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U.S. Senate
Committee on the Judiciary
Subcommittee on Oversight, Federal Rights, and Agency Action

Hearing on "Justice Denied: Rules Delayed on Auto Safety and Mental Health"

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Chairman Blumenthal, Ranking Member Hatch, and Members of the Subcommittee, I appreciate your invitation to appear before you today to testify on trends in rulemaking by the National Highway Traffic Safety Administration (NHTSA). By way of background, I am the Edward B. Shils Professor of Law and former Deputy Dean for Academic Affairs at the University of Pennsylvania Law School, as well as a Professor of Political Science and the Director of the Penn Program on Regulation at the University of Pennsylvania. The focus of my research and teaching has been on administrative law and government regulation, with a particular emphasis on the empirical study of regulatory policymaking. My recent books include *Does Regulation Kill Jobs?* (with Adam Finkel and Christopher Carrigan, forthcoming 2013), *Regulatory Breakdown: The Crisis of Confidence in U.S. Regulation* (2012), and *Import Safety: Regulatory Governance in the Global Economy* (with Adam Finkel and David Zaring, 2009).

Summary

For more than two decades, administrative law scholars have perpetuated claims about how the threat of judicial review has effectively "paralyzed" NHTSA in the exercise of its rulemaking authority. Specifically, the claim is that judicial review under the arbitrary and capricious standard has prompted NHTSA all but to abandon rulemaking and shift instead to issuing individual recalls on defective automobiles. Yet these claims of NHTSA's abandonment of rulemaking in the face of judicial review simply do not bear up under close scrutiny. NHTSA has continued to undertake substantial rulemaking, notwithstanding the persistent threat of judicial review. The agency's purported shift to recalls has been neither dominant nor as discernible as has been typically supposed. The trends that do exist in NHTSA rulemakings over several decades do not appear well explained by judicial decisions. Other explanations – such as the life cycle of regulatory implementation, decreases in public support for auto safety regulation, and changes in budgetary resources – appear more plausible. Members of Congress would do well to consider carefully other highly plausible alternatives before making policy decisions based on claims that have little empirical support, however widely accepted they may be among legal scholars.

Claims of NHTSA's Retreat from Rulemaking

The Administrative Procedure Act of 1946 (APA) authorizes courts to invalidate government regulations deemed to be "arbitrary and capricious." Many scholars and practitioners believe that, to minimize the risk of judicial rejection, government officials overcompensate by taking excessive care to develop extensive rulemaking records and draft lengthy *Federal Register* documents, resulting in what has become known as the "ossification of rulemaking."

Claims of ossification are made about regulation generally, but they are most frequently supported by reference to a detailed and elegant case study on NHTSA completed in the 1980s by Jerry Mashaw, a thoughtful and distinguished professor of administrative law at Yale University, and his co-author, David Harfst, a lawyer.[1] Mashaw and Harfst examined NHTSA's record of rulemaking during the two decades following the enactment of the National Traffic and Motor Vehicle Safety Act of 1966 ("Motor Vehicle Safety Act"). Like other new regulatory initiatives of the late 1960s and early 1970s, the Motor Vehicle Safety Act called for the government to provide for the protection of public health and safety by issuing general rules or standards. This power to issue general rules was viewed at the time as one of the "greatest inventions of modern government"[2] because it offered a procedure for governmental correction of market failures thought to be easier than the traditional case-by-case adjudication that characterized older regulatory agencies. Yet rather than finding rulemaking easier, NHTSA purportedly retreated from rulemaking in the face of judicial losses in the early 1970s. According to Mashaw and Harfst, NHTSA's losses under the arbitrary and capricious standard "burdened, dislocated, and ultimately paralyzed its rule making efforts."[3] Instead of seeking to protect the driving public by issuing rules, the agency shifted to vehicle defect recalls, a form of the old-style, adjudicatory approach.

Although Mashaw and Harfst's underlying research is now itself more than a quarter-century old, their findings continue to reinforce widespread agreement that judicial review has hampered administrative agencies' regulatory efforts and has led some agencies – like NHTSA – to retreat from rulemaking altogether. Discussion and concern about ossification persist throughout contemporary administrative law scholarship, as well as in discussions by legal and policy decision makers.[4] Citing Mashaw and Harfst's work, Professor Richard Pierce has written that "NHTSA has abandoned almost completely its efforts to establish policy through

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1 Jerry L. Mashaw & David Harfst, Regulation and Legal Culture, 4 Yale J. Regn. 257 (1987) (hereinafter "Legal Culture"); Jerry L. Mashaw & David Harfst, Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance, 57 U. Chi. L. Rev. 443 (1990) (hereinafter "Legal Determinants"); Jerry L. Mashaw & David Harfst, The Struggle for Auto Safety (1990) (hereinafter "Struggle").

2 Kenneth Culp Davis, Administrative Law Treatise 283 (1970).

3 Mashaw & Harfst, Legal Determinants, supra note 1, at 444.

4 See, e.g., American Radio Relay League, Inc. v. FCC, 524 F.3d 227 (2008) (J. Kavanaugh opinion concurring and dissenting in part) (lamenting that judicial application of the arbitrary and capricious standard has "gradually transformed rulemaking -- whether regulatory or deregulatory rulemaking -- from the simple and speedy practice contemplated by the APA into a laborious, seemingly never-ending process.").

rulemaking."[5] In his widely cited article on rulemaking ossification, Professor Thomas McGarity has noted that "[i]n an exhaustive study of rulemaking in the NHTSA, Professors Mashaw and Harfst found that stringent judicial review is largely responsible for that agency's virtual abandonment of rulemaking in favor of case-by-case recalls."[6] Professors Cass Sunstein and Adrian Vermeule have cited Mashaw and Harfst's research to support their claim that:

> It is now well-documented that [judicial] review has contributed to the "ossification" of notice-and-comment rulemaking … In light of the risk of invalidation, many agencies have turned away from notice-and-comment rulemaking altogether – with the National Highway Traffic Safety Administration ("NHTSA"), for example, attempting to promote automobile safety through ex post recalls.[7]

Chronicling how NHTSA has "stalled" as an agency, Professors Rena Steinzor and Sidney Shapiro rely on Mashaw and Harfst's work to argue that, following a loss in the Sixth Circuit in 1972, NHTSA "dropped prospective standard setting as the centerpiece of its regulatory efforts" and "[i]nstead…turned to recalls as its weapon of choice."[8] Dean Elizabeth Magill has written that "NHTSA shifted to a strategy of recalls, all but abandoning its standard-setting efforts."[9]

The Mashaw and Harfst Account

In their influential study of NHTSA, Mashaw and Harfst called attention to the fact that in the first eight to ten years following passage of the Motor Vehicle Safety Act of 1966, NHTSA and its predecessor agencies put into place a basic regulatory framework -- one that exists largely to the present day. By 1976, NHTSA had put in place about 50 different safety "standards" governing different parts of the vehicle. As Mashaw and Harfst described it, "[v]irtually no aspect of motor vehicle safety was ignored. From brakes, windshield wipers, and seat belts to fuel tanks, rearview mirrors, and energy-absorbing steering assemblies, NHTSA cast an intricate net of minutely detailed regulatory requirements over a vast array of motor vehicle components and equipment."[10]

However, in these early years, NHTSA also faced resistance by firms within the automobile industry, including legal challenges to some of its new standards. In 1972, NHTSA lost three major cases in a row. Mashaw and Harfst singled out one of these three cases,

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[5] Richard Pierce, Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking, 1988 Duke L.J. 300 (1988).

[6] Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385 (1992).

[7] Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 885, 932 (2003).

[8] Rena Steinzor & Sidney Shapiro, The People's Agents and the Battle to Protect the American Public: Special Interests, Government, and Threats to Health, Safety, and the Environment (2010).

[9] M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1447 n. 132 (2004)

[10] Mashaw & Harfst, Struggle, supra note 1, at 69.

Chrysler v. Department of Transportation,[11] for its dramatic impact on the agency. In *Chrysler*, the Sixth Circuit reviewed a challenge to the agency's attempt to develop a passive restraints standard. Although the court upheld NHTSA's standard against a series of objections, it ultimately sent the rule back for failing the APA's arbitrary and capricious test because the agency had not adequately specified the dimensions and criteria for the anthropomorphic dummies used in the crash tests called for under the standard. NHTSA apparently had little reason in advance to suspect that the rule would be rejected for failure to state adequately a few parameters for test dummies. For this reason, the *Chrysler* decision[12] -- not to mention the losses in the other cases that same year[13] -- apparently came as a shock and placed "a stranglehold on the regulatory process" at NHTSA.[14] For Mashaw and Harfst, "it was this case, more than any other, that taught the agency how precarious its legal position in rulemaking really was."[15] Mashaw and Harfst argued that "ninety percent of [NHTSA's] total rulemaking output occurred prior to 1974. Indeed, none of its current safety rules was first issued after 1976"; after the *Chrysler* decision, NHTSA "fail[ed] almost completely to promulgate any new safety rules."[16]

Why did judicial review under the arbitrary and capricious standard allegedly result in NHTSA's abandonment of rulemaking? According to the conventional account, the chief problem lies with the uncertainty over how any given court will interpret the standard. Because courts may inflate the importance of marginal issues, agencies cannot anticipate the depth of analysis that may be required. Regulators either spend their time attempting to respond to every conceivable challenge in advance, or they turn to other actions that are not as vulnerable to judicial rejection.

In contrast to the judiciary's posture in *Chrysler* and other rulemaking cases, the courts had purportedly tread much more lightly on agency decision making when industry challenged NHTSA's recall decisions in court. The courts permitted NHTSA to pursue defect claims based on identified problems with the mechanical operation of a vehicle even if the agency could not show that the defect caused an unreasonable risk or created a sufficient safety problem to justify the cost of the recall action. Due in large part to this "green light from the courts," NHTSA apparently "produced an orgy of recall activity in the latter half of the 1970s."[17] Losses in court over rulemakings combined with wins over recalls led NHTSA to "shift from rules to recalls."[18]

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[11] 472 F.2d 659 (6th Cir.).

[12] Mashaw & Harfst, Struggle, supra note 1, at 87-88.

[13] Mashaw & Harfst, Legal Determinants, supra note 1, 457.

[14] Jerry L. Mashaw, Greed, Chaos, & Governance: Using Public Choice to Improve Public Law 181 (1997). Mashaw also described judicial review's effects on NHTSA as "debilitating," id. at 165, and "crippling," Mashaw & Harfst, Struggle, supra note 1, at 147. To be sure, he does not claim that judicial review is the only factor that may affect the production of rules, though it is the dominant one discussed in his work and certainly in the larger literature on administrative law.

[15] Mashaw & Harfst, Struggle, supra note 1, at 87-88

[16] Mashaw & Harfst, Legal Determinants, supra note 1, at 445.

[17] Mashaw & Harfst, Struggle, supra note 1, at 164.

[18] Mashaw & Harfst, Legal Culture, at 312.

Reconsidering NHTSA's "Retreat" from Rulemaking

Those unfamiliar with the work of administrative law scholars might be forgiven for finding the ossification thesis somewhat surprising. After all, government regulation overall has clearly not disappeared. Quite the contrary, today regulation occupies a space that is high on the policy agenda. The *Federal Register* continues to be published each business day, with more pages appearing nearly every year. In 1970, the *Federal Register* contained 20,036 pages, while in 2002 it contained 80,332 pages. To be sure, the *Federal Register* contains much more than just binding regulations, but the government publication that contains just the binding language of agency rules – the *Code of Federal Regulations* (CFR) – has also grown significantly over the years, doubling in the overall number of pages during the period from 1976 to 2002.[19]

When social scientists have looked systematically for ossification in rulemaking across the federal government, they have failed to find much evidence that this effect exists. In a comprehensive study of rulemaking across the federal government from 1983-2003, Professor Anne Joseph O'Connell reported that her "results suggest that the administrative state is not significantly ossified."[20] A statistical analysis of federal rulemaking from 1983-2006 by Professors Jason Webb Yackee and Susan Webb Yackee indicated that agencies that experience a high volume of litigation actually produce rules somewhat more quickly than other agencies.[21] As I have noted elsewhere, "[t]he empirical evidence for a retreat from rulemaking in the face of stringent judicial review is not nearly as clear as has been generally supposed."[22]

A rulemaking retreat is also far from clear at NHTSA. On the contrary, we can see today more clearly than ever before that NHTSA has definitely not abandoned rulemaking. The part of the CFR containing NHTSA's auto safety rules more than doubled during the period from 1976 to 2002 – an increase greater than that for the CFR overall during the same period.[23] To find further evidence of substantial NHTSA rulemaking activity, one needs to look no further than the Office of Management and Budget's (OMB) annual reports on federal regulation. The pages of the *Regulatory Program of the United States Government* that OMB issued annually from 1986 through 1992 contain list after list of NHTSA rulemaking proceedings. Since the late 1990s, OMB's Office of Information and Regulatory Affairs has published an annual report to Congress which details the estimated costs and benefits of regulations adopted across the federal government. Out of the hundreds of federal agencies and offices issuing regulations each year, OMB has consistently singled out NHTSA, along with a small number of other major-rulemaking agencies such as the Environmental Protection Agency, for issuing rules with

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[19] Cary Coglianese, Empirical Analysis and Administrative Law, 2002 Univ. Ill. L. Rev. 1111, 1128 (2002) (noting that in 1976 the CFR spanned 72,740 pages, but by 1996, it had grown to 132,112 pages -- or an increase of 1.8 times). By 2002, the CFR had increased to 145,099 pages, or a doubling since 1976.

[20] Anne Joseph O'Connell, Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State, 94 Va. L. Rev. 889 (2008).

[21] Jason Webb Yackee and Susan Webb Yackee, Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified"? 20 J. Pub. Admin. Res. & Theory 261 (2010).

[22] Coglianese, supra note 19, at 1127.

[23] NHTSA's auto safety regulations took up 218 pages in the CFR in 1976 and 572 pages in 2002 (or 2.6 times more pages).

substantial economic impacts. The 2013 draft report to Congress, for example, estimates that NHTSA's major rules from 2002-2012 imposed between $5.2 – $10.1 billion in annual costs and yielded $13.1 – $22.3 billion in annual benefits.[24]

Since the 1980s, NHTSA has published cost estimates in the Federal Register for some of its most significant rules. In 1983, for example, NHTSA required the installation of single-centered stop lamps on the rear of cars, at an estimated cost to the industry of $40-70 million per year. In 1989, it issued new head restraint standards estimated to cost $12.4 million. In 1991 and 1992, it issued new standards for reflectorized school bus stop arms and school bus mirrors, at an annual estimated cost respectively of $3.3 million and $1 million. Its trailer lamps rule imposed an estimated $17 million in annual costs beginning in 1992. Fuel system integrity standards for alcohol fuel cars were added in 1993, at an estimated cost of $10 million a year. Some of NHTSA's most costly actions included standards in 1995 for antilock brakes on medium to heavy trucks, estimated to cost $400 million annually plus an additional $232 million for operating costs; standards for child restraint anchorage systems in 1999, costing an estimated $152 million per year; and head impact protection standards in 1995, costing an estimated $641 million annually.[25]

According to a 1996 Department of Commerce study of the auto manufacturing sector, "safety regulations have added about $1,000 to the average selling price of passenger cars since 1980."[26] In 2004, NHTSA released an extensive *ex post* evaluation of the economic impacts associated with its auto safety regulations. During the period 1968-1978 – which roughly corresponds with the period that Mashaw and Harfst (and others) have considered the height of NHTSA rulemaking – the annual costs associated with federal auto safety standards averaged $268 per car; by contrast, in the decade following the publication of Mashaw and Harfst's work (1991-2001), NHTSA computed the comparable annual costs to be $760 per car (both periods in 2002 dollars).[27]

In the several decades since the passage of the 1966 Act, fatalities from automobile accidents have declined in the United States, even as vehicle-miles-traveled have increased dramatically. According to National Safety Council data, in 1966 there were 5.7 fatalities per 100 million vehicle miles traveled; by 2009, this rate was down to 1.2, or a decrease of over 75

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[24] OMB, 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act (April 2013), http://www.whitehouse.gov/sites/default/-files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf.

[25] For the rules referenced in this paragraph, see: 48 Fed. Reg. 48235 (1983); 54 Fed. Reg. 39183 (1989); 56 Fed. Reg. 20363 (1991); 57 Fed. Reg. 57000 (1992); 57 Fed. Reg. 58406 (1992); 58 Fed. Reg. 5633 (1993); 60 Fed. Reg. 13216 (1995); 64 Fed. Reg. 10786 (1999); 60 Fed. Reg. 43031 (1995).

[26] Charles Fine et al., The U.S. Automobile Manufacturing Industry 77 (1996) (published the U.S. Department of Commerce, Office of Technology Policy, available online at http://www.ta.doc.gov/Reports/-autos/auto.pdf. *See also* Robert W. Crandall et al, Regulating the Automobile (1986) (referring to Bureau of Labor Statistics reports indicating that while auto safety standards added no more than $200 to the cost of the average car in 1972, these regulations had imposed costs of nearly $900 per car by 1984).

[27] NHTSA, Cost and Weight Added by the Federal Motor Vehicle Safety Standards for Model Years 1968-2001 in Passenger Cars and Light Trucks, DOT-HS-809-834 (December 2004).

percent.[28] NHTSA has estimated that more than 325,000 lives have been saved due to auto safety standards; as the costs associated with auto safety standards have increased, so too have the number of lives saved annually from required technologies: from 1,373 lives saved per year during 1968 -1978 to 14,142 per year from 1991-2001.[29]

Reconsidering NHTSA's "Shift" to Recalls

Although it is clear that NHTSA has not abandoned rulemaking, perhaps the agency has nevertheless shifted disproportionately to vehicle recalls. According to Mashaw and Harfst, NHTSA's shift to recalls can be documented by data contained in agency reports showing an increase in the number of recalled vehicles during the period between 1966 to 1980: "[M]otor vehicle recalls have increased from about fifteen million motor vehicles between 1966 and 1970 to some thirty-three million vehicles from 1971 to 1975, to over thirty-nine million vehicles between 1976 and 1980."[30] NHTSA experienced, in Mashaw and Harfst's words, "an orgy of recall activity in the latter half of the 1970s. During some of the Carter years, 1977 through 1980, more cars were recalled for repair than were sold new in the United States."[31] This increased recall activity became, according to their account, a substitute for rulemaking: "[I]t was only mildly hyperbolic to characterize vehicle safety regulation as synonymous with NHTSA's recall program."[32]

The source on which Mashaw and Harfst relied -- NHTSA's report of annual recalls -- probably gives an inflated view of the agency's recall activity. The *total* recalls reported annually by the agency include not only recalls initiated by the agency, but also manufacturer-initiated recalls, which actually make up a substantial portion of the number of recalls issued in any given year. Under the 1966 Act, manufacturers are required to notify consumers if they find a defect or a violation of a safety standard on their own. In addition to these manufacturer-initiated recalls, the Act also provides separately for NHTSA to initiate its own recall investigations in response to consumer complaints about alleged defects or safety standard violations. NHTSA-initiated recall investigations often result in the manufacturer agreeing to take action without any order from NHTSA or the courts, but these investigations are prompted by NHTSA in response to complaints or on the basis of its own analysis of accident data. As a result, this subset of recalls initiated by NHTSA, as opposed to those initiated by manufacturers, probably more purely reflects *the agency's* behavior.

Furthermore, since NHTSA can initiate its recalls in response to complaints of both defects and violations of safety standards, it is important to distinguish further even within the category of NHTSA-initiated recalls. Those agency recalls arising out of alleged violations of safety standards serve to *complement* rather than *substitute* for the agency's rulemaking, namely by enforcing the standards imposed by rulemaking. Any examination purporting to show that

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28 National Safety Council, Injury Facts 104 (1999); National Safety Council, Injury Facts 94 (2011).

29 NHTSA, Lives Saved by the Federal Motor Vehicle Safety Standards and Other Vehicle Safety Technologies, 1960-2003, DOT-HS-809-833 (October 2004).

30 Mashaw & Harfst, Struggle, supra note 1, at 12.

31 Id. at 164.

32 Id. at 166.

NHTSA recalls have become a true substitute for rulemaking should be based on the subset of NHTSA-initiated defect recalls, as they do not stem from any existing safety standards.

NHTSA's recall database permits an examination of recall activity back to 1967. Each recall in the database is coded according to whether it was reported manufacturer-initiated or NHTSA-initiated, as well as whether it was a defect or a standard violation recall. For each recall campaign, the database provides the estimated number of vehicles affected. Figure 1 (appendix) compares the data reported by Mashaw and Harfst on *total* recalled vehicles with the number of vehicles coded in NHTSA's database as *NHTSA-initiated defect* investigations. As shown in Figure 1, the NHTSA database lists very few agency-initiated recalls before 1970 – incidentally the same year the agency was established. Given that the agency was created in 1970, it should be unremarkable that an increase occurred in both NHTSA-initiated recalls as well as total recalls after 1970.[33] However, contrary to the impression created within the administrative law literature, the subsequent five-year period saw no corresponding increase in recalls coded as NHTSA-initiated. It would appear that NHTSA initiated no steady "orgy" of defect recalls.

This is not to say that NHTSA-initiated defect recalls have not increased over the span of the past four decades. To the contrary, both the number of such recall campaigns and the number of vehicles affected have increased over the years, albeit with notable fluctuation from year to year. The recalls and the vehicles affected by them, however, have occurred at a rate positively correlated with the number of vehicles on the roads, which has risen quite steadily over the same period.

What Can Judicial Review Explain?

Given the time period when Mashaw and Harfst conducted their research, they could understandably only observe NHTSA activity through the mid-1980s. Relative to NHTSA's rulemaking output up through the mid-1970s, rulemaking did fall in the subsequent decade. Mashaw and Harfst correctly observed a decline in the number of NHTSA final rules issued after 1976.[34] Between 1967-1976, NHTSA and its predecessor agencies issued an annual average of 49 final rule documents in the *Federal Register*, while between 1977-1986 NHTSA issued an annual average of only 19. (The average annual output of rules during NHTSA's first decade is also significantly higher than the annual average from 1977-2003.)

Might judicial review explain this decline in the annual number of rules issued after 1976? Most administrative law scholars believe it does. Although NHTSA's rulemakings survived their first two encounters in court in 1968 and 1969, the agency received three losses in a row in the next round of court decisions in 1972.[35] According to Mashaw and Harfst, the judicial losses NHTSA suffered in 1972 – and particularly the *Chrysler* decision – "beleaguered"

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[33] Figure 1 reports the data in graphical form exactly as Mashaw and Harfst report them in the text of their book, namely in the three five-year periods shown. See supra note 30 and accompanying text.

[34] Mashaw & Harfst, Struggle, supra note 1, at 13 (noting that "total rulemaking issuances in NHTSA's second decade are less than half those of its first").

[35] Wagner Elec. Corp. v. Volpe, 466 F.2d 1013 (3rd Cir. 1972); H & H Tire Co. v. U. S. Dept. of Transp., 471 F.2d 350 (7th Cir. 1972); Chrysler Corp. v. Department of Transp., 472 F.2d 659 (6th Cir. 1972).

the agency.[36] NHTSA suffered from a "hypersensitivity to judicial review in the aftermath of the *Chrysler* decision."[37] As a result, the pace of rulemaking "dramatically" slowed down.[38] The resulting "slowdown" prompted a series of legislative hearings beginning in February 1974, at which "agency officials repeatedly defended the pace of NHTSA's rulemaking activity on the grounds that the agency was likely to be sued on almost every rule and that even greater delay in standard setting would result from judicial determinations that the rulemaking record had been inadequately developed and analyzed."[39]

Notwithstanding this widely-held understanding among administrative law scholars, judicial review does not provide a satisfactory explanation of the pattern of rulemaking at NHTSA over time. First, given that NHTSA's major litigation losses occurred in 1972 (and that legislators' apparent complaints about a rulemaking slowdown began to be aired in early 1974), we should presumably expect to see a decline in the number of final rules beginning in 1973. What is striking, however, is that NHTSA continued to issue an average of 56 new rules each year for the following *four* years, 1973-1976. As shown in Figure 2 (appendix), this average number of rules issued in the four years *following* the agency's key court losses is slightly higher than the average for the four years preceding 1972. If *Chrysler* and the other judicial losses in 1972 had debilitated the agency, as Mashaw and Harfst and others have claimed, then it took the agency four years before it began exhibiting a downturn in its issuance of final rules – the very actions that subjected the agency to the risk of a judicial challenge. Yet there is no clear theoretical reason why the effects of judicial review should exhibit a four-year lag, especially if the *Chrysler* decision had the kind of dramatic shock to NHTSA's rulemaking system that is commonly supposed. The 1972 court losses certainly did not appear to have led NHTSA to pull back rules in the pipeline out of fear of litigation so as to take substantially more time in conducting additional internal analysis and development.

One possibility, of course, is that even if the 1972 judicial losses did not affect the completion of rules already in the pipeline, these losses perhaps could have affected NHTSA's willingness to initiate new rulemaking proceedings. If one looks just at NHTSA's proposed rules (Figure 3, appendix), they do drop off earlier than the final rules -- but again not for a couple of years after the *Chrysler* decision. After a slight drop in 1973, NHTSA's proposed rules increased in 1974 to a level *higher* than in 1972. The much more precipitous drop-off in proposed rules corresponds not with the court losses in 1972 -- but with the bipartisan congressional decision in late October 1974 to override and revoke NHTSA's rulemaking authority in connection with the controversial ignition interlock rule, a NHTSA standard adopted in 1972 that provided for the installation of continuous buzzers or interlock devices that prevented drivers from starting their cars until the seat belts were fastened.

Another reason to doubt that judicial review led to the kind of debilitating effects that have been generally assumed is that the probability of any NHTSA rulemaking being blocked by

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[36] Mashaw & Harfst, Struggle, supra note 1, at 107. In addition, allegedly "*Chrysler*, combined with other judicial opinions, enormously enhanced the perceived burdens of standard setting." Id. at 92.

[37] Mashaw & Harfst, Struggle, supra note 1, at 121.

[38] Id. at 106 ("NHTSA's rulemaking activity was slowing dramatically in the 1970s").

[39] Id. at 106-107.

the courts appears to be quite low. A search for court decisions resolving challenges to federal auto safety final rules resulted in less than two dozen cases from 1967 to the present (or an average of less than half a case per year).[40] Based on the experience of the past four decades, the risk that an auto safety rule will be subject to a court decision would appear to be about 2%. Moreover, of the twenty-three cases shown in Table 1 (appendix), the agency won completely in more than half of them – a 61% affirmance rate that compares favorably to the rate for other agencies.[41] Even when NHTSA has "lost," this has usually just meant that the court accepted one or two of the petitioners' arguments; the agency still withstood the bulk of the objections leveled against it. And while no doubt a remand requires extra work for the agency, it is hard to see why such an outcome would ever be debilitating or paralyzing to NHTSA or any other agency. On remand NHTSA has an opportunity to revise the rule, or elaborate its justification of it, to address the court's concerns. In most of NHTSA's remands, NHTSA has been able to revise and reissue its rules in a way that preserves the agency's basic initial decision or involves only minor modifications. As even Mashaw and Harfst acknowledge, in response to the *Chrysler* decision, NHTSA was able to reissue its passive restraints standard with new dummy specifications in about nine additional months.[42]

The conclusion that judicial review has not systematically dampened NHTSA's rulemaking is consistent with empirical findings with respect to other agencies. For example, decision makers at the Environmental Protection Agency do not tend to behave as if judicial review is particularly threatening or unfriendly.[43] Even in the wake of judicial remands, the Environmental Protection Agency has usually been able to achieve it rulemaking goals by revising and reissuing its rules.[44]

When it comes to recalls, the courts again do not appear to have been a factor accounting for NHTSA's behavior. Although administrative law scholars argue that NHTSA shifted to recalls due to its rulemaking losses, the rate of agency-initiated defect recalls actually *decreased* immediately following NHTSA's three court losses in 1972 (Figure 4, appendix). Furthermore, even though NHTSA scored key judicial victories in recall cases between 1975 and 1977 –

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[40] Table 1 includes cases in which the courts reached the merits. It does not include an additional challenge to a 2005 NHTSA rulemaking that was dismissed by the D.C. Circuit Court of Appeals on standing grounds. It also does not include petitions for review that were filed but settled before reaching a judicial decision.

[41] EPA has tended to win about half of its adjudicated cases. Cary Coglianese, Assessing Consensus: The Promise and Performance of Negotiated Rulemaking, 46 Duke L. J. 1255 (1997). See also Hearing on the Regulatory Improvement Act of 2007: Hearing Before the Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. 11 (2007) (statement of Professor Jody Freeman) (reporting data showing that "on average, 58% of all rules are upheld in their entirety").

[42] Mashaw & Harfst, Struggle, supra note 1 at 92.

[43] Cary Coglianese, Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process, 30 Law & Society Review 735 (1997).

[44] William S. Jordan, III, Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals through Informal Rulemaking?, 94 Nw. U. L. Rev. 393 (2000).

decisions that Mashaw and Harfst have suggested gave NHTSA the "green light" on recalls[45] -- the number of NHTSA-initiated defect recalls only made a brief uptick before again *decreasing* for several years after these recall-case wins (Figure 4, appendix). Even more pronounced decreases in the number of recalled vehicles can be observed after rulemaking losses and recall wins (Figure 5, appendix). These observed patterns are simply not consistent with the literature's expected response to the courts' external stimuli.

Alternative Explanations

In 1976, a House Commerce Committee issued a report on perceived delays at NHTSA and made no mention of the courts as a factor. Instead, the House committee staff, working in consultation with NHTSA, attributed the agency's apparent rulemaking slowdown to the increasing complexity of the regulatory issues, weak public support for new rules, resistance from industry, requests for economic analysis by the administration, and "political interference" from the executive branch.[46] Might these or other alternatives better explain the patterns in NHTSA's rulemaking outputs than can judicial review? I believe other explanations are much more plausible. After all, not only do the conventional claims about NHTSA's shift from rulemaking to recalls fail to withstand close scrutiny, but the APA's arbitrary-and-capricious standard has remained substantively unchanged over the last several decades. NHTSA has remained subject to the supposedly debilitating *Chrysler* decision, as well as its underlying uncertainty-inducing arbitrary-and-capricious test, and yet it has continued to issue substantial new rules, ones that are no doubt much more complex than many rules from the early 1970s and ones that also yield significantly higher estimated benefits and costs.

A full consideration of alternatives remains the subject of ongoing research, but I will briefly mention three quite plausible alternative explanations. These alternatives illustrate why caution is in order before attributing to the courts the relative burst of rulemaking activity in NHTSA's first decade followed by seemingly reduced rulemaking activity in the late 1970s and 1980s. That pattern could quite readily be explained by other factors.

(1) *Regulatory Life Cycle*. The initial passage of any new legislation can be expected to generate a relative flurry of new rules as a previously unregulated sphere of activity comes under governmental oversight for the first time. In NHTSA's case, the agency faced the task of putting in place a regulatory structure for the safety of automobiles and all their attendant parts. To accomplish that task, NHTSA in some cases turned to the work of private standard-setting organizations such as the Society of Automotive Engineers (SAE). Some of the government rules adopted during the perceived heyday of auto safety rulemaking were not really new rules at all, just codifications of existing industry standards. For example, the 1969 *Code of Federal Regulations* stated that "[e]ach passenger car shall have a windshield washing system that meets

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[45] Mashaw & Harfst, Struggle, supra note 1, at 164. See also Mashaw & Harfst, Legal Determinants, supra note 1, at 458 ("The courts responded between 1975 and 1977 [by ruling] that recalls could be ordered on the basis of evidence that would have been laughed out of court if offered as support for a motor vehicle standard.").

[46] Report by the House Subcommittee on Oversight and Investigations (1976).

the requirements of SAE Recommended Practice J942"[47] and that "[t]he performance ability of the fully operational service brake system for passenger cars shall be not less than that described in section D of Society of Automotive Engineers Recommended Practice J937."[48]

Furthermore, when Mashaw and Harfst suggested that by 1974 NHTSA had completed 90 percent of its "total rulemaking output," they were actually referring to the number of safety standards (or *sections* in Part 571 of the CFR) -- not to the number of rulemakings NHTSA engaged in. For NHTSA, a "safety standard" is essentially a section of Part 571 that corresponds to a particular feature of an automobile, such as windshields, brakes, seat belts, or rear view mirrors. Although Mashaw and Harfst were correct that nearly all of the conceptually distinct sections found in Part 571 in the mid-1980s had been in place since the mid-1970s, NHTSA has made many subsequent additional and revised requirements to the regulatory language within these various sections, with each change and addition made via a new rulemaking proceeding subject to judicial review. Furthermore, since the mid-1980s when Mashaw and Harfst conducted their research, additional sections (or safety standards) have been added to Part 571. By 2003, Part 571 included 19 new sections or standards that did not exist in 1974, including those addressing child restraint anchorage systems, internal trunk releases, rear impact protection, school bus rollover protection and body joint strength, compressed natural gas fuel container integrity, and school bus pedestrian safety devices. To be sure, 19 new standards over nearly three decades may look like slow progress compared with the 46 standards found in Part 571 in 1974, only eight years after the passage of the Motor Vehicle Safety Act. But once the agency had established a framework for Part 571 consisting of sections addressing virtually all the relevant parts of a car (e.g., bumpers, brakes, steering wheels, headlights, rearview mirrors, and so forth), it should hardly be surprising that there were not as many additional categories or sections left to add in subsequent years.

(2) *Reduced Public Support.* A couple of years after NHTSA encountered its early losses in court, the agency confronted a notable shift in the political climate surrounding auto safety regulation and suffered a major setback in its relationship with Congress. In 1966, Congress unanimously adopted the Motor Vehicle Safety Act, which authorized the federal government to regulate automobile design and manufacturing to protect the safety of vehicle occupants. But by 1974, due to an outcry by the consuming public, Congress demanded a rollback in NHTSA's authority in response to the infamous ignition interlock standard. As already noted, NHTSA made a sharp decline in new, proposed auto safety rules after 1974.

The 1973-1975 recession may also have contributed to the weakening of public support for government regulation of the automobile industry. Since that time, it is hard to find strong indications of the public demanding much in the way of new or bolder auto safety regulations, at least not to the extent that seemed to exist around the time leading up to the enactment of the 1966 Motor Vehicle Safety Act. A NHTSA survey in the 1990s asked citizens about "the single most important thing that the Federal government could do to reduce fatal traffic accidents," and only 8 percent called for the government to "research/strengthen/enforce safety standards."[49]

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47 49 CFR § 371.21 (Standard 104).

48 49 CFR § 371.21 (Standard 105).

49 NHTSA Customer Satisfaction Survey 1.60 (1997).

(3) *Budgetary Shifts*. Any agency's production of rules will surely be influenced by the availability of resources. As an agency moves through its life cycle or as it encounters a decrease in public support, it may find corresponding declines in available resources. Mashaw and Harfst aptly note that "[c]ongressional … appropriations after 1975 hardly revealed a Congress eager to support bold new regulatory initiatives….[C]rucial funding … declined steadily in real terms from 1972 on. A budget that had never been healthy was by 1980 truly anemic."[50] Whether anemic or just substantially reduced, NHTSA's operations and research budget did decline from 1972 forward, as shown in Figure 6 (appendix). It is important to notice that the trend in NHTSA's budget seems to correspond, with a lag, quite closely to the trends in the agency's development of new rules as shown in Figures 2 and 3 (appendix). For both its rules and budgets, NHTSA's first ten years were above the norm; then the pattern stabilized at a reduced level throughout the administration of President Reagan; and then things fluctuated somewhat in the years to follow.

That there should be a correlation between NHTSA's budget and its rulemaking output certainly makes sense. Whether NHTSA's budget reflects diminished support for regulation during the recession of 1973-1975, or a diminished sense of a need for as many rules once a stock of existing standards had been codified, or something else altogether, one thing is certain: the courts did not set NHTSA's budget.

Conclusion

Despite widespread acceptance by virtually every major scholar of administrative law, the claim that NHTSA has retreated from rulemaking and shifted instead to recalls does not bear the weight of scrutiny. NHTSA has continued to issue a substantial body of new regulations even in wake of judicial losses that have been thought to have been paralyzing to the agency. Its recalls did not increase in the aftermath of either the agency's losses in rulemaking challenges or its wins in recall litigation. When a broad sweep of NHTSA's litigated cases is considered, it is clear that NHTSA has not been beleaguered by high levels of judicial invalidations. The way that NHTSA rules declined after an initial flurry of regulatory activity appears more likely explained by the life cycle of implementing a new statute, diminished public support for auto safety regulation, or changing patterns in the agency's operations and research budget.

My testimony has offered findings from my ongoing research on NHTSA rulemaking. My focus has been on auto safety regulations across the board rather than on any individual rulemaking in particular, even a rulemaking that might be viewed as taking an excessive amount of time to complete. This is because, given the institutional environment within which rulemaking takes place, single cases do not make it possible to assess the impacts of other possible explanatory factors that could affect a regulatory agency's regulatory productivity. Taking the broader view, and seeking to triangulate using multiple sources of data, offers a stronger basis for drawing the kind of empirical generalizations that can support public policy decisions that are themselves a kind of generalization. Important policy decisions, including about the availability of judicial review of administrative action, should be informed by the best available evidence.

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[50] Mashaw & Harfst, Struggle, supra note 1, at 147.

Appendix: Tables and Figures

Figure 1:
Number of Vehicles Recalled, 1966-1980

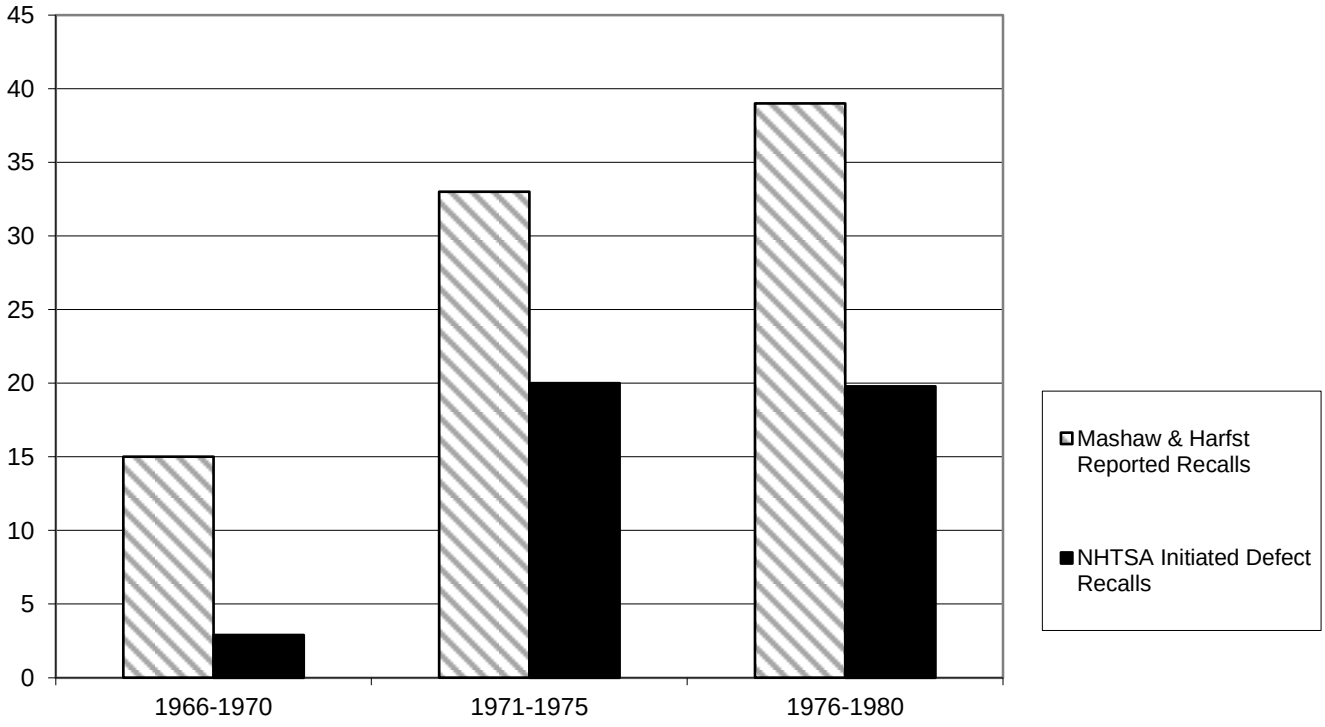

Figure 2:
Auto Safety Rules, 1967-2003

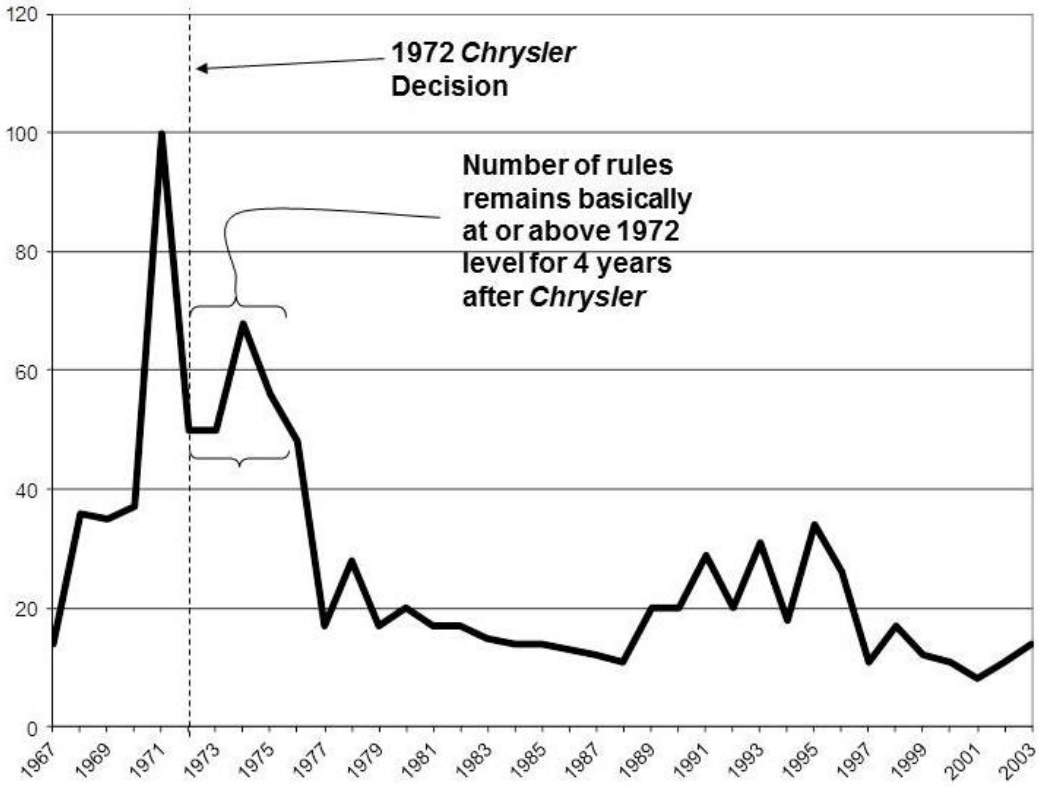

Figure 3:
Proposed Auto Safety Rules, 1967-2003

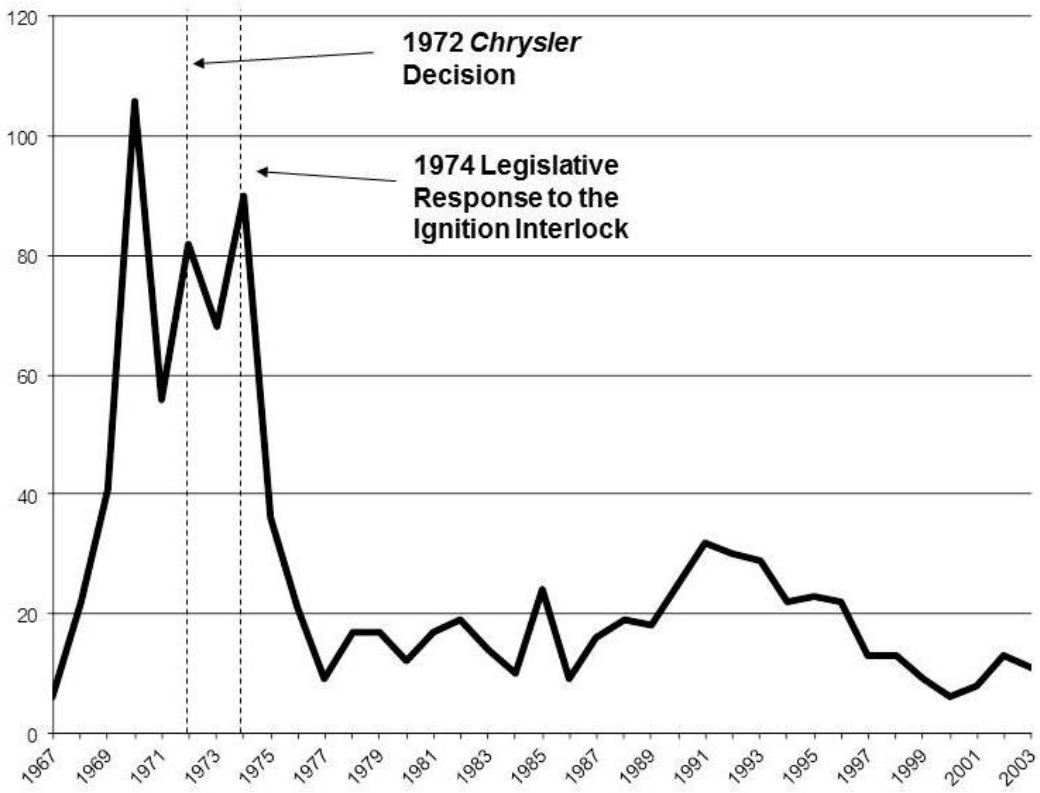

Table 1:
NHTSA's Rulemaking Record in Court

Year	Case Name	Citation	Outcome
1968	Automotive Parts & Accessories Ass'n v. Boyd	407 F.2d 330 (D.C. Cir.).	**Rule Upheld**
1969	Boating Industry Ass'n v. Boyd	409 F.2d 408 (7th Cir.).	**Rule Upheld**
1972	Wagner Elec. Corp. v. Volpe	466 F.2d 1013 (3rd Cir.).	Remanded
1972	H & H Tire Co. v. U. S. Dept. of Transportation	471 F.2d 350 (7th Cir.).	Remanded
1972	Chrysler Corp. v. Department of Transportation	472 F.2d 659 (6th Cir.).	Remanded
1973	Ford Motor Co. v. NHTSA	473 F.2d 1241 (6th Cir.).	**Rule Upheld**
1974	National Tire Dealers & Retreaders Ass'n, Inc. v. Brinegar	491 F.2d 31 (D.C. Cir.).	Remanded
1975	Chrysler Corp. v. Department of Transportation	515 F.2d 1053 (6th Cir.).	**Rule Upheld**
1976	Goodrich v. Department of Transportation	541 F.2d 1178 (6th Cir.)	Remanded
1978	Paccar, Inc. v. NHTSA	573 F.2d 632 (9th Cir.).	Remanded
1979	B.F. Goodrich Co. v. Department of Transportation	592 F.2d 322 (6th Cir.)	**Rule Upheld**
1979	Pacific Legal Foundation v. Department of Transportation	593 F.2d 1338 (D.C. Cir.).	**Rule Upheld**
1979	Vehicle Equipment Safety Commission v. NHTSA	611 F.2d 53 (4th Cir.).	**Rule Upheld**
1983	Motor Vehicle Mfrs. Ass'n v. State Farm Insur.	463 U.S. 29.	Remanded
1985	Center for Auto Safety v. Peck	751 F.2d 1336 (D.C. Cir.).	**Rule Upheld**
1986	State Farm Mut. Auto. Ins. Co. v. Dole	802 F.2d 474 (D.C. Cir.).	**Rule Upheld**
1988	Public Citizen v. Steed	851 F.2d 444 (D.C. Cir.).	**Rule Upheld**
1990	National Truck Equipment Association v. NHTSA	919 F.2d 1148 (6th Cir.).	Remanded
1995	Simms v. NHTSA	45 F.3d 999 (6th Cir.).	**Rule Upheld**
1996	Washington v. Department of Transportation	84 F.3d 1222 (10th Cir.)	**Rule Upheld**
2003	Public Citizen v. Mineta	340 F.3d 39 (2nd Cir.).	Remanded
2004	Public Citizen v. NHTSA	374 F.3d 1251 (D.C. Cir.)	**Rule Upheld**
2013	National Truck Equipment Ass'n v. NHTSA	711 F.3d 662 (6th Cir.)	**Rule Upheld**

Figure 4:
NHTSA-Initiated Defect Recall Campaigns, 1967-2003

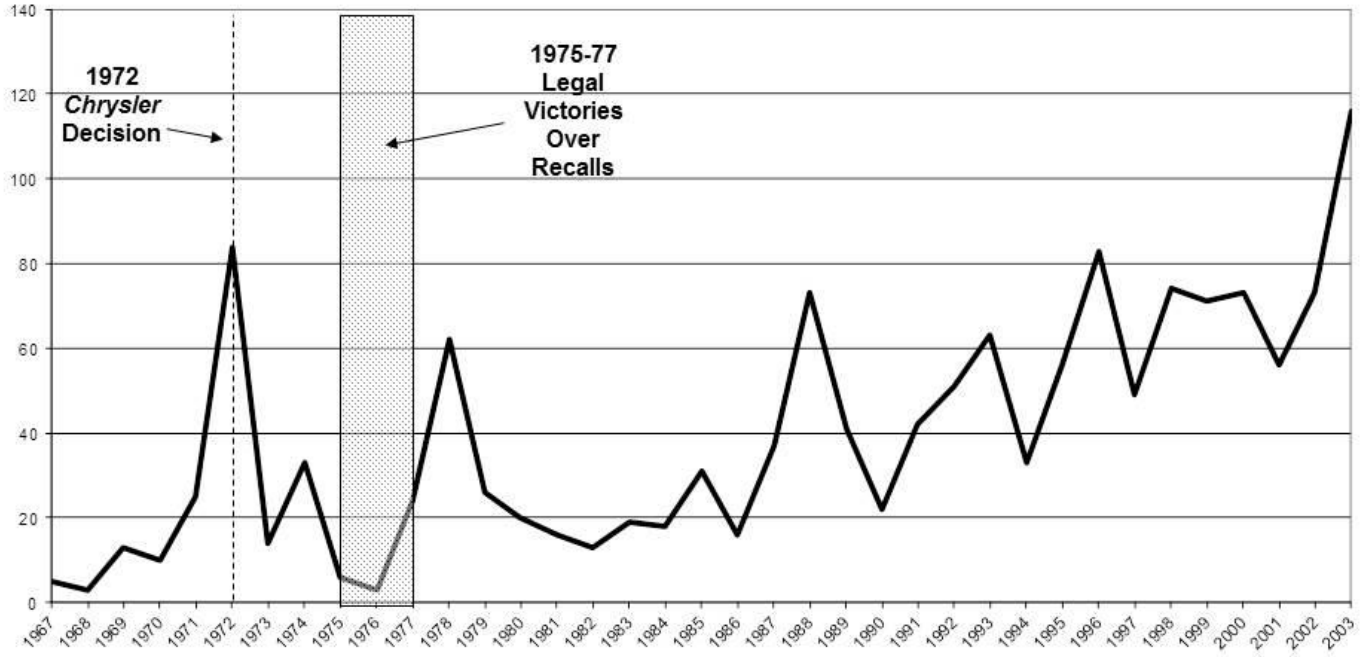

Figure 5:
Vehicles Subject to NHTSA-Initiated Defect Recalls (millions), 1967-2003

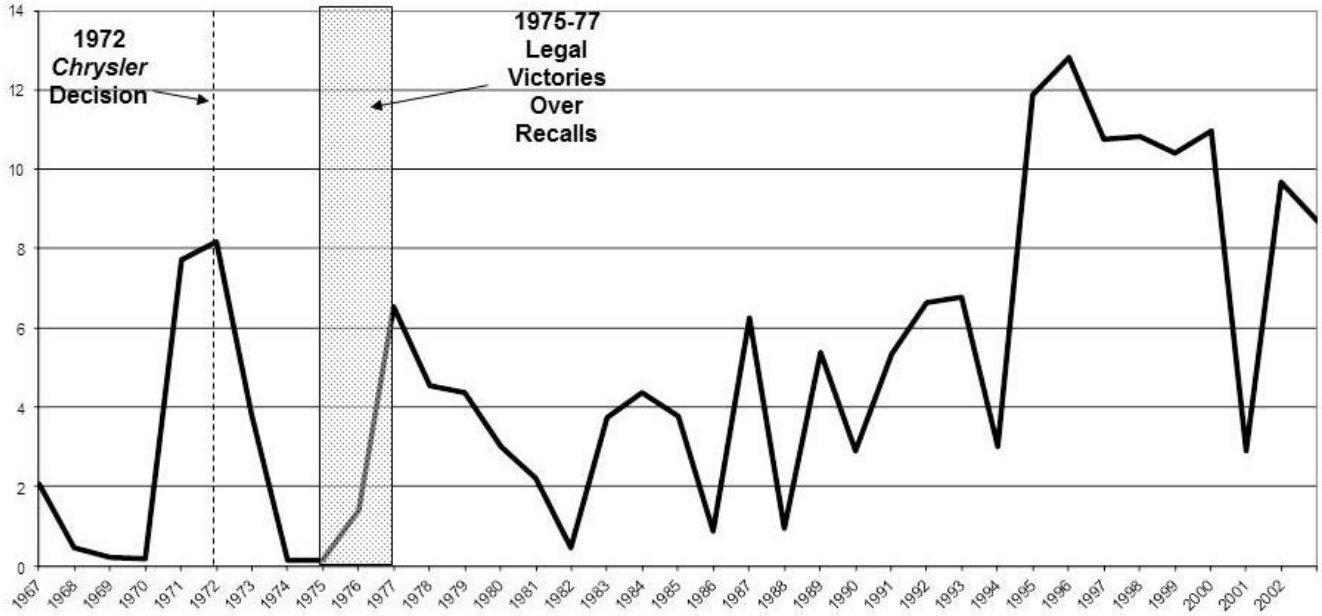

Figure 6:
NHTSA Operations and Research Budget, 1970-2003
(millions 2000 dollars)