I have worked as a volunteer to try and advance MADD's mission at the local, state, and national levels.

We have made great progress in the fight against drunk driving—much of which occurred in the 1980s and through the mid-1990s—thanks to strong laws and tireless leadership from law enforcement.

For the past 15 years, we have been able to maintain this progress, but until the current recession, few major gains have been made in actually reducing the overall number of impaired driving fatalities. Thanks to Congressional action in 2000, the national .08 BAC standard has been instrumental in holding progress in place as vehicle miles travelled steadily increased.

Legislative achievements and law enforcement leadership have saved tens of thousands of lives, but America continues to practice a "catch and release" program: law enforcement does their very best to catch drunk drivers, and we as a society through our legislatures and courts, too often let them go with few consequences. Studies show that up to 75 percent of drunk drivers continue to drive even when their licenses have been revoked.

#### **Campaign to Eliminate Drunk Driving**

Fortunately, MADD, with support from Members of Congress, NHTSA and others in the highway safety community, has a plan. Following only those solutions proven to work, MADD announced the Campaign to Eliminate Drunk Driving on November 20, 2006.

The Campaign consists of four parts, all singularly focused on putting a long-overdue end to drunk driving tragedies on our roads:

- Intensive high-visibility law enforcement, including twice-yearly impaired driving crackdowns and frequent enforcement efforts that include sobriety checkpoints and saturation patrols in all 50 states.
- Full implementation of current alcohol ignition interlock technologies, including interlock devices for all convicted drunk drivers. A key part of this effort will be working with judges, prosecutors and state driver's license officials to stop the revolving door of repeat offenders.
- Exploration of advanced vehicle technologies through the establishment of a cooperative research agreement and a Blue Ribbon panel of international safety experts that is assessing the feasibility of a range of technologies that would prevent drunk driving. Ultimately, any technologies put forth for the public must be voluntary, moderately priced, absolutely reliable, unobtrusive to the sober driver, and set at the illegal limit of .08 BAC.
- Mobilization of grassroots support, led by MADD and its more than 400 affiliates, and our partners to make the elimination of drunk driving a reality.

MADD is uniting drunk driving victims, families, community leaders, and policymakers in the fight to eliminate drunk driving.

#### **Advanced Alcohol Detection Technology**

The Motor Vehicle Safety Act of 2010 presents an important opportunity to provide the National Highway Traffic Safety Administration (NHTSA) with additional tools and resources to carry out its lifesaving work. Vehicle safety features, while certainly recognized by all as an essential part of the safety matrix, have not been MADD's area of focus until recent years. After three decades of concentrating on changing human behavior—the biggest contributing factor to traffic crashes, death and injury—our organization is also focusing its attention on the use of in-vehicle technology to stop impaired driving.

The simple reason that drunk drivers continue to drive drunk is because they can. Vehicle technology is now being used to park cars, thwart theft, monitor tire pressure, alert the driver to lane departure, maintain vehicle stability, and help motorists with various other issues. Mobile technology solutions now exist to prevent texting while driving. As we look to the cars of the future, it is exciting to think about a time when motorists will simply not be able to misuse their vehicles—illegally—by driving drunk.

Such advanced vehicle technology to prevent drunk driving could one day save more lives than any other highway safety countermeasure in history—8,000–9,000 lives each year, according to the Insurance Institute for Highway Safety (IIHS).

The Driver Alcohol Detection System for Safety, or DADSS, is the result of a cooperative research agreement currently underway between the Automotive Coalition for Traffic Safety (ACTS), comprised of many of the world's leading auto manufacturers, and NHTSA. The agreement is a public-private partnership with both entities providing \$1 million per year for 5 years.

The purpose of this agreement is to research, develop, and demonstrate noninvasive in-vehicle alcohol detection technologies that can very quickly and accurately measure a driver's BAC. These advanced technologies offer the potential for a system that could prevent the vehicle from being driven when the driver's BAC exceeds the illegal limit.

Any technology which is developed must be absolutely accurate, nearly instantaneous, and not hassle the sober driver. If the technology is successful, a sober driver would notice no difference in his or her driving experience. Any technology developed must be set to detect blood alcohol concentrations of .08 or above.

In the first phase of technology development, three companies have been selected through a request for proposal process and testing will be overseen by Harvard Medical School. While we are hopeful that DADSS will be successful in identifying a technology which will one day eliminate drunk driving, we need this Committee's help to make this goal a reality.

Senator Tom Udall and Senator Bob Corker have introduced bipartisan legislation, the Research of Alcohol Detection Systems for Stopping Alcohol-related Fatalities Everywhere Act, or ROADS SAFE, which would authorize an additional \$12 million per year for DADSS. Currently the legislation has seven other co-sponsors. In the House, Representatives Ehlers and Sarbanes have introduced similar legislation.

Additional funding would provide a much needed financial boost to the program and ensure a greater Federal commitment toward eliminating drunk driving.

A recent study shows that the public is ready for such a device. The Insurance Institute for Highway Safety research shows that two-thirds of those surveyed consider the use of advanced technology to keep drunk drivers off the road to be a "good" or "very good" idea. A similar survey by the AAA Foundation for Traffic Safety found even stronger public support.

MADD urges the Committee to include the ROADS SAFE Act as part of the Motor Vehicle Safety Act of 2010. ROADS SAFE provides \$12 million a year to address a problem that costs the United States \$130 billion each year. This is a good return on taxpayer investment.

#### **Conclusion**

Looking into the future, we have great hope that one day advanced alcohol detection technology will be available, preventing drunk drivers from operating their cars.

With this committee's leadership, we are poised to discover the cure for one of America's deadliest public health problems.

Thank you again, Mister Chairman and Ranking Member Hutchison, for your leadership on this issue.

## ATTACHMENTS

**Driver Alcohol Detection System for Safety (DADSS)**

DADSS is an ambitious undertaking, addressing a broad range of issues while developing a technology to prevent drunk drivers from operating vehicles without disrupting the normal driving that is such an integral part of our everyday lives.

The early phase of the project has focused on identifying technologies that sense a driver's blood alcohol content level in an unobtrusive way, while also being extremely reliable, durable, repeatable, maintenance-free—and relatively inexpensive.

In the first phase of technology development, three companies are developing prototypes to be delivered to project experts in late spring or early summer. The next step will be testing at a lab associated with the Harvard Medical School.

Why is this important? It is estimated that nearly 9,000 lives could be saved by a system that prevents driving by those over the generous legal limit for alcohol. The key will be public acceptance, and initial surveys are quite promising.

Developing advanced alcohol detection technology through DADSS is one of the major elements of Mothers Against Drunk Driving's Campaign to Eliminate Drunk Driving (CEDD). DOT is pleased to work with MADD on this activity through NHTSA Administrator David Strickland, who serves as Honorary Chairman of the CEDD.

I encourage you to look for future entries reporting on further progress with this important initiative, or go to [www.dadss.org](http://www.dadss.org).

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<http://fastlane.dot.gov/2010/05/chuck-hurley-a-pioneer-in-road-safety.html#more>

FAST LANE: THE OFFICIAL BLOG OF THE SECRETARY OF TRANSPORTATION

May 14, 2010

**New technology, diverse partnership working to eliminate drunk driving**

There is exciting news in the ongoing fight to prevent—and maybe even eliminate—a major threat to the American family: drunk driving.



There has been enormous progress since *MADD's founding 30 years ago*. Together, we have cut drunk driving fatalities nearly in half, but we still face the entirely preventable loss of *almost 12,000 deaths last year*. That's nearly  $\frac{1}{3}$  of all traffic-related fatalities each year—100 percent preventable.

Advanced technology to prevent drunk drivers from operating vehicles holds the real potential of eliminating this threat. For nearly 3 years, our National Highway

Traffic Safety Administration (NHTSA) and leading automakers, working through the *Automotive Coalition for Traffic Safety*, have partnered on an advanced alcohol detection research program called DADSS, *Driver Alcohol Detection System for Safety*.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO  
HON. DAVID L. STRICKLAND

*Question 1.* Should the Center for Vehicle Electronics, Vehicle Software, and Emerging Technologies be staffed exclusively by Federal employees or through a combination of Federal employees and contractors?

Answer. NHTSA believes that it should have the flexibility to use a combination of Federal staff and contract staff to meet its needs. While much of our work would benefit from a more stable Federal work force, over time we have often seen the need for specific expertise that may solely be available or accessible from a private-sector firm or needed by NHTSA for a short-term duration. These factors would favor the use of contract support to supplement our Federal staff.

*Question 2.* Is there a minimum threshold for the Center in terms of staffing levels and budget for it to have significant impact agency wide? In other words, would be it useful for the legislation to authorize minimum staffing and budget levels?

Answer. NHTSA agrees that it would be beneficial to strengthen its expertise in the area of vehicle electronics and software. Because such a Center does not exist currently and because NHTSA believes that the findings of the National Aeronautics and Space Administration (NASA) and National Academy of Science (NAS) studies should help guide efforts and expectations of the Center's operation, NHTSA would prefer the flexibility to assess its needs over time and to staff and fund the operation at the level most appropriate to obtain the maximum benefits. Therefore, it would be preferable to provide NHTSA general authorization for the Center without specifying minimum or maximum staffing or funding levels.

*Question 3.* My expectation is that initially, employees from other parts of NHTSA will be reassigned to the Center. Is there a need for Congress to ensure that over time the Center adds new in-house technical capacity to NHTSA rather than just shuffling around existing personnel?

Answer. Because the Motor Vehicle Safety Act of 2010 has not yet become a finalized law, NHTSA did not anticipate the establishment of such a Center in its 2011 budget submission. Accordingly, existing NHTSA personnel and funds would be insufficient to support the long term administration of the Center. If the Center is authorized and appropriated funds, NHTSA would not plan to rely only on existing personnel.

*Question 4.* At the Committee's March second hearing on the "Toyota Recalls and the Government's Response," I asked Toyota to read the EDR from the 2007 Toyota Tundra involved in a fatal accident taking the life of a constituent. The 2007 Toyota Tundra was subject to two of NHTSA's recalls regarding unintended acceleration. In April, Toyota read out the EDR in the presence of the family's technical expert.

The technical expert was not satisfied that the read-out tool provided complete and consistent information of the EDR. For example the EDR recorded the vehicle traveling 75 miles-per-hour at the time of the crash and 177 miles-per-hour after the crash.

I have sent a letter to you requesting that NHTSA read out the EDR of that vehicle. Is that something NHTSA can commit to doing?

Answer. NHTSA has the necessary equipment to read the EDR from the 2007 Toyota Tundra involved in the crash. To follow up on your request, we can take steps to "image" the EDR. It is our understanding from Toyota that the anomalies in the EDR data readings were caused by translation errors with the version of the Toyota software used, but that the anomalies have been resolved in the current version of the software. Toyota has asserted to NHTSA that when tested with the updated software, the EDR did not report anomalous results.

*Question 5.* Auto manufacturers are moving to a business model where they become systems integrators. At the same time, they are increasing the amount of software and electronics content within a vehicle. I believe system integration of auto software and control systems presents a considerable challenge today. This challenge will only increase in the future as more hybrid and electric vehicles are introduced into the market.

The Center for Vehicle Electronics, Vehicle Software, and Emerging Technologies is critical for NHTSA to be able to carry out its mission in the future. Today, NHTSA appears to be severely limited in its in-house capability in these areas.

NIST is involved with standards organizations and developing tests to ensure conformance to standards in areas including software and control systems. They are working on these challenges for the Smart Grid and Health IT. NHTSA contacted NASA to assist in looking at issues related to unintended acceleration in vehicles. Did NHTSA also contact NIST?

Answer. NHTSA contacted the National Institute of Standards and Technology (NIST) in March 2010 as part of our effort to gather information related to electronic vehicle controls and to assess their expertise in this area. While NHTSA believes that NIST has significant expertise in certain aspects of electronics, NASA was chosen because of its extensive expertise in electronic controls, as well as its unmatched expertise in forensic analysis and fail-safe design, verification, and testing strategies.

*Question 6.* Is there a way for NHTSA to tap into NIST's expertise as part of the Center for Vehicle Electronics, Vehicle Software, and Engineering Expertise?

Answer. NHTSA believes that NIST has significant expertise in certain aspects of electronics, and has worked with NIST on previous research studies. NHTSA fully expects to continue its collaboration with NIST on all areas, including vehicle electronics, software and engineering as appropriate.

Also, NHTSA recommended NIST to the Volpe Center at DOT's Research and Innovative Technology Administration, which will conduct a peer review of aspects of the NHTSA-NASA work; the Volpe Center selected a NIST panelist to serve in that peer review.

*Question 7.* An Event Data Recorder (EDR) recovered at the crash scene can provide useful information about the crash, complementing information gathered from victims and eyewitnesses. EDR data can also serve as a piece of evidence. And as with other evidence collected at a police investigation scene there should be a chain of custody to ensure that if the information is used in a later criminal or civil proceeding, no one will question whether the data or device has been tampered with.

Section 107 requires that EDRs be tamper resistant. From a legal standpoint, I imagine prosecutors may want EDRs to be tamper proof. I recognize that there is a difference between the two terms with respect to performance and cost. From the NHTSA's perspective of improving passenger vehicle safety, would a tamper resistant EDR suffice, or is a tamper proof EDR required?

Answer. For this response, we are assuming that "tamper" means the deliberate altering or destroying of the EDR data. Based on our current information, a tamper resistant EDR would suffice. This is based on the following:

1. The agency has no evidence to suggest that EDR modules or data are currently being compromised by tampering.
2. We believe it would require a great deal of resources (both time and money) to make the EDR and its contents absolutely tamper proof.
3. There is a tension between efforts to prevent tampering of EDR data and to enable legitimate entities access to the data for legitimate purposes. For example, one way to limit tampering would be to use some device to restrict access to the EDR imaging ports. However, it is not clear where to draw that line between tamper resistance and ease of access by legitimate entities.

An alternate way to deal with this potential problem would be for Congress to provide for specific civil or criminal penalties for tampering with an EDR and authorize NHTSA to enforce those penalty provisions.

*Question 8.* Should law enforcement be able to place a device on the EDR or its electronic connector, or be able to download software to prevent unauthorized users from accessing the data? Is there technology available to do that now?

Answer. Because traffic enforcement and accident response are handled at the State level, NHTSA does not have a position on whether law enforcement should be able to place a device on the EDR or its electronic connector. We are currently unaware of any available software that would prevent unauthorized users from accessing the data. However, we do have concerns that alterations to the EDR itself may unintentionally compromise the EDR's operation.

*Question 9.* Under current law, does NHTSA have any authority to address privacy issues related to EDRs and EDR data?

Answer. As a Federal agency, NHTSA is governed by the Privacy Act of 1974, the privacy provisions of the E-Government Act of 2002, various directives from the Office of Management and Budget, and the Freedom of Information Act exemptions from release of information that would invade privacy. These provisions allow us and, in some cases require us, to protect personally identifying information. In the

absence of more specific legislation, we apply these provisions in addressing privacy issues related to EDR data in our possession.

*Question 10.* Under current law who owns EDR data? From NHTSA's perspective does it matter?

Answer. We are aware of no Federal statutes or case law addressing the issue of EDR data ownership. However, at least 13 states have laws relating to the use or ownership of EDR data. Several of these laws provide that EDR data is the property of the vehicle owner. All 13 of these states accord some measure of privacy to EDR data, providing that only the "owner" of the vehicle (generally including a person renting or leasing, or with a security interest in, the vehicle) can access the data, unless a specified exception applies. Several states define the "owner" as the owner at the time the data were created or recorded. In NHTSA's view, in these states permission from the owner of the EDR data is necessary for NHTSA to access EDR data in most instances. In states that do not have a law identifying the owner of EDR data, NHTSA assumes the current owner of the vehicle owns the EDR data, and that NHTSA requires that owner's permission for access, unless State law provides otherwise.

*Question 11.* In the near future there will be more real-time collection of EDR data over a two-way communications network connected to the Internet. That presents both opportunities and challenges.

A May 13, 2010 article in the *New York Times* described researchers at the University of Washington working under a National Science Foundation grant who figured out a way to remotely hack into a car's electronic control systems and control a wide range of automotive functions such as disabling the brakes and stopping the engine. Do you believe that policymakers need to be concerned about potential cyber security vulnerabilities in passenger vehicles as an increasing number of passenger vehicles are expected to have real-time two-way connections to the Internet? Is this something that would fall [within] NHTSA's current authority or is new authority required?

Answer. NHTSA is carefully reviewing the report by the researchers from the University of Washington and the University of California San Diego, and has been in contact with those researchers to understand the potential threat and impact on vehicle safety and security. NHTSA intends to study facets of this issue as part of a program on Vehicle-to-Vehicle Communications, which is a primary component of DOT's Intellidrive program. Additionally, the NAS effort, which is examining the broad subject of electronic vehicle controls across the entire automotive industry, will also study this issue and make recommendations or suggested courses of action for NHTSA going forward.

NHTSA currently has authority to issue Federal motor vehicle safety standards that protect the public against existing or anticipated sources of "unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident."<sup>1</sup> To the extent that the vulnerability of vehicle electronic control units and systems to external interference, manipulation, or alteration can be construed as presenting an unreasonable risk of accidents, our standard-setting authority would enable us to require the adoption of measures to reduce that vulnerability.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO  
HON. DAVID L. STRICKLAND

*Question 1.* Could you explain to this Committee how NHTSA is working with leading automakers to develop new, in-vehicle technologies to prevent—and potentially eliminate—drunk driving?

Answer. In February 2008, NHTSA entered into a 5-year Cooperative Agreement with the Automotive Coalition for Traffic Safety (ACTS)—a non-profit organization that is comprised of certain automobile manufacturers (BMW, Chrysler, Ford, General Motors, Honda, Jaguar Land Rover, Mazda, Mercedes Benz, Mitsubishi, Nissan, Porsche, Toyota, and Volkswagen). This cost-sharing agreement, known as the Driver Alcohol Detection System for Safety (DADSS) program, allows NHTSA and ACTS to engage in cooperative research to develop technologies that will quickly and accurately measure a driver's blood alcohol concentration (BAC) in a non-invasive manner. It will assess whether such devices meet acceptable reliability levels, are non-obtrusive to the sober driver, and are compatible with mass-production at a moderate price. If these requirements are met, these technologies could be a component of a

<sup>1</sup>49 U.S.C. 30102(a)(8).

system that can prevent the vehicle from being driven when the device registers that the driver's BAC exceeds the legal limit (0.08 grams per deciliter in all U.S. states).

*Question 2.* What progress in this research and development effort do you hope to see in the coming months and years?

Answer. The NHTSA/ACTS Cooperative Agreement supports the development and testing of prototypes and subsequent demonstration hardware. The goal, at the end of the 5-year program, is the practical demonstration of an alcohol detection subsystem in one or more research vehicles. The DADSS effort is following a two-stage process. Phase I, which is almost complete, supports the development of three working proof-of-principle prototypes. These prototypes will begin bench and human subject testing in 2010. Phase II, which is scheduled to commence in 2011, represents a substantial effort that is intended to lead to the development of one or more research vehicles. This effort will focus on ensuring that such devices meet the stringent performance specifications, are reliable, durable, and virtually maintenance free through the vehicle's life span, while operating in the challenging automobile environment.

*Question 3.* What percent of the fleet has an event data recorder?

Answer. More than 90 percent of the 2010 new car and light truck fleet is equipped with EDRs. The only car companies that do not offer any EDRs are the German manufacturers.

*Question 4.* Do you have an estimate on how long it will be before all vehicles have an event data recorder?

Answer. It is our understanding that the German manufacturers will not equip their vehicles with an EDR absent a mandate to do so. Other manufacturers have indicated that they will offer EDRs on the models not currently equipped with them in the next 3 or 4 years.

*Question 5.* Could legislation requiring installation of event data recorders lead to new vehicle safety advances?

Answer. We believe that EDRs have the potential to improve safety by providing a better understanding of the crash environment, including vehicle crash performance and driver performance. Indirectly, they may lead to safer vehicle designs, improved crash reconstruction, and better assessments of safety equipment and automatic crash notification systems.

*Question 6.* In addition to requiring event data recorders in light duty vehicles, could requiring event data recorders in medium and heavy duty vehicles enhance motor vehicle safety?

Answer. Yes, EDRs on these vehicles could provide the same valuable information for these vehicles that EDRs currently provide on light-duty vehicles. However, unlike light-duty vehicles, these vehicles are not required to have crash sensors, which are a necessary component of EDRs. Additional time would be needed for these manufacturers to develop crash sensors on their vehicles.

By State and the Highest Driver BAC in the Crash Fatality Analysis Reporting System (FARS)  
1982-2007 Final and 2008 ARF

Year	*Total Fatalities Number	BAC=0.0		BAC=0.01-0.07		Fatalities in Alcohol-Impaired-Driver Crashes (BAC= .08+)		BAC=0.15+		BAC=0.01+	
		Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
1982	43,945	19,771	45%	2,912	7%	21,113	48%	14,277	32%	24,025	55%
1983	42,589	19,787	46%	2,588	6%	20,051	47%	13,689	32%	22,639	53%
1984	44,257	21,429	48%	3,007	7%	19,638	44%	13,260	30%	22,645	51%
1985	43,825	22,589	52%	2,974	7%	18,125	41%	12,096	28%	21,098	48%
1986	46,087	22,896	50%	3,487	8%	19,554	42%	12,988	28%	23,041	50%
1987	46,390	24,186	52%	3,238	7%	18,813	41%	12,733	27%	22,051	48%
1988	47,087	25,164	53%	3,156	7%	18,611	40%	12,726	27%	21,767	46%
1989	45,582	25,152	55%	2,793	6%	17,521	38%	12,062	26%	20,314	45%
1990	44,589	23,823	53%	2,901	7%	17,705	40%	12,181	27%	20,607	46%
1991	41,508	23,025	55%	2,480	6%	15,827	38%	10,908	26%	18,307	44%
1992	39,250	22,726	58%	2,352	6%	14,049	36%	9,604	24%	16,401	42%
1993	40,150	23,979	60%	2,300	6%	13,739	34%	9,310	23%	16,039	40%
1994	40,716	24,948	61%	2,236	5%	13,390	33%	9,224	23%	15,626	38%
1995	41,817	25,768	62%	2,416	6%	13,478	32%	9,108	23%	15,883	38%
1996	42,065	26,052	62%	2,415	6%	13,451	32%	9,065	22%	15,866	38%
1997	42,013	26,902	64%	2,216	5%	12,757	30%	8,591	20%	14,973	36%
1998	41,501	26,477	64%	2,353	6%	12,546	30%	8,461	20%	14,899	36%
1999	41,717	26,798	64%	2,235	5%	12,555	30%	8,351	20%	14,790	35%
2000	41,945	26,082	62%	2,422	6%	13,324	32%	8,885	21%	15,746	38%
2001	42,196	26,334	62%	2,441	6%	13,290	31%	8,947	21%	15,731	37%
2002	43,005	27,080	63%	2,321	5%	13,472	31%	9,055	21%	15,783	37%
2003	42,884	27,328	64%	2,327	5%	13,096	31%	8,786	20%	15,423	36%
2004	42,836	27,413	64%	2,212	5%	13,099	31%	8,762	20%	15,311	36%
2005	43,510	27,423	63%	2,404	6%	13,582	31%	9,110	21%	15,985	37%
2006	42,708	26,633	62%	2,479	6%	13,491	32%	8,977	21%	15,970	37%
2007	41,259	25,611	62%	2,494	6%	13,041	32%	8,768	21%	15,534	38%
2008	37,261	23,317	63%	2,072	6%	11,773	32%	8,048	22%	13,846	37%

