

***Statement of Joan Claybrook, President Emeritus, Public Citizen, and Former Administrator, National Highway Traffic Safety Administration***

***Concerning the Performance of the National Highway Traffic Safety Administration and Recommendations for Legislative Improvements***

***Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce***

***U. S. House of Representatives  
Washington, D.C.***

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Mr. Chairman, members of the Committee, my name is Joan Claybrook. I am a former Administrator of the National Highway Traffic Safety Administration (NHTSA) and President Emeritus of Public Citizen, a national public interest organization. I appreciate the invitation to testify today on the performance and decisions of NHTSA on motor vehicle safety issues and the opportunity to make recommendations for improvements.

To start, let me say that one of the pleasures of working for or in association with NHTSA is the opportunity to support its clear mission of saving lives and reducing fuel use on the highway. The rewards of this work have kept many agency staff working there for years. Also, the statute creating the agency in 1966 with amendments over the years is strong and supports effective leadership.

Yet NHTSA is the poor stepchild of the U.S. Department of Transportation (DOT), responsible for addressing 95 percent of the transportation-related deaths with only one percent of the DOT budget. This has severely hampered the agency's effectiveness.

NHTSA has been viewed by the motor vehicle industry for years as a lapdog, not a watch dog. The agency is heavily dependent on the manufacturers it regulates to cooperate with the agency and supply information. While NHTSA sends defects investigation letters requiring response, for decades it has not sent a subpoena or letter requiring a sworn response under threat of criminal penalty. It has not asserted its hefty authority through demanding information from manufacturers, suppliers and dealers, through extensive defects testing at its Ohio facility, through hiring the best experts worldwide or

contacting consumer lawyers and their experts, or through alerting consumers to supply information about their experiences on the road. Auto companies, including Toyota, treat the agency with contempt, failing to supply requested information, delaying actions requested, arguing against reasonable agency proposals, attempting to mislead the agency, gloating when the agency backs off of proposed actions, and boasting about their influence over the agency. This is a sad state of affairs for a crucial, vitally important and potentially potent safety regulatory agency. NHTSA's new leadership must change the agency's performance and results.

This new leadership gives us great hope that a number of agency shortcomings to be tackled. And this hearing today is just what is needed to make sure that the agency is doing its job and has the capacity to do so.

Today I will recommend seven types of legislative and administrative remedies for the agency to be much more effective, to be a watchdog instead of a lapdog, and to save the lives it should be saving, as has been tragically highlighted by the Toyota cases.

**1. Low Priority for Enforcement.** The agency leaders for too long have given low priority to its enforcement programs, and as a result, cases are opened and closed routinely with minimal investigation, there are no clear criteria by which the agency determines its priorities in investigating cases, and the public must be able to seek judicial review of agency enforcement decisions as it can already for rulemaking final decisions.

**2. Agency Secrecy Makes Public Oversight Difficult.** There is little opportunity for public oversight because of excessive secrecy, including with the Early Warning Reports program created by the TREAD Act in 2000 under this Committee's auspices. The Early Warning program has not served the public need.

**3. Penalties are Insufficient to Deter Violations.** The penalties in the law are insufficient to deter manufacturers from refusing or failing to admit their vehicles contain a defect and then recalling them

**4. Agency Resources Need to be Drastically Increased.** The agency resources to handle the volume of vehicle defect problems each year are pitiful and they need to be drastically increased.

**5. Information Gathering and Data Systems are Insufficient.** NHTSA's information gathering and data systems are woefully under-funded and inadequate for issuance of safety standards and enforcement.

**6. New Safety Standards Should Result from Investigations and Testing.** The enforcement office should regularly recommend to the leadership new or upgraded safety standards based on findings from its investigations.

**7. Conflict of Interest Rules Need to be Strengthened.** The agency needs to review its conflict of interest rules to determine whether they need to be tightened based on the

issues raised with former NHTSA personnel leaving the agency to work for Toyota and other auto companies.

### **Low Priority for Enforcement**

The standards and defect enforcement program at NHTSA is often a stepchild until a big case like Firestone or Toyota blows up and then a laser beam of attention is focused on it. But most of the time NHTSA administrators worry about setting standards for safety and fuel economy, and state grant in aid programs which dominate the agency's budget.

An important tool for assuring keen oversight of NHTSA enforcement decisions is the ability of outside parties to challenge them in court just as they can challenge final safety standards in court. The law needs to be amended to grant this authority. The statutes of many other agencies include such authority (Atomic Energy Act, The Clean Air Act, the Safety Drinking Water Act, the Endangered Species Act and more). It is clear that it is needed for the National Traffic and Motor Vehicle Safety Act as well. I can testify from my own personal experience that the agency takes great care with issuance of safety rules because it knows it can be challenged in court. It should give the same premium consideration to enforcement actions.

Reviewing tens of thousands of consumer defect complaints, gathering detailed information about a problem with particular make/model vehicles, asking the manufacturer for more specific information and analyzing all the data is a daily task for enforcement engineers and investigators to whom little attention is paid. The small size of the staff, the huge size of the manufacturers regulated, the imbalance not only of resources but of knowledge about particular problems between manufacturer and regulator, the pressure on NHTSA engineers to "get it right" or face the ire of supervisors and manufacturers, all combine to make agency staff very cautious and often secretive.

But as the U.S. Department of Transportation Inspector General emphasized in a report on his audit of NHTSA's defect investigation programs in 2004, the agency needs to "ensure consistency in recommending and opening defect investigations in order to ensure the highest priority cases are investigated." This means not only effective procedures but also regular reporting to and review by the Administrator to assure the agency is the government cop on the corporate beat.

Over the years the defect program has become increasingly complex and hard for outsiders to fathom. To begin a defect review the agency used to conduct an engineering analysis, produce a public list each month of ongoing cases, and if warranted open an investigation with a press release. Then it added additional preliminary steps, didn't tell anyone, and stopped producing monthly lists of vehicles with potential defects being considered. Keeping this information secret means the public is not alerted so citizens can take measures to protect themselves, and it means they will not know to supply crucial information to the agency about their own vehicles.

NHTSA has tried in the past to limit recalls regionally (until challenged by consumer groups). In the case of the Lexus in 2007, NHTSA allowed an equipment recall for floor mat replacement without requiring vehicles to be brought in and inspected by dealers, saving Toyota \$100 million according to a Toyota July 2009 power point presentation. Some companies (Toyota in October 2009) conduct a recall but in documents filed at NHTSA claim the problem is not a safety related defect. And the agency does not respond. The agency has the authority to review recall letters a company sends to consumers to be sure it truly alerts the recipient to the dangers and encourages them to get repairs made. Many letters, however, appear not to have been reviewed because they are designed to be so bland that the consumer is not likely to respond. This protects the manufacturer's liability and restrains costs.

Also, the agency used to routinely ask companies to conduct voluntary recalls when the top engineering staff believed a safety defect was involved. Some companies agreed and others didn't. After GM raised a stink about such a request involving the CK pickup truck with dangerous side-saddle gas tanks in the 1990's, the agency created so-called peer review panels that include even legislative staff who have to sign off on such a request before it is made. These panels meet infrequently, delaying action. They should be abolished. The head of the Enforcement should have authority to approve of such requests.

Another tactic the agency should not tolerate is a company substituting so-called "service campaigns" for full safety recall campaigns. This may be appropriate in very limited circumstances where there is no safety issue involved, but once one company does it the others all try to do so as well.

### **Agency Secrecy Makes Public Oversight Difficult**

Over the years NHTSA has gotten more and more secretive. Often simple requests require the filing of a Freedom of Information Act (FOIA) letter which is more time consuming for the agency to process but which at least must be answered and can be challenged in court. Thus consumer organizations now routinely file FOIA requests instead of informal ones. All of that of course takes time and resource by the requesters and the governments. The Internet has helped the public get information about docket comments on rulemaking and about safety defect and enforcement final decisions. But more and more manufacturers are requesting confidentiality for information submitted, and too often the agency grants the requests. It also takes a long time to process some of the confidentiality requests.

A major program the Congress intended to be public but NHTSA fought to keep secret is the Early Warning Report program information submitted quarterly by manufacturers by make and model and alleged defect when they learn of a death or injury. It took effect in 2004.

During debate on the TREAD Act, reported out of this committee in 2000, Chairman Billy Tauzin and Representative Ed Markey had a colloquy on the House floor assuring

the early warning information would be public. In the signing statement for TREAD, President Bill Clinton said the information should be public. The NHTSA legislative counsel John Womak wrote a memo after the law was enacted stating the information would be kept public. The first rulemaking notices indicated the information would be public. But guess what? In a jujitsu move, the agency amended its confidentiality rule and decided the early warning notices from manufacturers would be secret.

Public Citizen had to sue twice to get only some of the information. The public now has access to the make, model, alleged defect and the number of death and injuries. But still kept secret by NHTSA are the number of warranty claims, the number of consumer complaints, and the number of field reports about that make/model vehicle and alleged defect. Not even required to be reported are the number of law suits filed on that vehicle. NHTSA says such information is confidential business information. Yet for years it has released such information on particular make/model vehicles in final reports on safety defect investigations. Recommendation: All of the early warning information should be made public.

As the Toyota cases make clear, even excellent letters or defect investigation petitions from consumers that cause the agency to take a look at an issue can be dismissed by NHTSA, but without the early warning information the public cannot weigh in and be effective advocates in response. We still don't know whether Toyota filed early warning reports on the vehicles NHTSA initially reviewed for sudden acceleration following receipt of letters and petitions, or whether they were filed (as they should have been) before the Toyota recall announcements on a variety of vehicles for sudden acceleration.

In addition, NHTSA has kept secret information about what early warning reports prompt the agency to initiate informal investigations or inquiries. They simply are not made public like other agency defect investigations. There is no reason for this secrecy and all of them should be made public.

The DOT Inspector General in its 2004 report criticized the agency for its many mistakes in creation of a computer program to manage the early warning reporting that cost the agency \$9.4 million through 2004 and another \$11.5 million to operate and maintain from 2005 through 2009. The computer program is called ARTEMIS. As the Inspector General reported, "ARTEMIS (Advanced Retrieval(Tire Equipment, Motor Vehicles) Information System) cannot perform more advanced trend and predictive analyses that were originally envisioned as being needed to identify defects warranting investigation...." If this program is not helping identify potential defects, what criteria does the agency use to do so? This question needs to be answered.

Further, the NHTSA web page on early warning is almost impossible to use, particularly for a consumer. Whatever the reason, it needs to be made user friendly with easy summaries by type of vehicle and type of alleged defect. Let's finally administer this program as Congress originally intended to not only help the agency do its job but to save lives as well.

## **Penalties Are Insufficient to Deter Violations**

The current penalties under the NHTSA statute are primarily civil. However, there is a useless criminal provision that should be rewritten. Under the TREAD Act, which added section 30170 to Title 49, violations that include falsifying or withholding information with the specific intent of misleading the Secretary of Transportation with respect to motor vehicle or equipment safety related defects that have caused death or serious injury are subject to a fine under 18 U.S.C 1001, the government wide criminal law, and/or up to 15 years in jail, except it contains a safe harbor provision under which criminal penalties do not apply if the person did not know the violation would result in an accident causing death or serious injury and the person corrects any improper reports.

This section too narrow and fails to cover elements of the NHTSA law other than defects. But the safe harbor provision also essentially negates the criminal penalty and raises the question about whether 18U.S.C. 1001, which does not have the safe harbor, could separately be applied. This section should be rewritten to apply criminal penalties for any knowing and willful violation of the NHTSA statute, similar to the provision this Committee wrote in 2008 for the Consumer Product Safety Commission Act (CPSA). The Food, Drug and Cosmetic Act has contained criminal penalties for years. Its office of Criminal Investigations has a \$41 million budget. It's amazing that NHTSA does not have authority to impose criminal penalties given that an individual negligent driver can be prosecuted for vehicular homicide for killing one person.

Civil penalties with a maximum of \$16.4 million dollars apply to all other NHTSA statutory violations. This is hardly enough to influence the decisions of multinational motor vehicle manufacturers. The TREAD Act increased NHTSA's maximum civil penalty from \$1 million to \$15 million (increased to \$16.4 for inflation). Unfortunately NHTSA lax leadership is revealed by its failure to impose even the penalties is currently is authorized. The agency did not impose any penalties from 2004 to 2008 and the maximum penalty it has imposed is \$1 million dollars!

The law should be amended to remove any maximum civil penalty and increase the current \$5000 per violation penalty to \$25,000 as in the EPA law. By comparison, one defense contractor, BAE Systems, was recently fined \$400 million in a decades old case, for misleading the Defense and State Departments about compliance with the Foreign Corrupt Practices Act.

Increasing these penalties for violations of the Act will deter manufacturers from failing to obey the law and reduce the load on NHTSA that too often finds itself "urging" manufacturers to comply.

## **NHTSA's Resources Need to be Drastically Increased**

NHTSA is the poor stepdaughter in DOT. It is responsible for addressing 95 percent of transportation-related deaths but has only 1 percent of the DOT budget.

Its motor vehicle safety budget is \$132 million for FY 2011. This is totally insufficient to conduct research and prepare regulatory analyses for issuance of complex motor vehicle safety standards, test sufficient numbers of vehicles to assure their compliance with agency vehicle safety standards, carry out the New Car Assessment Program under which new cars are crash tested and the information listed on the price stickers of new cars in the show room and also published on NHTSA's web page, review and evaluate tens of thousands of consumer complaints, manage the Early Warning Reporting program, investigate vehicle safety defects require recalls.

For FY 2011, NHTSA's motor vehicle program request is \$5 million less than Congress enacted for FY 2010. By comparison, grants to the states total \$620 million, an increase of \$14 million over FY 2010. An additional \$117 million is allocated for highway safety research. These two programs total 84 percent of NHTSA's budget. The motor vehicle program accounts for only 15 percent.

The motor vehicle safety budget should be increased by \$100 million dollars. It has been declining for years and has crippled this important agency as the Toyota case reveals. The Office of Defects Investigation has only 57 employees and 18 investigators. It lacks crucial electronics and software expertise needed to oversee today's vehicles. Not only is there a gross imbalance in resources between NHTSA and any company whose vehicle is being investigated, there is an imbalance in knowledge and expertise which is exacerbated by lack of funding. As a result, in addition to being ill-equipped to conduct thorough investigations of Toyota's sudden acceleration defects, it regularly closed promising inquiries after Toyota refused to acknowledge any defect. This type of agency failure must be changed. And adequate resources for NHTSA is one of the key to that change.

### **Information Gathering and Data Systems are Insufficient**

NHTSA's databases are woefully under funded and inadequate for standards setting and enforcement. The original intent of the National Accident Sampling System (NASS) was to conduct about 20,000 accident investigations a year. It now conducts only about 4,000 at a cost of about \$12 million annually, with the result it is unable to identify key problems from its data.

In addition to the fatality data system (a census of all motor vehicle fatalities occurring each year) and NASS that need vastly increased funding, there is a potential vast new source of data the agency has not attempted to tap that could be readily available. That is the data from Event Data Recorders, or black boxes, now in most motor vehicles that record data when a crash occurs. But there are great variations in the existing systems which would make creation of a data base impossible.

NHTSA issued a voluntary standard in 2007 that takes effect in 2012. It requires a minimal amount of data to be captured in a crash. But it is totally insufficient and should be rewritten. The data collected under a mandatory standard should include all important crash data and could form the basis for a new NHTSA data base from real world crashes—a very exciting prospect. It would also have to require a single, uniform interface system for downloading the data (now each company's system has a different downloading method causing great confusion) so that the police would need only one computer to do so. Also the standard should include protections against exposure to fire, water submersion, and tampering, and prohibit on/off switches. It must also include enhanced recording of rollover crashes (currently only one event is recorded when multiple air bags deploy) and rollovers usually involve 2 or more rolls.

I cannot emphasize enough the potential treasure trove of safety information inexpensively collected to significantly enhance NHTSA's analytical capacity. NHTSA should be required to issue a mandatory safety standard and to establish a public repository/database for EDR case data with personal identification information removed, and state and local authorities should be required to routinely collect EDR data in all fatal, injury and tow-away crashes and forward it electronically to the NHTSA database.

The event data recorders are also an issue in the Toyota cases. Toyota, unlike U.S. manufacturers, has made it almost impossible to secure black box information. It has not made available any downloading systems, saying the one it had in the U.S. was a prototype. To the best of my knowledge, Toyota has not made available to NHTSA any black box information about its vehicles involved in sudden acceleration crashes, making it more difficult for the agency to do its job. In the midst of the storm over Toyota's posture on the sudden acceleration recalls, the company announced it was delivering three computers to download the black box information to NHTSA and that 100 systems would be available for commercial application in April. However, it is very likely that the data collected by the Toyota systems is minimal given the company's penchant for secrecy.

### **New Safety Standards Should Result from Investigations and Testing**

In the course of conducting safety enforcement and consumer information New Car Assessment crash tests and defect investigations, agency staff often learns about vehicle failures that can be corrected with new safety standards. It appears that such information is not effectively transmitted to the safety standards section of the Agency or that it is not treated seriously if it is transmitted. For example, front seat backs have failed in a number of agency rear impact crash tests, yet a safety standard to prevent such failures has never been issued.

Likewise, the Toyota cases bring to light a number of safety standards that should be upgraded or issued. The **accelerator standard** was issued in 1973, years before electronic throttles were installed but which are now common in all motor vehicles. This standard needs to be seriously upgraded to address electronic accelerators.

The **brake override** system that has been prominently mentioned in the Toyota floor mat recall is another needed standard given the prevalence today of electronic throttles. Toyota said it is installing the brake override in many of these vehicles when they are brought in for the floor mat fix. NHTSA should issue a safety standard as rapidly as possible to assure the service brake overrides inputs to the accelerator control systems.

Another issue raised by the Toyota cases is the need for **standardization of ignition shut-off systems**. Reports of tragic Toyota sudden unintended acceleration cases have revealed the difficulty for drivers in shutting off the engine. NHTSA should require standardization depending on whether the shut-off mode uses a traditional key, instrument panel button or switch, or an electronic key fob.

In addition, the Toyota case reveals the need for a safety standard for motor vehicle electronics, given that many safety-critical systems for vehicle operation and control are now electronic. NHTSA should set minimum **safety standards for electronic systems** and for **protection of those systems from electromagnetic interference (EMI)**.

There are of course other safety standards NHTSA should address but these are key ones that have been given prominence by the Toyota recalls.

### **Conflict of Interest and Ethics Rules Need to be Tightened**

While neither NHTSA nor DOT usually set ethics rules that are different from the government-wide rules, we urge the Secretary of Transportation to consider the need to impose tougher standards and stricter scrutiny for the agencies that protect the public safety, particularly in light of the two Toyota employees who came to the company from NHTSA as well as the large number of high level NHTSA/DOT staff who now work directly for the auto industry. In particular, the focus should be on engineering staff that can move immediately from the agency to a regulated company as long as they don't work on any matter they handled at the agency. It should also consider a cooling-off period longer than two years for senior agency or department personnel leaving to represent the auto industry.

I would also note that NHTSA rents space at a crash testing now owned by Honda Motor Company. It originally was owned by the State of Ohio when I established our testing work at the facility. It is now time to avoid the conflicts inherent in this arrangement and find new facilities that are not involved with regulated companies.

Thank you Mr. Chairman and members of the Committee for the opportunity to testify on these important matters today.

