SAFETY SELLS: Market Forces and Regulation in the Development of Airbags

By Martin Albaum

CHAPTER 5: How an Airbag Standard Finally Succeeded in a Period of Deregulation

Ronald Reagan's election in November 1980 brought to power a Republican administration that claimed to be more pro-business and committed to deregulation than its predecessor. Reagan's nearly 10 percent lead in the popular vote and overwhelming sweep of the electoral vote were accompanied by Republican gains of 33 seats in the House of Representatives and 12 in the Senate, enough to take control of the Senate but not of the House.

Although there was some real growth of the gross domestic product in 1981 after a bit of shrinkage in 1980, inflation and unemployment were still unusually high. In 1982 domestic production fell again, more dramatically than in 1980, but inflation was beginning to ease. The domestic auto industry was a focus of the current economic crisis. Domestic passenger car sales declined from 8.3 million in 1979 to 6.6 million in 1980, 6.2 million in 1981, and 5.8 million in 1982. Car imports stayed fairly steady during this period, since importers were supplying the small, quality cars Americans increasingly wanted but could not get in adequate numbers at home.

Among the highest priorities of the new administration were those measures aimed at improving the economy — stimulating investment by cutting taxes and repealing restrictive regulations. In the case of the auto industry this meant trying to eliminate regulation or possibly minimize their enforcement, rather than changing the legislation on which they were based. NHTSA went from 874 permanent, full-time positions in fiscal year 1980 to 640 in 1985.

Regulatory relief for the auto industry was a prominent part of Reagan's drive to minimize regulation wherever possible. Changing regulations, rather than legislation, was the preferred method because Reagan's party did not control both houses of Congress. Executive Order 12291, issued in the earliest days of his presidency, required that benefits of regulation must exceed their costs, but agencies were exempted when this violated their legislative mandate, as it did for all health, safety, and environmental agencies. These agencies still had to make such an assessment, but not a formal comparison. Any proposed regulation had to be submitted to the Office of Management and Budget (OMB) for approval by the Office of Information and Regulatory Affairs; a denial could be appealed to the President.[1]

1. W. Kip Viscusi, "The Misspecified Agenda: The 1980s Reforms of Health, Safety, and Environmental Regulations," in Martin Feldstein, (ed.), *American Economic Policy in the 1980s*, Chicago: The University of Chicago Press, 1994, p. 457, notes that minimizing the issuance of specific regulations was a general approach of the Reagan administration, which used its legislative energy "on tax reform rather than rewriting the legislative mandates of regulatory agencies." See also pp. 460 and 463, as well as Barry D. Friedman, *Regulation in the Reagan-Bush Era: The Eruption of Presidential Influence.* Pittsburgh: University of Pittsburgh Press, 1995, pp. 31-38.

The Democrats increased their control of the House in the election of 1982, while the Senate remained fairly unchanged. By 1983 the economy was expanding again, which it continued to do throughout the remainder of Reagan's two terms, with relatively moderate inflation levels of 2-4 percent. Unemployment was historically high, but shrank fairly steadily from nearly 10 percent in 1982 to 5.5 percent in 1988. Sales of new domestic cars recovered in 1983-1985, reaching a peak of about 8.2 million in 1985-1986, and then falling to 7 million in 1987 and 7.5 million in 1988. Prosperity and relative peace brought a sweeping popular vote victory for Ronald Reagan in 1984; he defeated former Vice President Walter Mondale by 18 percentage points, and regained some of the ground that his party had lost in the House, but not enough to take control. By the 1986 election, the Republicans had lost both houses of Congress.[2] From 1984 on the Reagan administration gave lip service to deregulation, but returned to the regulatory patterns of previous administrations.[3]

There was evidence of growing public concern about automobile safety in the late seventies and early eighties. Many states were passing child safety seat requirements; Mothers Against Drunk Driving had been effectively advocating tougher drunk driving laws and their enforcement. Automobile manufacturers began to recognize that car safety might sell. The Highway Loss Data Institute (HLDI), an affiliate of the Insurance Institute for Highway Safety, for years had published data on injury claims by car make and model. For the first time, an American manufacturer cited its performance in mass media advertising. In January 1982, General Motors advertised that it produced 15 of the 19 cars with the best HLDI injury experience among 1978-1980 models. In a June 1982 press briefing Howard Kehrl, Vice Chairman of General Motors, said that the idea that safety does not sell was not true then, if it ever was; public opinion surveys showed that more Americans than ever were considering safety when buying cars.[4] A public opinion survey commissioned by the All-Industry Research Advisory Council in 1981 found that 63 percent of those polled considered as "very important" the "degree to which the car protects people from injury," trailing only cost and mileage ratings as the prime concerns of car shopper.[5] Still, Kehrl and other auto company representatives did not express enthusiasm for a passive restraint regulation.

Whatever was occurring to increase public sensitivity to safety issues was not the result of crash experience. Motor vehicle fatalities showed no marked trend during the Reagan years. They dropped somewhat in the beginning — from 51,000 in 1980 to nearly 44,000 in 1982, then ranged between 42,500

2. Election and economic statistics are from *Statistical Abstract of the United States: 1990*, Washington, pp. 244, 255, 380, 427, 468; car sales are from American Automobile Manufacturers Association, *Facts and Figures '93*, p. 14.
3. Viscusi, op. cit., pp. 466-467, 501.
4. The GM newspaper ad is reported in Status Report, January 27, 1982, pp. 2-3. The Kehrl briefing was cited by Raymond A. Peck Jr., NHTSA Administrator and confirmed by Kehrl himself in *Motor Vehicle Safety and the Marketplace*, Hearings before the Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation, United States Senate, Ninety-Eighth Congress, First Session. Serial No. 98-16. February 17, March 10 and 11, 1983, pp. 162-163, 182-183.
5 *Status Report*, February 17, 1982, pp. 2-3.

and 47,000 for the rest of the decade. Broadly speaking, this reflected a slight drop in the fatality rate per registered vehicle.[6]

Regulatory Relief for Auto Manufacturers

As the Reagan administration was coming to power, there was essentially bipartisan concern about the contraction of the American automobile industry. In the last days of the Carter years, Secretary of Transportation Neil Goldschmidt sent the President a report suggesting that the adversarial regulatory approach currently applied to the auto industry might be replaced by a negotiating process like that used in other countries, maybe even with incentives for achieving goals rather than penalties for not achieving them.

> In addition, where government deems a particular improvement to have merit, it should be prepared to share the cost of implementing it. The unproductive and bitter battle over airbags could easily have been short-circuited had government been prepared to assume part of the cost of their installation.[7]

The Reagan administration was preparing more sweeping action. In his "Economic Dunkirk" memorandum prepared in December 1980, David Stockman, soon to become a leading spokesman as director of the Office of Management and Budget, cited the airbag rule as one that should be quickly rescinded. Stockman wanted to stop the government from making marketplace decisions that he said could be made more effectively by buyers or sellers. The American Enterprise Institute and the Heritage Foundation, conservative "think tanks" that were considered close to the Republican planners, called for even broader curtailment of regulations issued under the Motor Vehicle Safety Act of 1966.[8] So it was no surprise that the transportation task force of the new government in waiting let it be known that the opportunities to increase auto safety at a reasonable social cost had been exhausted.[9] The day after inauguration a task force on regulatory relief was appointed, chaired by Vice President Bush.[10] Drew Lewis, the new secretary of transportation, was named head of another task force to help the beleaguered auto industry. Lewis said then that the only question about the automatic restraint standard was whether to switch the timing and have it apply to small cars before large ones.[11] Spokesmen for General Motors and Ford told Senator John Danforth of Missouri, at hearings held shortly after Lewis' interview, that the standard ought at least to be delayed and that it should apply to small cars first. GM said that if the standard were promptly rescinded it would be able "to avoid most of the projected $285 million investment for passive belts in all its cars." Ford emphasized the safety benefits of requiring passive restraints in small cars first. Chrysler, as a maker concentrating on small cars, said it could not comply in

6. Department of Transportation, National Highway Traffic Safety Administration, *Traffic Safety Facts 1992*, pp. 1518.
7. *The U.S. Automobile Industry, 1980*. Report to the President from the Secretary of Transportation, January 11, 1981. The recommendations are in the letter of transmittal signed by Secretary of Transportation Goldschmidt.
8. *Status Report*, January 19, 1981, p. 1; the "Economic Dunkirk" memo is reprinted in William Greider, *The Education of David Stockman and Other Americans*, New York: Dutton; 1982.
9. *The New York Times*, December 28, 1980, p. 15.
10. Friedman, op. cit., p. 38.
11. *The New York Times*, January 29, 1981, section IV, p.1; Status Report, February 9, 1981, p. 8.

time if the standard were to apply to small cars as early as the 1982 or 1983 model years. All three still favored reassessing or dropping the automatic protection requirements entirely.[12]

Early in 1981 the Department of Transportation issued a notice of proposed rulemaking that called for a one-year delay in requiring automatic occupant protection for large cars, from September 1, 1981 to September 1, 1982. The reasons given to justify the delay stressed changes in economic conditions and the incorrect premises for the phase-in schedule. Car sales were depressed, and there were 200,000 auto workers unemployed. The passive restraints required by the new standard would raise the prices of large cars and shift demand to mid-size and small cars, where foreign manufacturers competed. By 1984 or 1985 the large car share of the market would be negligible, DOT said, cutting in half the benefits anticipated from having automatic restraints in large cars. The delay in applying the standard to small cars had been intended to allow time to develop effective airbags for them. But now it appeared that almost all of them would be equipped with automatic belts. Although there was no explicit cost benefit analysis in the proposal, DOT did concede that delaying the standard for one year would result in 600 more deaths and 4,300 more serious injuries.[13] A few days after the delay proposal was issued, Lewis was quoted as telling a meeting of the Automobile Dealers Association, "If I could do it, it would be a 4-year moratorium. I know 4 years is unrealistic, but my point is this administration opposes regulation."[14]

The major American auto manufacturers not only supported the delay unanimously, they either advocated the outright revocation of the automatic restraint standards or called for their reevaluation, which they expected would lead to revocation. Both General Motors and Chrysler argued that the manufacturers' decision to implement automatic restraints entirely with automatic belts of a detachable variety — GM called them "less coercive" — meant that they were not likely to be used more frequently than manual belts. Without the one-year delay, GM expected to lose $760 million in large car sales and a further $13 million in capital costs. Mercedes-Benz, on the other hand, told NHTSA that the delay proposal caught it in the middle of preparing to voluntarily install airbags in all 1982 model-year cars, but that they were now reassessing their course.[15]

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12. *Government Regulations Affecting the U.S. Automobile Industry*, Hearing Before the Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation United States Senate, 97th Congress, First Session, January 28, 1981. The GM estimate is on p. 30.
13. Department of Transportation, National Highway Transportation Safety Administration, 49 CFR Part 571. [Docket 74-14, No. 20] Federal Motor Vehicle Safety Standards; Occupant Crash Protection; Notice of Proposed Rulemaking. *Federal Register*, February 12, 1981, pp. 12033-*12036.*
14. *Washington Star*, February 11, 1981, reprinted in *Automatic Crash Protection Standards*, Hearings Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, House of Representatives, Ninety-Seventh Congress, First Session, April 27 and 30, 1981. Serial No. 97-10, pp. 233-234. On p. 228 Ralph Nader said he checked the accuracy if the quotation with Lewis' office.
15. Betsey Anker-Johnson, Vice President, General Motors, Letter to Drew Lewis, Secretary of Transportation, with Comment on N-20 attached, March 16, 1981, [74-14-NPRM-N20-109]; Letter from Roger E. Maugh, Director, Automotive Safety Office, Environmental and Safety Engineering Staff, Ford Motor Company, 3/16/81 [74-14-NPRM N20-104].; Letter from C.M. Kennedy, Director, Federal Government Affairs, to Docket on Notice 20, March 13, 1981 [74-14-NPRM-N20-079]; Memorandum to the Docket from Diane K. Steed, Associate Director, NHTSA, "Meeting with Mercedes-Benz Representatives," March 17, 1981.[74-14-NPRM-N20-152].

Automobile insurers were the most active and outspoken opponents of the proposed delay. Allstate stressed the superiority of the protection provided by airbags over belts. State Farm stressed the legal argument that safety had to be the overriding concern of any action taken under the Motor Vehicle Safety Act of 1966. Nationwide reiterated its 1977 estimate of the insurance savings that would result from automatic occupant protection. All of them challenged the government's right to judge that economic losses could outweigh the loss of 600 lives and 4,300 serious injuries predicted in the proposal. They then went on to cite the cost-benefit analysis produced for them by William Nordhaus, a Yale professor who had been a member of Carter's Council of Economic Advisors. Based upon a detailed econometric analysis, he concluded:

> In terms of the costs and the benefits of different options, there is no justification for either the proposed delay or a general rollback. In particular, the economic costs of the proposed delay are approximately five times greater than the benefits, for a net cost of over $200 million. The net costs of the general rollback are significantly greater, in the order of $4.5 billion.

Nordhaus estimated that the financial benefits of the proposed delay for the automobile industry were minuscule. Since it meant that more cars would get automatic protection earlier, a one-year delay plus making all small cars subject to the standard in model year 1983 was the most beneficial standard he analyzed. Because it gave the auto industry some immediate financial relief, this was the option on which both the Insurance Institute for Highway Safety and the insurers pinned their hopes.[16]

NHTSA paid careful attention to Nordhaus' cost-benefit analysis but differed in some key assumptions, most seriously in predicting automatic seat belt use would range from 15-60 percent rather than his 60 percent. NHTSA also believed the standard would reduce large car sales by 100,000, leading to a profit reduction of $292 million and 13,200 lost jobs.[17] So in spite of the increase of 1,800-11,600 serious injuries and 75-490 fatalities that it now estimated would result, DOT adopted the one-year delay as originally proposed. There was powerful political backing for the action "I make no bones about the fact that I and [Drew] Lewis and Dave [Stockman] thought it was appropriate to delay the standard," said James C. Miller III, administrator of OMB's Office of Information and Regulatory Affairs. "The issue

16. Comments of William Nordhaus on N20 [74-14-NPRM N20-110?]; Letter from Don Schaffer to the author, March 9, 1981, with a draft of Allstate's comment [to be filed by NAII] on Notice 20. He says;
"One reason we want a strong industry position is because if all that is accomplished is that the Secretary eliminates the requirement for the large cars in 1982 there will be no pressure to revise the whole standard through a Warner-type proposal so as to move the small cars up a year and guarantee the public some choice between automatic belts and airbags." See also the final filings by Allstate, Nationwide, NAII, State Farm and IIHS of comments on Notice 20. All of these positions were restated in the House April hearings on *Automatic Crash Protection Standards* cited above.
17. "Final Regulatory Impact Analysis: Amendment to Federal Motor Vehicle Safety Standard No. 208, Occupant Crash Protection," NHTSA, Plans and Programs, Office of Program and Rulemaking Analysis. April 1981. [74-14-N21-001] NHTSA also argued that Executive Order 12291 required that regulation must take into account "the particular industries affected ...[and] the condition of the national economy" in addition to benefits outweighing costs. The delay was justified by the totality of these considerations. See Appendix A, p. 19.

was discussed in Cabinet meetings, sometimes with the President there, and so I don't think that it should come as any surprise that [the department] took action expeditiously."[18]

On the same day DOT issued another proposal to review the status of the entire standard. Both actions were announced by the White House on April 6, 1981 as part of an initiative to eliminate 35 air quality and safety regulations in order to help the automobile industry.[19] The notices were signed by Drew Lewis because the man he had selected to be administrator of NHTSA, Raymond A. Peck, Jr., was not yet confirmed. Peck was a Washington attorney who had worked in the Nixon and Ford administrations on environmental issues and had become well known as an opponent of regulatory expansion. Peck had met Lewis when he was asked by the Reagan transition team to brief cabinet designees on regulatory procedures,[20] and so was well aware of the Reagan Administration's strategy for regulatory reform.

The review of the automatic restraint rule that Peck was now to carry out was presented in terms of three alternatives:

1. small cars would be subject to the standard by the 1983 model year (September 1, 1982), midsize cars by the 1983 model year, and large cars by the 1984 model year;
2. all cars by March 1, 1983; or
3. automatic restraint requirements would be rescinded entirely.

The first two alternatives would include eliminating the automatic restraint requirement for the front center seat. The regulatory impact analysis that accompanied the rule echoed the analysis supporting the one-year delay, noting major changes that had occurred since the 1977 rule:

- large cars would be 1 percent of new cars;
- automatic protection would be provided by airbags in 1 percent of new cars rather than in 62 percent;
- because of their detachability, automatic belt usage would range anywhere from 15 to 60 percent rather than 60 percent;
- ultimately the standard would save 750-7,500 lives rather than 9,000.[21]

Congressman Tim Wirth (D-CO) quickly convened hearings on DOT's review of the automatic crash protection standard.[22] Peck made it clear that since the proposed standard would require airbags to be installed in no more than 1 percent of cars, the issue centered on the extent to which automatic belts, most easily detachable, would actually be used. Wirth wondered whether the standard would encourage or

18. Jonathan Rauch, "Fasten Your Seat Belts-There is Turbulence Ahead on the Safety Front," *National Journal*, June 27, 1981, pp. 1158-1162.
19. *The New York Times*, April 7, 1981; Department of Transportation, National Highway Transportation Safety Administration, 49 CFR Part 571 [Docket 74-14, No. 21], Federal Motor Vehicle Safety Standards; Occupant Crash Protection; Final Rule. *Federal Register*, April 9, 1981, pp. ??; also 49 CFR Part 571 [74-14, No. 22] Federal Motor Vehicle Safety Standards; Occupant Crash Protection; NPRM. *Federal Register*, April 9, 1981, pp. 21205-21208.
20. Interview with Raymond Peck, June 5, 1995.
21. National Highway Traffic Safety Administration, Office of Plans and Programs, Regulatory Impact Analysis, Proposed Amendment to FMVSS 208 Automatic Occupant Protection, April 1981. [74-14-NPRM-N22-001]
22. *Automatic Crash Protection Standards*, Hearings Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, House of Representatives, Ninety-Seventh Congress, First Session, April 27 and 30, 1981. Serial No. 97-10.

discourage the use of poorly designed, detachable automatic belts. Peck answered that it was a performance standard that did not reach the design issue, but that even the best automatic belt, which he thought was found on the Cadillac, was hard to get used to. Joan Claybrook, now representing the Nader-founded group, Public Citizen, attacked the rescission option with some asperity:

> Essentially what they have done [in that option] is delegate to the auto companies the ability to decide the issue, not the government, by saying that the auto companies offer the worst possible system and the public does not like it; then, there is no payoff on the standard.[23]

Ralph Nader wanted Congress to require airbags that met a 40 mph standard in all cars by 1983, and to fund a GSA order for airbags in all federally purchased cars.[24] Representatives of the insurers and the auto manufacturers repeated their positions on the proposed delay, with the automakers making it clear that they favored complete rescission. GM said it had abandoned its plans to offer airbags because they would not sell at $1,100 per car. In fact, based on its sales experience with both airbags and passive belts, GM felt the public would not accept any form of passive restraint.[25] In a document filed with the House committee, Ford attributed delays in airbag production first to concerns regarding out-of-position children, adding:

> Continued deterioration of the large car market, a shortened cycle life on the large Lincoln and Mark, continually rising variable and retail costs for the airbag option, *potential regulation requiring a noncoercive detachable passive belt system, (emphasis added)* and low installation rate projections led to the cancellation of the production Lincoln/Mark airbag program in February, 1981.[26]

NHTSA issued a call for a public hearing to be held August 8th on its proposed alternatives to the passive restraint standard 208. Administrator Peck presided and questioned most of the speakers at the hearing, which lasted two days.[27]

Congressman Wirth led off by calling on NHTSA to eliminate the loopholes that allowed compliance with the standard through designs that even the agency itself called poor. Peck denied that NHTSA ever had called any design “poor.” Speaking for the Insurance Institute for Highway Safety, Dr. William Haddon seconded Wirth’s point and noted that airbags, when installed, would by definition always be used, yet NHTSA had done nothing to encourage their availability. In fact, by exempting the front center seat from the standard, the agency would eliminate an important incentive for the manufacturers to offer airbags.

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23. Ibid., pp. 42-43 for the exchange between Wirth and Peck, and p. 96 for the Claybrook quote.
24. Ibid., p. 230.
25. Ibid., pp. 259-362 and 319.
26. Ibid., pp. 354-356.
27. Department of Transportation, *Transcript of Public Hearing Concerning the Automatic Occupant Restraint Requirements of Safety Standard No. 208, Occupant Crash Protection*, two volumes, August 5-6, 1981.

Ralph Nader asked whether Peck really had the authority to support the reinstatement of standard 208 given the unanimous opposition among his superiors, both in DOT and at the White House. Peck insisted that he felt free to choose among the options in the proposal. Nader observed that rescission would destroy the airbag industry. He revised his earlier position, calling for a 30 mph standard to be applied to all models by the 1983 model year instead of a 40 mph one, to be followed by a proposal for a 50 mph standard. NHTSA should also have arranged for fleets to order 50,000-100,000 airbag-equipped cars.

William Nordhaus, the Yale economist, continued to criticize NHTSA's assumptions about automatic belt usage; this was the sole significant difference between the cost-benefit analyses that he had done with the support of a group of insurers and the agency's analysis. His most recent work showed net benefits of a passive restraint standard would be $2.5 billion. Another academic economist, Henry Grabowski, testified about an unsponsored cost-benefit analysis that he and Richard J. Arnould had published.[28] It showed a high benefit for an automatic belt standard but essentially no benefit for airbags because of their high cost. Peck cross-examined him aggressively about usage rates. Grabowski maintained that even if automatic belt usage rates were only 15-20 percent higher than for manual belts, there would be a positive benefit. Don McHugh, State Farm's general counsel, again relied on Nordhaus' analysis. When asked, however, whether State Farm gave a discount to cars with airbags, McHugh said that State Farm would give a discount only on the basis of its claims experience. But another insurer, Nationwide, noted that it did give discounts for airbags.

When the auto manufacturers' representatives gave their now standard arguments for dropping the automatic occupant protection requirement, Peck asked what might lead them to offer airbags to the public. Roger Maugh, speaking for Ford, said it would depend on demand. When asked whether Ford would sign the Coleman agreement again, he ducked the issue by saying that Ford had fulfilled one of the agreement's purposes by continuing to work on the technology. The General Motors spokesman said airbags would be offered on large cars only in response to competition from foreign manufacturers. GM did not commit to signing a revived Coleman plan and claimed the American public would not accept mandatory seat belt use laws. Peck explored the extent to which either automaker thought safety was a selling point. The furthest either would go was to say that no manufacturer could allow a vehicle to get a reputation for being unsafe. Chrysler's representative said that it would be glad to have the Coleman plan revived (it had no commitments under it), but that the company could not meet any of the proposed revised timetables for automatic protection. Ford said it could not begin meeting them until the 1983 model year.

28. Richard J. Arnould and Henry Grabowski, "Auto safety regulation: an analysis of market failure," *The Bell Journal of Economics*, Vol 12, pp. 27-48.

Apparently Mercedes-Benz chose not to testify, but its German competitor, BMW said it was planning to meet the standard with airbags in its top three models and automatic belts in the others. Twenty-two months would be needed to provide airbags, BMW said, so it wanted the 1984 model year to be the target. Both Toyota and Volkswagen joined their American competitors in urging rescission, saying they could not meet the standard with automatic belts in the 1983 model year.

Airbag suppliers, including Thiokol, Talley, and Romeo Kojyo, avoided supporting the standard but urged NHTSA to encourage airbags, possibly through reviving the Coleman plan. The airbag industry was rapidly disappearing for lack of contracts with carmakers. On the other hand, the Automobile Occupant Protection Association, an alliance of airbag manufacturers, insurers, and consumer groups, continued to support the passive restraint standard, but did not oppose the first two delay alternatives offered in the NHTSA proposal.

After some delay, Peck wrote the first draft of the decision himself on a Colorado vacation, cut off from the NHTSA staff. He has said that he never discussed the substance of this issue with DOT Secretary Lewis or any other Reagan administration official, either before his appointment or before the decisions he later made. The only time he had talked about the issue with Lewis was before his decision, when Lewis told him that the decision on the airbag standard was Peck's to make and that Lewis would back him on it, whatever it was.[29] However, the Reagan administration made a practice of selecting political appointees who would be "the first line of *offense* in ferreting out ineffective and excessively burdensome regulations," according to former administration officials James Miller and Murray Weidenbaum.[30] As a briefer of the transition team, Peck did not need explicit instructions on the administration's policy preferences. At his confirmation hearing Peck was frank about his personal feeling that automatic restraints should be offered as options rather than required on all cars.[31]

When he returned from his retreat, Peck said he called senior staff into his office on a Saturday to tell them that he had no alternative but to rescind the passive restraint standard. Michael Finkelstein, the associate administrator for rulemaking, said he told Peck, with profane punctuation, how stupid that was.[32] At a press conference on the decision Peck said:

> I don't think anyone on my staff agreed with all aspects of this decision, with all aspects of this conclusion. Most agreed with some. There were as sharp differences of opinion in my staff as I am sure there are in this room, and I certainly did not enjoy being the only one that had to make this decision...

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29. Interview with Raymond Peck. Peck told almost the same story in Congressional testimony a few months after the decision: *National Highway Traffic Safety Administration Oversight and Authorization*, Hearing Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, House of Representatives, Ninety-Seventh Congress-Second Session, March 23, 1982, pp. 403-404.
30. James C. Miller and Murray L. Weidenbaum as quoted in George C. Eads and Michael Fix, *Relief or Reform? Reagan's Regulatory Dilemma*. Washington, D.C.: Urban Institute Press, 1984, p. 139.
31. *Status Report*, April 27, 1981, p. 4.
32. Interview with Michael Finkelstein, June 7, 1995. Both Peck and Barry Felrice (interviewed December 8, 1994) mentioned the meeting.

> I think it would be fair to say, in some form or another, they all argued to retain this standard. I think it is also fair to say, in some form or another, they all saw elements of this decision that would militate against retaining the standard, but it was my decision.[33]

Yet Peck insisted in a House hearing a few months later that he had been misquoted:

> At our senior staff meeting, I offered anyone who wished to express an opinion to me as much time as was needed either singly or with others to in effect lobby me on the issue because I wanted to be absolutely certain I had the full range of their views. Based on my recollection of some of the discussions, I think what you have here is probably charitable on the side of rescission, I think there were some very persuasive arguments indeed made to retain the standard. I might point out that every argument made to retain the standard was based on one set of facts, and that was that without the standard we would not get airbags. Everyone without exception said the standard was dumb and belts were not going to work and it was conceded that was the case, but without the standard we would never have airbags introduced into the fleet. The determination I made in making this decision was that I could get airbags into the fleet without this standard, and that to waste a million (sic!) dollars a year was intolerable.[34]

Senior staff members who were present at the hearing did not contradict Peck directly, but in interviews Messrs Finkelstein, Felrice, and Berndt all said that they had made it clear that they disagreed with the rescission.

Establishing that the decision was his alone seemed to be even more important to Peck than showing that the staff agreed with his logic. According to Peck, he had arranged a trip to Europe the day after the regulation was to be released. The purpose of the trip was to convince Mercedes-Benz to make airbags available in their U.S. models. The day before the scheduled release, Frank Berndt, the general counsel, came in with Finkelstein to tell Peck that they had all forgotten about the need for the regulation to be cleared by OMB. Peck then called David Stockman and, using his speaker phone, explained the scheduling problem and asked for a waiver of the review. Stockman, instead, promised a quick overnight review if the regulation could be brought to his office before the close of day. He then asked whether Peck could tell him what the decision was, and reacted with astonishment when Peck told him. Peck then noticed that the staff were thunderstruck because Stockman had not known the decision up to that time. In separate interviews both Berndt and Finkelstein remembered the incident although they said they could not hear Stockman's side of the conversation. At the October 23, 1981, press conference, Peck answered a question about whether OMB had signed off on his decision by saying, " I called Director Stockman yesterday and obtained clearance before telling him what the decision was."[35] Christopher DeMuth, who reviewed the regulation as administrator of OMB's Office of Information and Regulatory Affairs, said

33. "Transcript of Raymond Peck, Administrator, National Highway Traffic Safety Administration, at the News Conference on the 208 Decision, October 23, 1981," pp. 24 and 25. This is available in the Ronald Reagan Library.
34. *National Highway Traffic Safety Administration Oversight and Authorization*, Hearing Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, House of Representatives, Ninety-Seventh Congress-Second Session, March 23, 1982, p. 406.
35. Transcript, October 23, 1981, p. 26.

that Peck had called him and asked for a rapid review. DeMuth knew that the President was very skeptical about the standard, as he was himself, and so did a very cursory job. DeMuth also thought that he had discussed the issues with Peck before that.[36]

The rationale for the decision to rescind the automatic occupant protection standard was essentially one that both General Motors and Chrysler had suggested in their comments on the earlier proposal to delay it. Ninety-nine percent of cars would meet the standard through passive belts, they said, usually easily detachable. Once detached, there was no reason to believe that they would be used more than manual belts. So, the argument continued, there would be little probable return for imposing estimated price increases of about $1 billion a year. There was no attempt in the decision to estimate what automatic belt use might actually be. The emphasis was, instead, on the uncertainty. Compelling belt use with nondetachable belts might be counterproductive and contribute to public backlash, NHTSA said. Instead, the agency favored a campaign to promote seat belt use.[37] The decision included a vague commitment to encourage airbag development and production.

Keeping Airbags Alive after Rescission

Whenever he got the opportunity, in press conferences and in congressional hearings, Peck insisted that he believed that airbags would save lives and reduce injuries; he just did not believe that they could be mandated with cost-effectiveness. In the press conference announcing his decision, Peck said he was launching a “full-court press” on airbags.[38] That ultimately led to three initiatives.

One high priority initiative was to convince Mercedes-Benz to make airbags available on cars in the United States. Peck and Finklestein visited the manufacturer shortly after announcing the decision to rescind the passive restraint standard. As Karl-Heinz Faber, one of the company’s vice presidents, had said in a letter to Ralph Nader, Mercedes-Benz had been ready to meet the standard using airbag technology “across the entire model line... to the extent permitted by production and supplier capability restraints.” Although it had delivered more than 1,100 airbag-equipped cars in Europe, it had delayed further commitments until the NHTSA decision.[39] Daimler-Benz executives listened to Peck’s request that they bring airbags to the United States even without the standard and promised to continue to work on it. But they did not announce that airbags would be available on Mercedes-Benz in the United States until January 1983. Then it was described as a “supplemental restraint system” which was an integral part

36. Interview with Christopher DeMuth, July 24, 1995.
37. NHTSA, 49 CFR Part 571 [Docket 74-14, No. 25] Federal Motor Vehicle Safety Standards; Occupant Crash Protection: Final Rule, *Federal Register*, October 29, 1981, pp. 53419-53429.
38. *New York Times*, October 24, 1981; also, as an example of Peck’s testimony, *Small Car Safety Technology*, Hearings Before the Subcommittee on Transportation, Aviation and Materials and the Subcommittee on Investigation and Oversight of the Committee on Science and Technology, House of Representatives, Ninety-Seventh Congress, Second session, November 30, December 3, 1982. [No. 164], p. 317.
39. *Status Report*, November 5, 1981, p. 3.

of the protection provided by a three point belt and an emergency belt tensioner retractor.[40] The point of the description was that Mercedes-Benz drivers were not being offered a passive restraint, but a device that gave protection in addition to a seat belt.[41] This description set a precedent followed by all other automobile manufacturers. It may have been a potential defense against product liability suits, but it also reflected the manufacturers' belief that seat belt use was key to occupant protection.

Just after announcing his decision to rescind the standard and before leaving for Europe, Peck said that he called the major American auto companies to ask them to make airbags available on a voluntary basis. General Motors and Chrysler did not react positively. The contact at Ford, Herbert Misch, had been responsible for reviving an airbag program at the company in the 1970s. When Roger Maugh, director of Ford's safety engineering, suggested to him that they could use a mothballed pilot production plant that Ford was still paying for, Misch sent him to talk with Peck. Together they worked out a plan for the General Services Administration to request bids for 5,000 compact cars with driver- side airbags. NHTSA and GSA announced that plan in April 1983 without noting that there was a supplier waiting in the wings. Although still concerned about the problem of out-of-position children on the passenger side, Ford did engineer driver-side airbags as original equipment for the compact Tempo. In April 1984, about a year after Peck had left NHTSA, Ford announced that it would provide the airbag-equipped Tempos to GSA during the 1985 model year at a cost of $7,000 per car, to be paid by NHTSA. Ford was hoping to get enough orders from private fleets to provide 35,000 cars. According to several participants, Ralph Nader played a role in these negotiations and in lining up some fleet buyers.[42]

Peck's third initiative to keep airbag technology alive was to encourage retrofitting them into cars on the road. NHTSA asked for proposals for kits to retrofit the driver side. A contract with Romeo Kojyo, providing $458,000 to retrofit up to 500 police cars, was released in April 1983, shortly before Peck stepped down. About a year later, the Breed Corporation was given a contract for $588,000 to develop an all-mechanical driver-side airbag that would also be retrofitted into police cars.[43]

Almost immediately after Peck rescinded the passive restraint standard, Senator Danforth, chairman of the Surface Transportation subcommittee, filed a bill to restore it. But shortly afterward Danforth preempted his own bill by introducing a tax measure that would allow automakers to claim a $300 tax credit for each car with airbags, starting with the 1984 model year. The bill would also levy an

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40. Letter from W.R. Bodack, President, Mercedes-Benz of North America, Inc, to Raymond Peck, NHTSA, January 28, 1983, in appendix C-1, MVMA v State farm, Brief of the Automotive Occupant Protection Association as Amicus Curiae, Supreme Court, February 7, 1983. See also statement of Walter R. Bodack, *Motor Vehicle Safety and the Marketplace*, Hearings before the Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation, Unites States Senate, Ninety-Eighth Congress, First Session. Serial No. 98-16. February 17, March 10 and 11, 1983, pp. 206-207.
40. Interview with Ingo Kallina and Dr. Zeidler, Mercedes-Benz, July 21, 1994.
42. Interviews with Herbert Misch, Roger Maugh, Raymond Peck, Michael Finkelstein, Ralph Nader; Status Report, April 22, 1983, p. 8 and March 3, 1984, pp. 1-2.
43. On the request for proposals, see the testimony of Finkelstein on p. 288 and of Peck on p. 317 of *Small Car Safety Technology*; on the contracts, Status Report, April 22, 1983, p. 8 and March 24, 1984, pp. 1 and 3.

excise tax on every car sold without airbags. Danforth told the press that he aimed to shift the cost of airbags to society as a whole and eliminate the automatic belt issue. In hearings early in 1982 IIHS, consumer advocates, and insurers supported the proposal, but the Treasury Department and Peck opposed it. Peck said he preferred a demonstration program and revealed the existence of the Ford-GSA negotiations. Danforth's bill went nowhere.[44]

Six months after rescinding the passive restraint standard, Peck provided additional regulatory relief for the auto industry by rolling back the bumper standard. The existing requirement for a 5 mph "no damage" bumper was replaced by a requirement for a 2.5 mph test, front and rear, that allowed unlimited damage to the bumper itself. Peck's loyal application of Reagan administration policy on deregulation antagonized many Congressional safety advocates in both parties. Rep. Tim Wirth (D-CO) held more than one hearing at which Peck was closely cross-examined, and Senator Danforth (R-MO) did the same. Even before the rollback of the bumper standard, Danforth lamented:

> In barely a year, this "can-do" spirit has been replaced with an "un-do" spirit...
>
> The centerpiece of NHTSA's work for the last 15 years, the passive restraint rule, was killed...
>
> I am at a loss to think of a single thing that NHTSA has done to save lives on the highway or to make it easier for people to choose safer cars.[45]

A low point in Peck's Congressional relations was reached when Congressman Adam Benjamin (D-IN), during a discussion of airbag cost estimates, asked how he could believe Peck when he was not under oath. Peck then demanded to be sworn in, and Benjamin instead "excused" him from the hearing.[46]

Peck claimed in early 1982 that his efforts would put airbags in cars earlier than the passive restraint standard would have.

> I am confident at this point — and I have received no negative implications from any manufacturer — that we will have airbags in cars. We will have airbags in all probability earlier than we would have had under the 208 standard. We have in fact been pressing on that technology issue.[47]

A year later Peck had apparently convinced himself that the auto manufacturers were going to provide airbags, both because the market demanded it and because they now knew that safety was a selling point.

> First, with respect to the market for airbags, we know it is out there, because both we and the industry have done testing on it... at any event, we understand the motivations that exist in the marketplace for safety. I think you will hear from the auto manufacturers later

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44. *Status Report*, December 9, 1981, pp.3-4; December 21, 1981, p. 3; February 17, 1982, pp. 4-5;March 15, 1982, pp. 10-11.
45. *NHTSA Oversight*: Hearing Before the Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation, United States Senate, Ninety-Seventh Congress Second Session, March 31, 1982. Serial No. 97-111, p. 2. Senator Danforth chaired the committee.
46. *National Highway Traffic Safety Administration Oversight and Authorization*, Hearing Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, House of Representatives, Ninety-Seventh Congress-Second Session, March 23, 1982, p. 428.
47. *NHTSA Oversight*, p. 8.

> on today that what has been usually described as their traditional attitude, that safety does not sell, is changing, in some cases has changed dramatically.[48]

Peck cited a press conference held by Howard H. Kehrl (see above), vice chairman of General Motors, as a source of his belief that automakers now thought that they could sell safety. But in a statement to the same Senate subcommittee that heard Peck, Kehrl was more restrained: "While Americans are very interested in safety, there appear to be limits on what they will do to increase the level of safety in their cars."[49] And although Roger Maugh of Ford said that "the airbag has a lot of potential," neither he nor Christopher Kennedy, the Chrysler representative, were unequivocal about safety being a selling point. Maugh said that customer acceptance and willingness to pay a premium for the technology still had to be tested.[50]

The Courts Intervene

Given the litigiousness that had already marked the passive restraint standard, an appeal of the rescission was to be expected. The lead in the appeal was taken, unexpectedly, by State Farm. Within the insurance industry there was a well understood division of leadership on public policy issues, with Allstate leading on airbags and State Farm on bumper standards. For nearly a decade Don Schaffer, Allstate's general counsel, had been an eloquent advocate of the lifesaving qualities of airbags, but now Archie Boe, the chairman of Allstate, did not want to lead the attack on the Reagan administration's decision. Although State Farm was not nearly as committed to airbags, its general counsel, Don McHugh, and its auto safety specialists had been convinced by Bill Haddon of IIHS of the superiority of passive restraints. McHugh used both the public health benefit potential of the rule and its consequent financial benefits to State Farm to convince Chief Executive Ed Rust that they had to appeal the rescission. The first step was a motion by State Farm, which was soon joined by the National Association of Independent Insurers (NAII), to stay NHTSA's order. Schaffer and Allstate participated in the case, but Arnold and Porter, State Farm's law firm, provided the legal leadership.[51]

State Farm's petition to the Court of Appeals in the District of Columbia attacked NHTSA's decision as arbitrary and capricious because its basis for rescission — the presumed almost universal adoption of detachable automatic belts — ignored the availability of other technologies; the rule could have been modified to ensure that its goal would have been reached. In a separate brief, filed with the same court, NAII went one step further, suggesting that NHTSA could have issued an airbag only standard:

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48. *Motor Vehicle Safety and the Marketplace*, Hearings before the Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation, Unites States Senate, Ninety-Eighth Congress, First Session. Serial No. 98-16. February 17, March 10 and 11, 1983, p. 143. Senator Danforth chaired this hearing.
49. Ibid., p. 183.
50. Ibid., pp. 190-195.
51. Interviews with Donald C. Schaffer, January 21, 1993, with Donald McHugh, February 16, 1993, and with James Fitzpatrick, July 19, 1995. Fitzpatrick was a senior attorney at Arnold and Porter, State Farm's counsel on the case.

> Even if it is assumed, *arguendo*, that no type of automatic seat belt will be consistent with the needs of automobile safety, Notice 25 is flawed for not even considering, much less adopting, the obvious alternative of proceeding with an airbag-only passive restraint alternative.[52]

The two cases were later joined. The Court of Appeals denied the petition for a stay, but did hear the case for reversing the ruling with a three-judge panel consisting of David L. Bazelon, Abner J. Mikva, and Harry T. Edwards, all reputed liberals.

NHTSA's defense of its decision rescinding standard 208 was largely a restatement of its original rationale, except for some procedural arguments. A major one was that the court should defer to the agency because this was an administrative action poorly suited to judicial resolution. Another argument was that the agency could not have prohibited detachable seat belts without further rulemaking, but, even so, the possibility had been considered and rejected. No notice was taken of the argument about an airbag only rule.[53] NHTSA noted that its own uncertainty about the effectiveness of the passive restraint law was not unlike State Farm's unwillingness to give discounts to automobiles equipped with passive restraints before their actual effect on loss experience could be tallied. State Farm replied that it believed that the standard would reduce losses; it simply could not predict the size of the reduction, but noted that the Insurance Service Office and other insurers had offered discounts. On the other hand, NHTSA was said to have ignored the implications of its own studies showing that the major reasons for not buckling up were that it took too much time and that occupants were lazy or forgetful. Even detachable automatic belts, the argument continued, would be left on and would result in a significant net increase in belt use.[54]

The case was argued on March 1, 1982. Three months later the court issued a unanimous decision that NHTSA's rescission was arbitrary and illogical.[55] The decision, written by Judge Mikva, was not endorsed in all respects by Judge Edwards, but the latter noted tartly "the agency decision appears to be nothing more than a determined effort to achieve a particular result without regard to the facts at hand."

Mikva reviewed congressional action since 1974 and concluded that, in each of three periods, Congress had essentially confirmed the passive restraint standard. Therefore, NHTSA had to explain why it was reasonable for it to change course. This it failed to do.

> The rescission of Modified Standard 208 on the grounds stated by NHTSA was arbitrary and illogical for two general reasons. The agency has offered no evidence that seatbelt usage will fail to increase as was expected when the standard was first promulgated, and has therefore made no showing that the standard is unjustified as written. More important,

52. In the United States Court of Appeals for the District of Columbia Circuit. National Association of Independent Insurers v. National Highway Traffic Safety Administration, November 25, 1981. State Farm v. Department of Transportation was filed November 23, 1981.
53. United States Court of Appeals for the District of Columbia Circuit, State Farm Mutual Automobile Insurance Co., et. al., v. Department of Transportation, et al., "Brief for Respondents," filed in preliminary form January 25, 1982.
54. United States Court of Appeals for the District of Columbia Circuit, State Farm v. DOT, Petitioners' Reply Brief, February 8, 1982.
55. State Farm v. DOT, 680 *Federal Reporter*, 2d Series, pp. 206-243. United States Court of Appeals, District of Columbia Circuit. Argued March 1, 1982; decided June 1, 1982.

> NHTSA has failed to consider or analyze obvious alternatives to rescission, and has thus artificially foreclosed attempts to further the purpose of the Safety Act.

The court held that there was no evidence supporting the conclusion that detachable seat belts would not raise use by at least 13 percentage points, and that alternatives like nondetachable belts or airbags were not given serious consideration. Nor did it understand why the agency did not consider reviving the Coleman plan for demonstration projects. Within hours after the rescission was issued, Mikva noted, the automobile manufacturers had begun to dismantle their passive restraint programs. Now they said that it would take at least 12 months after the beginning of the next model year to make up the lost ground.

The remand decision gave NHTSA 30 days to submit a schedule for resolving the opinion's questions, leaving open the possibility that NHTSA might still find a reasoned basis for rescission. The agency's response was to suggest a notice be issued calling for comments on how to gauge potential usage of automatic belts and on standards for either nondetachable automatic belts or airbags only. The proposal was attacked by State Farm, NAII, Allstate, and others as a delaying tactic, and they urged that standard 208 be reinstated. On August 4, 1982, the Court of Appeals did just that, which meant that all cars manufactured after September 1, 1983, had to comply, unless NHTSA proved that the schedule could not be met. The agency was given until October 1, 1982, to respond. The Motor Vehicle Manufacturers Association and the Automobile Importers Association then appealed to the Supreme Court, and Chief Justice Warren Burger gave the federal government until September 8 to appeal. Earlier, Senator Danforth got unanimous consent for an amendment to prevent NHTSA from using appropriated funds to appeal the Court of Appeals order. The clause was dropped in committee, but both he and a more conservative senator, Orrin Hatch, argued that the basic issue at stake was whether a federal agency could overrule Congress. DOT did, however, join the manufacturers in appealing the June 1 decision, pleading its right to change standards under changed circumstances and charging the Court of Appeals with usurping executive powers by issuing a timetable. At about the same time, NHTSA told the Appeals Court that, as the manufacturers also maintained, automatic restraints could not be installed in all new cars until the 1986 model year. Insurers ridiculed this further delay, but State Farm suggested that no decision be made until the Supreme Court decided whether it would accept the appeal. Meanwhile, the insurers and health groups argued that the Supreme Court should not accept the appeal. On November 8, the Supreme Court issued a writ of *certiorari* to DOT and the manufacturers. On November 18, the Court of Appeals recalled its order to NHTSA.[56]

On June 24, 1983, the Supreme Court unanimously upheld the Court of Appeals decision, but not all of its reasoning.[57] Justice Byron White's majority opinion was, however, followed by a partial dissent by Justice William Rehnquist, supported by three other members. The minority did not agree that NHTSA was arbitrary and capricious in its view of detachable seat belts.

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56. *Status Report*, July 22,1982, pp.1-5; August 12, pp. 1-2; September 2, p. 1; September 15, p. 3; October 21, pp. 1,2,6,7; November 19, 1982, p. 1.
57. 103 *Supreme Court*,. 2856 (1983).

Many of the arguments on each side concerned procedural issues and the question of whether a decision to rescind should be viewed any differently than a decision not to issue a regulation in the first place. The Supreme Court held that revoking a regulation required the same test as promulgating it. It was not to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." There had to be "a reasoned analysis for the change." This was a stronger standard than the one needed for refusal to regulate in the first place, which was the one the MVMA said should apply.

The Court's decision spent little time discussing the overall performance standard of automatic, or passive, restraints. Instead, it went directly to the two kinds of technologies available to meet the standard and considered them separately.

> The first and most obvious reason for finding the rescission arbitrary and capricious is that NHTSA apparently gave no consideration whatsoever to modifying the Standard to require airbag technology be utilized. Standard 208 sought to achieve automatic protection by requiring automobile manufacturers to install either of two passive restraint devices: airbags or automatic seat belts. There was no suggestion in the long rulemaking process that led to Standard 208 that if only one of these options were feasible, no passive restraint standard should be promulgated.

The agency based its decision on the possibility that safety goals would not be reached because so many cars would meet the standard with detachable seat belts.

> Given the effectiveness ascribed to airbag technology by the agency, the mandate of the Safety Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags. At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment...
>
> The automobile industry has opted for the passive belt over the airbag, but surely it is not enough that the regulated industry has eschewed a given safety device. For nearly a decade the automobile industry waged the regulatory equivalent of war against the airbag and lost — the inflatable restraint has proven sufficiently effective... If, under the statute, the agency should not defer to the industry's failure to develop safer cars, which it surely should not do, *a ortiori*, it may not revoke a safety standard which can be satisfied by current technology simply because the industry has opted for an ineffective seatbelt design... [T]he mandatory passive restraint rule may not be abandoned without any consideration whatsoever of an airbag only requirement.

The majority of the Supreme Court also held that NHTSA's dismissal of the safety benefits of automatic seat belts that might be detachable was not enough to demonstrate reasoned decision making. The agency's argument that a detachable belt was the same as a manual belt overlooked the fact that once attached, the automatic belt would stay that way unless another positive act was taken. Also, it did not give an adequate basis for not requiring nondetachable seat belts. It considered the nondetachable seat belt, along with the ignition interlock, as a use-compelling device and asserted, without proof, that it would generate the same kind of negative public reaction. Since the continuous seat belt does not interfere

with the operation of the car as the interlock does, the majority rejected equating them. In reexamining the likely range of seat belt use rates, NHTSA was told to reconsider the reasonableness of the monetary and other costs associated with the standard, and "bear in mind that Congress intended safety to be the preeminent factor under the Motor Vehicle Safety Act."

The minority opinion by Justice Rehnquist agreed that the agency had to explain why it had not left the airbag and continuous-spool automatic seat belt requirements intact, but found adequate the explanation of why the standard should be revoked in so far as detachable seat belts were concerned. Then Rehnquist went on to make this comment:

> The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophies of the administration.

The majority vacated the Court of Appeals decision and instructed that court to remand the matter to NHTSA "for further consideration consistent with this opinion."

New Leaders at DOT and Another Review

Early in 1983 Drew Lewis resigned as Secretary of Transportation and was replaced by Elizabeth Hanford Dole, a former member of the White House staff and of the Federal Trade Commission and the wife of Senator Robert Dole, the majority leader. Shortly after her confirmation in April, she told the *Washington Post* that the airbag was "a good safety device," a view that she shared with Ray Peck.[58] About that time Peck resigned from NHTSA. His successor was his associate administrator, Diane Steed, a career federal official who had also once worked for OMB.

Almost as soon as the Supreme Court decision was published, Ralph Nader urged Mrs. Dole to take over the case.[59] Even before then, Peter Passell, *The New York Times'* economic commentator, noted that Peck's "dismissal" and Mrs. Dole's reputation as "a smart, practical conservative," raised the hope that the Reagan administration would realize that auto safety regulation did not necessarily conflict with free market principles.[60] On the other side, in an opinion piece in *The Wall Street Journal*, Sam Kazman, who wrote the Pacific Legal Foundation's brief to the Supreme Court defending rescission, attributed the court's decision to Peck's acceptance of his staff's favorable evaluation of airbags. Mrs. Dole, he feared,

58. *The Washington Post*, April 10, 1983, quoted by Graham, op. cit., p. 162.
59. Letter from Ralph Nader to Secretary Elizabeth Dole, June 29, 1983. [208-GR-99]
60. *The New York Times*, May 10, 1983.

would not be any more critical.[61] Apparently White House officials attempted to reassure the auto industry on this point. A report in *Ward's Auto World* quoted "a high ranking aide" to President Reagan:

> The Administration plans to fight this challenge all the way... If we lose, the worst the carmakers should expect might be an automatic-seat-belt requirement some years down the road... Mrs. Dole's marching orders on this one will be cut by the Vice President's task force on regulatory relief.[62]

The article went on to say that economists at OMB were drafting better arguments for rescission at the request of the task force. State Farm's attorneys at Arnold and Porter quickly wrote Mrs. Dole saying that the legitimacy and integrity of the remand proceeding had been compromised if this report were true. They asked that all past contacts on the matter between the White House, OMB, and DOT be published, as well as all future communications. James Burnley, DOT's general counsel, replying for the secretary, denied the report, but said that there was no need to hamper the full and frank exchange of ideas by requiring the kind of publication State Farm demanded.[63]

Senator Danforth held a hearing on whether OMB was taking over the decision. Diane Steed denied it, and Christopher DeMuth, the head of the OMB office responsible for regulatory review, said that in any case department heads carried great weight in the process.[64] Danforth had introduced a bill to require airbags in all new 1986 model cars, but the full Senate Commerce Committee approved a milder version mandating major automobile producers to offer airbags as an option in at least one 1986 model.[65] No legislation resulted.

Like most of her predecessors — Drew Lewis had been an exception — Mrs. Dole did take over the decision on the passive restraint rule. Burnley, who later moved from general counsel to deputy secretary at DOT, briefed her on the Supreme Court decision. He has said that the hurdles set by the decision were so high that simply rewriting the justification of the rescission would not work; if there was a positive safety outcome to be obtained from a regulation, there would have to be an extremely strong justification for not taking that route. Even if a cost-benefit analysis showed that costs exceeded benefits, the court had clearly said that this could not override the safety intent of the statute. On the other hand, according to Burnley, the White House's attitude was obvious to the DOT staff from the history of the case:

> It was a Reagan Administration decision to rescind the 208 decision of the prior Carter Administration. There was no mystery about what the attitude would be in the Office of Information and Regulatory Affairs. We knew from day one that they would be skeptical and perhaps hostile.[66]

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61. *The Wall Street Journal*, July 21, 1983.
62. *Ward's Auto World*, August 1983, p. 45.
63. James F. Fitzpatrick and Michael N. Sohn, Arnold and Porter, Letter to Elizabeth H. Dole, Secretary, DOT, August 16, 1983; James Burnley, General Counsel, replying on behalf of Secretary Dole, September 18, 1983. [74-14-N.31-004]
64. *Status Report*, September 20, 1983. pp. 1-2,4,9.
65. *The Wall Street Journal*, September 21, 1983.
66. Interview with James Burnley, June 8, 1995. The description of the decision-making process within DOT, here and later in this chapter, is based on that interview as well as on those with Robert Davis (Mrs. Dole's chief of staff at DOT) and Erica Jones (counsel, NHTSA), March 4, 1994; and Diane Steed, April 25, 1996.

Diane Steed has said that she thought at the time that it might still be possible to make a case for rescission. Mrs. Dole, according to both Burnley and other colleagues, had no initial predisposition on the issue. It was clear to her and her staff that whatever the decision, it was going to be challenged in the courts. So she wanted a complete record that would document her decision and its safety impact. An informal task force was set up within DOT, headed by Burnley and apparently dominated by political appointees, with membership changing depending on the issue.

In early August a group of nine insurance industry representatives, including McHugh of State Farm and Schaffer of Allstate, met with Diane Steed, then still deputy administrator of NHTSA, and some of her associates to discuss how DOT should handle the Supreme Court remand. If passive restraints were not mandated at the earliest possible date, "they would explore their legal options to ensure this outcome." The aim, they thought, should be to use a streamlined rulemaking procedure to implement the 1977 rule with some expression of concern about detachable belts. Steed said she could not make commitments about time; "DOT was already exploring the widest possible range of options... (N)either she nor the Secretary was contemplating extensive new studies"[67]

Before she announced the fact-finding process, Dole received a letter from Roger Smith, the chairman of General Motors, advising her to hire one or two consultants to help her sort out the issues involving airbags and their alternatives. He went on to say that the airbag systems currently on the road were so obsolete that no safety engineer would consider them acceptable.[68] When he learned of Smith's letter, Allstate's Don Schaffer wrote Dole:

> Mr. Smith is not a credible adviser upon this subject. He is an avowed opponent of automatic crash protection. He canceled the GM airbag program. He caused GM to submit the strategy upon which rescission of the safety standard was based. He included rescission of passive restraint standards on his first "wish list" when the Administration took office. His suggestions should be ignored.[69]

When NHTSA suspended FMVSS 208 for a year, pending the review mandated by the Supreme Court, State Farm objected that a final decision should come as quickly as possible, well before the one-year period. Expedited rulemaking should be limited to the issue of the lead time needed to install passive restraints.[70]

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67. Memorandum from Erika Z. Jones, Special Assistant to the Deputy Administrator/NHTSA, Meeting with Insurance Industry Representatives on Passive Restraints, August 24, 1983. [74-14-N31-003]
68. Letter of Roger B. Smith to Secretary Dole, August 26, 1983, reproduced in Appendix A, Attachment 1, General Motors Corporation, "Response to National Highway Traffic Safety Administration Proposal on Occupant Crash Protection, Docket No. 74-14, Notice 32." December 19,1983. [74-14-N32-1666]
69. Letter from Donald L. Schaffer to Elizabeth H. Dole, September 7, 1983.
70. Comment of State Farm on Notice 31, September 8, 1983. [74-14-N31-001]; Department of Transportation, National Highway Traffic Safety Administration, 49 CFR 571, [74-14, No. 31] FMVSS Occupant Crash Protection; Automatic Occupant Restraint Requirement. Suspension of Rule and Request for Comment. *Federal Register*, September 1, 1983, pp. 39908-9.

So it was in a fairly overheated atmosphere of continuing controversy that the Department of Transportation issued a new notice of proposed rulemaking, presented explicitly as part of the review "contemplated" by the Supreme Court.[71] It was a long and thorough document with no breathtaking assumptions. It also took no special notice of the financial condition of the auto industry, which was now reviving from its low point in 1981-82.

The notice estimated that manual seat belts, when used, reduced fatalities by about 50 percent and moderate to critical injuries by 65 percent. But current usage was a little over 12 percent. Automatic seat belt effectiveness was not estimated in the notice because DOT thought usage "could vary substantially depending on the particular design." The major change in effectiveness estimates in the notice was for airbags. DOT continued to believe that they were highly reliable and would work properly. Instead of estimates of a 66 percent reduction in fatalities for airbags plus lap belts and 40 percent for airbags alone, airbags plus lap belts were now estimated to fall in the 20-44 percent effectiveness range. The reason for this new estimate was mainly the discovery of additional fatalities in airbag deployments and further analyses of these data, even though it was acknowledged that the additional deaths were not statistically significant.[72] Also lap belt usage with airbags was now assumed to be the same as currently observed seat belt usage. The preliminary regulatory impact analysis included a break-even analysis that was not explicitly repeated in the notice:

> Given the airbag effectiveness range of 20-44 percent, manual seat belt usage must increase to 40-87 percent, and automatic belt usage to 36-100+ percent, to provide the same fatality benefits (assuming the higher level of airbag effectiveness and lower level of automatic belt effectiveness, the benefits of belts would not be equal to the benefits of airbags, regardless of usage.)[73]

The notice included a range of potential automobile insurance savings, depending on the usage rates of automatic belts or the effectiveness of airbags. For automatic belts, a usage rate of 20 percent was assumed to produce average annual savings with a discounted value of $20 over a 10-year car life. For a usage rate of 80 percent the savings were estimated at $197. For airbags, the comparable figures were $72 at 20 percent effectiveness and $215 at 40 percent effectiveness.

The notice's section on public acceptance cited surveys that said that comfort, convenience, and forgetfulness were factors in low belt usage. The lack of seat belt use laws was offset by the fact that bills were still being introduced and surveys showed a majority of people in Michigan, New York, and Delaware favored them. But no surveys were mentioned in the notice about attitudes toward automatic belts or airbags, although the preliminary regulatory impact analysis reviewed several of them.

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71. DOT, NHTSA, 49 CFR Part 571 [74-14, No. 32] FMVSS; Occupant Crash Protection, NPRM, *Federal Register*, October 19, 1983, pp. 48622-48641.
72. Ibid., pp. IV-24-IV-33a.
73. Ibid., pp. IV-70, IV-72.

DOT estimated costs of the various restraint devices on the basis of one million units per annum. Manual lap and shoulder belts would be about $50, fixed anchorage automatic belts would add $80 to that, and motorized automatic belts would add $180. Airbags in front seats would add $320. All of these estimates were lower than industry estimates, but all industry estimates used volumes far below one million.

The department outlined three regulatory actions it could take in response to the Supreme Court decision:

1. Amend the automatic restraint requirements of FMVSS 208 so they could be satisfied by installing:
   a. only airbags or nondetachable, continuous automatic belts,
   b. only airbags,
   c. or automatic restraints of any type in all automobiles.

These possibilities could apply just to the driver's side, to all the outboard positions, or to all positions in the car;

2. Retain FMVSS 208 as issued in 1977, but with new compliance dates;
3. Rescind FMVSS 208, but all the hurdles to rescission posed by the court decision were noted in detail, including the requirement that DOT cogently explain why it did not require airbags or continuous nondetachable belts.

Three other steps were proposed as possible supplements to the regulatory actions:

1. Conduct a demonstration program before taking a specific regulatory action;
2. Seek mandatory state seat belt usage laws through federal legislation that would provide for incentives; (this was clearly considered to be an alternative to automatic restraint requirements, rather than an option that could coexist with them.)
3. Seek legislation mandating that airbags or automatic belts be offered as optional equipment.

All of the possible strategies had detailed sets of questions attached concerning the issues of flexibility and reasonableness, public acceptance, cost, and technology.

There was a very explicit timetable in the notice; 60 days for public comment, two weeks for public meetings, and 120 days to analyze and prepare the decision as well as obtain clearance from the Office of Management and Budget on or before April 12, 1984. If needed, a supplemental notice would be issued by that date. With another 30 days for comment and 60 days for analysis, the final decision would be issued by July 11, 1984. DOT essentially kept to this schedule.

Two days of hearings were held, both in Los Angeles and in Overland Park, Kansas, followed by three days in Washington.[74] Mrs. Dole presided over one hearing in Kansas; Diane Steed was the senior official on all the other days. The DOT panel took pains to ask almost all of the witnesses' follow-up questions, and there were occasional questions from the audience. At many of the hearings those in favor of automatic restraints arranged for crash victims or their families to testify. Both Ms. Steed and Barry

74. Transcripts of the hearings are in Docket 74-14-N33-001 through 74-14-N33-004 and 74-14-N33-136 through 74-14-N33-139.

Felrice, the associate administrator for rulemaking, later said that said that the victim testimony had an important impact.[75] Almost all the regular participants in the debate filed docket comments in addition to appearing at the hearings.

Automobile manufacturers continued to be virtually unanimous in calling for the rescission of automatic restraint requirements and the enactment of laws requiring seat belt use. Most also expressed concern about their ability to meet the test requirements for airbags in small cars and about the effect of airbags on out-of-position passengers. But there were some interesting variations in their proposals. General Motors wanted its vehicle safety improvement program, which aimed to avoid injury in crashes up to 25 mph by improving car interiors, to be an alternative to other occupant protection requirements. GM also repeated its chairman's proposal that an independent consultant review the merits and costs of airbags and other technologies. Under questioning, GM's director of safety engineering, David Martin, seemed mildly encouraging about driver-only airbags, including those provided on an aftermarket basis.[76]

Ford was more positive about airbags than other American carmakers, but there were important nuances to its position. Helen Petrauskas, its new spokesperson on regulatory affairs, called for a mandatory test of passive restraint technology, both airbags and passive belts, by requiring that manufacturers include them in 5 percent of cars sold over a four-year period. The compliance tests for each kind of restraint should also be changed: for example, manual and passive belts should be subject to the same tests, and airbags should be tested only with restrained dummies and in frontal crashes. Ford joined almost all other car companies in rejecting the concept of automatic occupant protection:

> The effectiveness of airbags, even in the frontal collisions for which they are designed, depends on the willingness of drivers to use their safety belts. Likewise the effectiveness of passive belts depends on the public's willingness to use such systems. The idea of automatic protection is illusory and does not serve the public interest in motor vehicle safety.
>
> [we have]... a very, very basic premise and that is our belief that there is no such thing as an automatic system. In order to get the full benefit of any system, we need belt usage laws.[77]

But as Roger Maugh stressed later, Ford still thought airbags were a lifesaving technology:

> It is our judgement that the effectiveness of airbags should be greater than 15 percent, but the lack of statistically meaningful data points to the need for further on the road experience with this technology...
>
> In summary, Ford believes airbag technology holds promise as a supplementary protection device when used with a safety belt, but NHTSA must first document effectiveness and acceptability before wide-scale implementation of this costly system is

75. Their interviews with the author.
76. General Motors Corporation, "Response to National Highway Traffic Safety Administration Proposal on Occupant Crash Protection, Docket No. 74-14, Notice 32." December 19,1983. [74-14-N32-1666]; also Hearings, 74-14-N33-136, starting at p. 84.
77. Hearings, December 1, 1983, 74-14-N33-003, pp. 44, 50-51.

> ordered. Further, we believe any near-term airbag applications must be limited only to the driver-side because of unresolved out-of-position occupant issues and the lack of production-ready technology.[78]

Diane Steed has said that the fact that people at Ford supported the lifesaving potential of airbags was important to DOT's decision makers.[79]

Professor Willi Reidelbach of Mercedes-Benz, maker of the only automobile in the American market with airbags available, took positions similar to Ford's on the need for on-the-road demonstrations of airbags and their value as a supplemental restraint. But he said consumer research justified Mercedes-Benz's decision to market airbags.

> Our decision [to provide the SRS option] is supported by market surveys of luxury car owners which show, among the other things, that safety is prominent among reported purchase considerations, and that 53 percent of Mercedes-Benz drivers sometimes, or almost always, use their seat belts.[80]

BMW was going to make driver-side airbags optional in one of its 1985 model year cars, as a complement to the three-point seat belt, but otherwise its position was like those of the other carmakers'.[81] Volvo planned to install driver-side airbags in some expensive models by 1987 and use them to comply with a passive restraint standard.[82]

The proponents of mandating passive restraints made few new arguments in response to the DOT notice, frequently citing the Supreme Court decision as supporting their position. State Farm insisted that state motor vehicle laws or any other nonregulatory alternative could not be legally substituted for an automatic occupant protection regulation. But the company continued to be on the defensive about not granting discounts for airbags or other passive restraints because of its policy of basing discounts on actual claims experience. Barry Felrice wanted to know why NHTSA should then be expected to base its policy on data too meager to justify policy discounts. State Farm replied that other insurers were giving such discounts.[83]

Insurers and their allies, most notably Dr. Haddon, the head of the Insurance Institute for Highway Safety, usually emphasized that state seat belt laws, if vigorously enforced, could save some lives, but that they supplemented, rather than substituted for, automatic restraint requirements. Haddon cited findings of a national telephone survey done for IIHS that nine out of ten car buyers wanted airbags or automatic belts either as standard or optional equipment. But, as it always did, IIHS emphasized the

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78. Letter from Roger E. Maugh to Diane Steed, Re Occupant Crash Protection — Docket 74-14; Notice 32, December 19, 1983.
79. Interview with Diane Steed.
80. Hearings, December 7, 1983, 74-14-N33-138, p. 40.
81. Hearings, December 6, 1983, 74-14-N33-137, pp. 132-141.
82. NHTSA Hearings, December 5, 1983, [74-14-N33-136] pp. 158-167.
83. Before the United States Department of Transportation, December 19, 1983, In re Automatic Crash Protection Rulemaking Proceeding, Docket 74-14, Notice 30; Statement of Position of State Farm Mutual Automobile Insurance Company. [74-14-N32-5295]; and NHTSA, Hearings, December 6, 1983, 74-14-N33-137, pp. 85-110.

lifesaving potential of airbags alone and especially of airbags in combination with lap belts. It challenged NHTSA's lowered airbag effectiveness estimate of 20 percent, saying it should be at least 35 percent.[84]

Don Schaffer, for Allstate, noted that airbags were so superior to other restraints that product liability considerations alone might force carmakers to use them. Costs should not be a consideration in issuing the occupant restraint rule, said Schaffer, since performance standards meant that costs were a result of manufacturers' choices. Under the Supreme Court decision, went Schaffer's reasoning, DOT could choose between either an airbag only or a passive restraint rule, and Allstate preferred the latter.[85]

Although they doubted the crucialness of cost-benefit studies, insurers continued to support William Nordhaus' updating of his earlier analyses. Assuming that automatic belts would be the basic means of complying with FMVSS 208, and using most of NHTSA's other assumptions, Nordhaus now estimated the standard's annual benefits to be between $2.7 and $4 billion — higher if only airbags were used. He avoided NHTSA's problem of estimating automatic belt use by using FARS data about the reduction of fatalities associated with VW automatic belts, and he rejected NHTSA's reduction of its airbag effectiveness estimate. Automatic protection standards would still be beneficial, according to Nordhaus, even if belt use were increased by only 8 percentage points and airbags cost $825 per car. The standard might bring some small reduction in auto industry employment, but Nordhaus' econometric analysis showed that this would be more than balanced by employment growth among restraint makers. He rejected as flawed a study by Barbara Richardson of the University of Michigan that said that a passive restraint standard would reduce GNP by 0.12-0.36 percent and increase unemployment by 60,000-200,000. The flaws Nordhaus cited included assuming that the standard was an airbag-only one, that airbags had no value to the consumer, and that their cost was fully reflected in the Consumer Price Index. Automatic crash protection, according to Nordhaus, would be one of the most cost-effective federal regulations ever enacted, comparable in effect to the elimination of deaths caused by tuberculosis.[86]

Ralph Nader wanted to reinstate FMVSS 208 for model year 1985 and to raise its barrier impact standard. Nader believed that the real block to an automatic protection standard was the White House's anti-regulatory politics. With their return to profitability, the financial condition of companies like General Motors was no longer an issue. Nordhaus believed that mandating state seat belt laws was merely a stratagem to avoid an automatic protection standard. Nader's colleague, Joan Claybrook, added an attack on Ford's demonstration proposal, calling it a mere delaying tactic and an attempt to reduce the

84. NHTSA, Hearings, December 5, 1983, 74-14-N33-136, and Letter from William Haddon, MD, to Diane Steed, NHTSA, December 19, 1983 [74-14-N32-?]; also *Status Report*, January 27, 1984, pp. 1, 4-5.
85. NHTSA, Hearings, November 28, 1983, [74-14-N33-001], pp. 41-61, and Supplemental Submission to the Docket Re: Standard 208 National Highway Transportation Safety Administration, DOT, December 19, 1983, by Donald L. Schaffer, Allstate.
86. Comments by William Nordhaus on Notice of Proposed Rulemaking on Federal Motor Vehicle Safety Standards, Occupant Crash Protection, Docket No. 74-14; Notice 30 [really 32], December 19, 1983.

stringency of the standard. Nader believed that insurance discounts were irrelevant to the safety considerations that should guide rulemaking.[87]

Although restraint manufacturers avoided direct clashes with automakers, one of their trade association leaders, Charles Pulley of the American Seat Belt Council, favored both reinstating FMVSS 208 and providing federal incentives for the passage of state seat belt laws. He also thought NHTSA should encourage the installation of airbags. Jack Martens, speaking for the Automotive Occupant Protection Association, wanted passive restraints mandated for all cars by the 1987 model year, with airbags in all cars with a 101-inch or smaller wheel base and either airbags or nondetachable automatic belts in larger cars.[88] Robert Rockow, a tester of airbags at Dynamic Science, was asked by Steed to comment on the relative effectiveness of airbags and automatic belts:

> It is my personal feeling that when you get above 35 miles an hour in a frontal accident, 35 to 40 miles, somewhere in that range, your belt systems start causing you internal problems. You are going to have severe injuries occurring. Where your airbag will move that up to a higher speed. (sic!) Some years ago we tested some vehicles at our site, where we put three-point systems in one automobile and an airbag in another and we were able to get those up to about 45 miles an hour, where the airbag was saving the occupant, based on our dummy data and, of course, on the belt side the occupants of that vehicle were killed.[89]

Rockow thought that an all-airbag standard could be met by the industry in two years and that the 30 mph standard should be no problem for small cars.

DOT Explores New Possibilities

After a few months of review, Mrs. Dole announced that the comments received raised some new issues and possible alternative rules. According to her deputy, James Burnley, the 208 task force had become “fairly enamored” with the idea of combining a push for state seat belt laws with reinstatement of the passive restraint standard if enough laws were not passed. It was obvious that passive restraints would save lives, but with a long time lag. State seat belt laws would have an immediate payoff without any significant expense. The success with which child restraint laws had been passed in the previous few years encouraged the task force to believe that this might also happen with seat belt laws. Moreover, the emphasis on state action would make a favorable impression on the White House. This combination strategy was something the group came to itself after a few months of fact gathering.[90] There is no evidence that the group was aware of Congressman Cleveland’s apparently offhand comment in 1978 about the possibility of exempting any state from airbag requirements if 65 percent of its vehicle occupants used seat belts.[91]

87. For Nader, see NHTSA Hearings, December 6, 1983, [74-14-N33-137], pp. 44-65, and for Claybrook, see the next day’s Hearings [74-14-N33-138], pp. 141 ff.
88. NHTSA Hearings, December 2, 1983 [74-14-N33-004], pp. 245-261 for Pulley, and pp. 261-288 for Martens.
89. NHTSA Hearings, November 29, 1983, [74-14-N33-002], pp. 300-301.
90. Interview with James Burnley. Also interview with Robert Davis and Erica Jones, both members of the 208 task force, March 4, 1994.
91. See Chapter 4.

A supplemental notice of proposed rulemaking was needed to condition the rescission of the automatic protection standards on the passage of seat belt use laws. Some other issues were also aired.[92] For example, State Farm had argued that the public acceptability issue raised in the prior notice was relevant only to the extent that the public might act to disable the safety equipment.[93] DOT invited comment on this interpretation and the extent to which the public might take such action. As a result, the range of automatic belt effectiveness was lowered because of the possibility that there would be a somewhat greater chance of nonuse and, therefore, ejection compared with manual belts. Based on slightly revised estimates of the loss reductions that would result from various combinations of equipment, the notice estimated a range of potential savings in automobile insurance premiums and raised questions about how to ensure these savings were passed on to the insureds. Comments were invited on a number of test issues.

Four rulemaking alternatives were presented in the supplemental notice. Two concerned conditioning automatic protection requirements on the passage of mandatory seat belt use laws (MULs). Under consideration were waiving the requirements for any state that passed such a law, or not having the requirements come into force if 75 percent of the states (or states with 75 per cent of the population) passed MULs. The notice contained a detailed list of minimum criteria that the MULs would have to meet. Also, beginning on March 1, 1985, manufacturers would have to report on their strategies for meeting the automatic protection requirements and how these would be affected by state waivers. Ford's proposal for a mandatory demonstration program, involving 5 percent of each automaker's new cars, was the third alternative. The fourth was a variation of a proposal in the previous notice, requiring airbags on the driver's side only, but this time restricting the requirement to small cars only. All four alternatives were accompanied by many questions.

Insurers and other automatic restraint supporters generally opposed these new alternatives on the ground that seat belt laws and automatic restraint standards should not be either/or propositions. They doubted DOT's legal powers to condition safety rules on state MULs, and they felt that a demonstration program that was a substitute for safety standards meant long delays and more lost lives.[94] But IIHS did support the idea of a driver-side airbag requirement if it would lead to an early effective date for full frontal airbags.[95]

John Graham, now at Harvard's School of Public Health, thought the driver-side airbag alternative for small cars was the most innovative new approach in the 15-year history of FMVSS 208.

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92. DOT, NHTSA, 49 CFR Part 571 [74-14, No. 35] FMVSS; Occupant Crash Protection, [Supplemental Notice of Proposed Rulemaking], *Federal Register*, May 14, 1984, pp. 20460-20470.
93. Before the United States Department of Transportation, March 26, 1984. In re: Automatic Crash Protection Rulemaking Proceeding, Docket 74-14, Notice 32; Supplemental Statement of State Farm Mutual Automobile Insurance Company: "Public Acceptance" of Mandatory Automatic Crash Protection. [74-14-N32-6421]
94. See, for example, Statement of Allstate Insurance Company Submitted to Department of Transportation NHTSA 49 CFR 571(Docket No. 74-14; Notice 35) FMVSS occupant Crash Protection by Donald L. Schaffer, June 11, 1984. [74-14-N35-042] and Comments on Occupant Crash Protection 49 CFR Part 571 [Docket No. 74-14; Notice 35] from Nationwide Mutual Insurance Company, June 12, 1984. [74-14-N35-038].
95. Letter from William Haddon to Elizabeth H. Dole, Re: Docket 74-14, Notice 35, June 12, 1984.

Ford's demonstration proposal was flawed, he said, because it might not be large enough to provide statistically significant evidence. He was skeptical that enough states would pass MULs, and even if they did he doubted they would be effective substitutes for automatic restraints unless they resulted in belt use higher than 50 percent.[96]

William Nordhaus maintained that, with NHTSA's new estimates, passive restraint standards still produced $2-2.5 billion a year in net benefits; a delay to pursue a demonstration program or state MULs would cost $5-14 billion. Every automatic crash protection technology in each of the seating positions considered was cost beneficial, and the benefits increased if requirements were not restricted by car size or position.[97]

Automobile manufacturers generally objected to tying automatic protection standards, which they did not favor, to MULs, which they did favor. They all thought that the state by state alternative would be too costly and difficult to administer. They tended to object both to the criteria for judging state laws and to the requirement that they report their automatic protection strategies while the laws might be pending. The carmakers were also critical of the driver-side airbag requirement for small cars because they felt that the technology was not perfected. Although Mercedes-Benz and Volkswagen supported Ford's mandatory demonstration plan, most manufacturers suggested some changes — most frequently the smaller companies wanted to be excused from participation.[98]

Mrs. Dole's decision

Secretary Dole was an active participant in the task force discussions about FMVSS 208. As we have seen, she was always inclined to believe that airbags worked. Now she was concerned about the opposition displayed to them by many manufacturers and wanted to make sure that consumers had an opportunity to choose airbags for their cars. According to Burnley:

> Elizabeth Dole personally wanted to see bags out there... If we were going to end up with automatic restraints, she was not happy that we might end up with a fleet of automatic belts and no bags. Of all the alternatives, she did not think automatic belts were the most attractive. In fact, she felt they were the least attractive because they were so easily disabled. So she thought that would be the worst of all safety outcomes... Her desire was

96. Testimony of John D. Graham, June 11, 1984 [74-14-N35-063]
97. Comments of William Nordhaus on Supplemental Notice of Proposed Rulemaking on Federal Motor Vehicle Standards, Occupant Crash Protection, Docket No. 74-14, Notice 35, June 13, 1984. [74-14-N35-079].
98. American Motors Comments on Notice 35, submitted by Dale E. Dawkins, VP Environmental and Safety Affairs, June 12, 1984. [74-14-N35-035]; Letter from H.K. Sperlich, President, Chrysler Corporation, to Diane Steed, NHTSA, on Notice 35, June 12, 1984. [74-14-N35-036]; Ford Motor Company Comments on Supplemental Notice of Proposed Rulemeking FMVSS 208-Occupant Crash Protection. 74-14; Notice 35. [74-14-N35-065]; Letter from Betsey Ancker-Johnson to Elizabeth Dole enclosing comments on Docket 74-14; Notice 35, June 13, 1984. [74-14-N35-068 and 068A]; Comments of American Honda Motor Co. on Notice 35, June 8, 1984 [74-14-N35-048]; Letter from Karl Heinz Faber, Mercedes-Benz of North America, to NHTSA Docket, on Notice 35, June 12, 1984. [74-14-N35-043]; "Renault's Comments on the Supplemental NPRM of May 14, 1984 ...Notice 35," June 12, 1984 [74-14-N35-050]; Toyota's Comments on STD. 208 Supplementary Notice of Proposed Rulemaking, 74-14;N35; June 13, 1984 [74-14-N35-041]; Volvo's Comments on Docket 74-14; N35, June 12, 1984; [74-14-N35-039] June 12, 1984; "Volkswagen Comments to Docket 74-14; Notice 35...." June 12, 1984; [74-14-N35-046].

> to see that bags were available in significant numbers, and see what happens... She really personally had a lot to do with that element of this thing... She was quite insistent that we were going to craft an outcome that would do what it could to encourage bags.[99]

The main elements of Mrs. Dole's decision were to make an automatic protection standard contingent on not achieving state MULs, and to encourage the availability of airbags. During June 1984, two civil servants, Barry Felrice and Neil Eisner — respectively NHTSA associate administrator for rulemaking and a DOT assistant counsel — were briefed on the elements of the decision and asked to prepare the final regulation.

While the DOT task force had been working on the problem, Mrs. Dole, Burnley, and Diane Steed maintained open channels on the issue with Christopher DeMuth, head of OMB's Office of Information and Regulatory Affairs and executive director of the Presidential Task Force on Regulatory Relief. Although Burnley thought that they might have convinced DeMuth of their position, DeMuth recalled that he was not persuaded that the Supreme Court ruling presented an insuperable barrier to a reformulated rescission.[100] In any event, DeMuth felt that it was his role to argue for deregulation in any close case, and he did just that in a couple of closed meetings with the President's counsel, Ed Meese. There were meetings in the West Wing of the White House, Burnley recalled, that also included James Baker, the President's chief of staff, and Boyden Grey, the Vice President's counsel. These meetings took place at the very end of the process. Burnley characterized them as more philosophical than political. When the White House senior staff had endorsed Mrs. Dole's decision, she met with President Reagan to get his final blessing. She had a neurosurgeon with ties to the President, Dr. Paul Meyer, waiting outside in a limousine to brief the President on the medical aspects of passive restraints. But he was not needed. The President's assent was "pretty much a done deal," Burnley remembers.

On July 11, 1984, Secretary Dole issued her final rule on automatic occupant restraints[101] which contained a summary of the lengthy regulatory impact analysis.[102] Buried near the end was the acknowledgment that the Supreme Court's *State Farm* decision precluded DOT from rescinding automatic occupant protection requirements "at this time."[103] DOT could not say how much detachable automatic seatbelts would increase belt use, but it did believe that there would be some increase.

> On the other hand... such a substantial increase [in belt use] as a result of the widespread enactment of MULs would provide increased safety benefits much more quickly and at a much lower cost, thus making rescission clearly justifiable... Thus, the Department has

99. Interview with James Burnley.
100. Interview with Christopher DeMuth.
101. Department of Transportation, National Highway Traffic Safety Administration, 49 CFR Part 571 [Docket 74-14; Notice 36] Federal Motor Vehicle Safety Standard; Occupant Crash Protection; Final Rule. *Federal Register*, vol. 49, No. 138, July 17, 1984, pp. 28962-29010.
102. Department of Transportation, National Highway Traffic Safety Administration, Plans and Programs, Office of Planning and Analysis, *Final Regulatory Impact Analysis, Amendment to Federal Motor Vehicle Safety Standard 208, Passenger Car Front Seat Occupant Protection*, July 11, 1984. [74-14-N35-152].
103. Op. cit., p. 29002.

> concluded that if two-thirds or more of the American people were covered by such laws, the need for an automatic occupant restraint would be obviated.[104]

So, in a sense, the Dole decision substituted a possible future rescission for Peck's unconditional rescission.

DOT summarized its estimates of the annual benefits of various forms of protection (once the automatic forms were in the whole fleet) compared with benefits of manual belts at current 12.5 percent use levels:

Safety Benefits[105]
Incremental Reduction In Fatalities AIS 2-5 Injuries

	Mid-	High	Low point	Mid-	High	Low point
Airbags only	3,780	6,190	8,630	73,660	110,360	147,560
Airbags and lap belts (12.5 percent)	4,410	6,670	8,960	83,480	117,780	152,550
Airbags with lap/shoulder belts (12.5 percent)	4,570	6,830	9,110	85,930	120,250	155,030
Automatic belts						
20 percent use to	520	750	980	8,740	12,180	15,650
70 percent use	5,030	6,270	7,510	86,860	105,590	124,570
MULs in all States						
40 percent use to	2,830	3,220	3,590	47,740	53,440	59,220
70 percent use	5,920	6,720	7,510	100,430	112,410	124,570

Airbag effectiveness estimates were not based on statistically inadequate field experience, but on engineering judgments NHTSA staff applied to four samples that were presumed to be less biased than the ones used in the earlier GM engineer jury study. There was little disagreement, the ruling held, that airbags worked well in noncatastrophic frontal collisions.

> Airbags offer a distinct advantage over other occupant restraints in that they ensure a usage rate of nearly 100 percent for both drivers and passengers. Used alone, they do offer protection, but to equal the effectiveness of a manual lap and shoulder belt, airbags must be used with lap belts. Lap belts in airbag equipped cars would probably be used only at a level near the current level of seatbelt use, 12.5 percent. Because manual belt use is so low, however, airbags would provide much greater safety benefit.
>
> Airbags with lap belts also provide protection at higher speeds than safety belts do, and they will provide better protection against several kinds of extremely debilitating injuries (e.g., brain and facial injuries) than safety belts. They also generally spread the impact of a crash better than seat belts, which are more likely to cause internal injuries or broken bones in the areas of the body where they restrain occupants in severe crashes.[106]

Judgments of how well airbags would work in side collisions, rollovers, and catastrophic frontal collisions were reflected in the different levels of estimated benefits. As in the past, DOT dismissed fears that airbags might fail to deploy or deploy inadvertently or cause harm from the toxicity of sodium azide. It noted that the unobtrusiveness and almost 100 percent deployment of airbags in frontal crashes made

104. Ibid., p. 29003.
105. *Final Regulatory Impact Analysis*, p. IV-1. The same table is in the final rule, op.cit., p. 28986.
106. Ibid. p. 28991.

them the most beneficial restraint when combined with belt usage at current levels. The major drawback of airbags was their cost, which DOT, based on data from suppliers, said should be no more than $320 for full, frontal airbags in large production volumes. But no car maker's estimates came close to even twice that amount.[107] Although Breed estimated that the all-mechanical airbag it had developed would cost $141, it was at least a year from being ready for commercial use.

The problem of out-of-position occupants in small cars was discussed in a way that tried to balance the dangers and safety benefits of airbags:

> The out-of-position occupant problem primarily affects children less than three years old. (The size of the child and the speed with which the bag must open in small cars are the primary reasons for the problem.) Overall, the safety benefits are greater for an out-of-position occupant with an airbag than without one. Moreover, technical modifications (e.g., sensors that could detect an out-of-position occupant and adjust the opening of the airbag to account for the occupant's position) and child restraint laws should lessen the problem. Nonetheless, the Department can not state for certain that airbags will never cause injury or death to a child. This situation is similar to current safety belts where the benefits are well-known, but they do on occasion cause injuries that otherwise would not have occurred. Again, the Department is not mandating the use of airbags.[108]

All of the problems related to airbags plus the negative consumer comments in the docket were cited as reasons for allowing choice among automatic restraints rather than mandating airbags.

Three-point automatic seat belts were estimated by DOT to be as effective as their manual counterparts when they were used; the effectiveness of two-point automatic belts was somewhat downgraded because of the greater possibility of ejection reported in a Canadian study. Nondetachability was eliminated as a possible requirement because of fear that it would make automatic belts inconvenient and generate adverse public reaction. The estimated effectiveness of seat belt laws in raising belt use by at least two or even three times was based on a study of foreign experience by Peat, Marwick and Mitchell.[109] DOT dealt with skepticism about the political feasibility of state passage of MULs by citing the fact that 47 states and the District of Columbia had passed child restraint laws and New York State had just passed a seat belt use law with a $50 fine. Moreover, public attitudes toward safety had changed markedly in recent years, DOT said, as evidenced by "the grass roots uprising in opposition to drunk driving" and recent surveys showing majority support for MULs in Michigan, Delaware and Ohio.[110]

A demonstration program was rejected in the final rule because it would entail a delay in achievable benefits. Requiring that consumers be allowed to choose among passive restraint options would be a viable alternative only if the old rule were rescinded. But it would impose a major financial

107. Ibid. Table 9, p. 28989.
108. Ibid., p. 28992.
109. Peat, Marwick, Mitchell and Co., *Effectiveness of Safety Belt Usage Laws*, prepared for the National Highway Traffic Safety Administration, Contract No. Dot HS 9-02104. DOT HS-805 490, U.S. Department of Commerce, National Technical Information Service. May 1980.
110. Ibid., p. 28994.

burden on manufacturers, as would requiring an airbag retrofit capability. The manufacturers' claim that test procedures specified in the rule were not repeatable was rejected, as were proposals for other test changes. GM's request that barrier standards be lowered from 30 to 25 mph for "passive interiors" was denied because there were no data on the safety implications of such a change, but DOT had friendly words for the concept. The front center seat was exempted from the automatic protection rule both because of its small number of occupants and because manufacturers would eliminate it if using automatic belts.

The rule called for automatic protection to be placed into a minimum of 10 percent of all cars manufactured after September 1, 1986, 25 percent of cars manufactured after September 1, 1987, 40 percent after September 1, 1988, and all new cars after September 1, 1989. Although unstated, the reason for no longer basing the phase-in schedule on car size was probably concern that a delay for small car compliance would benefit importers. The requirements would instead be based on the average number of cars produced by the manufacturer in the United States. The rationale for the phase-in included the notion that more time was needed to engineer possibly better systems than automatic belts, like airbags or passive interiors. It was also hoped that by the time MULs covered two-thirds of the U.S. population, automatic restraints would have been produced at low enough prices to ensure public demand. During the phase-in period, manufacturers would receive a one-half car additional credit for every car produced with something to protect the driver automatically other than a passive belt. The right front passenger would also have to be protected automatically. DOT said explicitly that this credit was designed to encourage manufacturers to provide airbags:

> Even though fewer cars would be equipped with automatic protection if extra credit is given for airbag automobiles, airbags — when used with belts — are very effective... This should promote the development of what may be better alternatives to automatic belts than would otherwise be developed.[111]

The automatic protection requirement would be rescinded as soon as DOT determined that two-thirds of the population of the United States was covered by mandatory use laws. But this could occur no later than April 1, 1989. A state-by-state waiver was rejected as too burdensome to the manufacturers and too subject to possible abuse. Although the decision noted that "the effectiveness of the airbag system is substantially diminished if the occupant does not use a belt,"[112] it tended to view the two systems as alternatives rather than complements. The proposal to have both automatic restraints and MULS was dismissed on the ground that it ignored the issue of consumer resistance to the restraints and the incentives that the new DOT approach gave to passing MUL laws. To qualify for being counted toward the waiver, MULs would have to meet these minimum criteria:

111. Ibid., p. 29000.
112. Ibid., p. 28998.

- federally mandated seat (i.e., three-point) belts had to be used by front-seat outboard passengers whenever the vehicle was moving;
- no occupant waivers except for medical reasons;
- penalties of at least $25 for each violation;
- civil damages for auto injuries might be mitigated if the victim was unbelted;
- an education program to encourage compliance
- a program to evaluate the effectiveness of each law;
- an effective date no later than September 1, 1989.

When she issued her decision on July 11, 1984, Secretary Dole also announced a $40 million program to promote seat belt use and seat belt laws, half to be funded by DOT, half by the "private sector."[113] Later, Congress authorized only about $7.5 million for that purpose.[114]

Manipulating the "Trapdoor"

The insurance and consumer groups and state officials who had been the chief advocates of an automatic protection standard reacted to Mrs. Dole's final rule with predictable dismay about its potential rescission if enough states passed qualifying MULs. They quickly dubbed this the "trapdoor," which could be triggered if laws were passed in the 16 most populous states. Ralph Nader and Joan Claybrook predicted that manufacturers would concentrate on lobbying for seat belt laws rather than providing airbags. IIHS and the insurers deplored the idea that seat belt laws were viewed as possible substitutes for automatic restraint standards rather than as complements. State Farm almost immediately filed suit in the District of Columbia Court of Appeals to overturn that aspect of the rule, while the Automobile Importers of America filed and later dropped another appeal in California.[115] State Farm was joined, either in appeals or in *amicus* briefs, by other insurers and health organizations as well as by the states of New York and New Mexico and the National Association of Insurance Commissioners. The appeal argued that DOT did not have the power to, in effect, shift its regulatory authority to the states. It also argued that the ruling was arbitrary and capricious because, among other things, it did not give serious consideration to having both MULs and a passive restraint standard.[116]

Automobile manufacturers founded "Traffic Safety Now" to campaign vigorously for state seat belt laws. According to James Burnley, DOT did not play an active role in this lobbying, avoiding the state by state campaign for fear that its involvement would be counterproductive. But it did answer inquiries and generally encouraged those favoring the laws to make their views known.

113. Department of Transportation, "Statement by Secretary of Transportation Elizabeth Hanford Dole, News Conference on Automatic Crash Protection, July 11, 1984."
114. Graham, *Auto Safety*, pp.181-182.
115. Status Report, July 28, 1984, pp. 1-6.
116. State Farm, et. al., v. Elizabeth Dole, Petition to Review a Final Order of the Department of Transportation, Petitioners' Final Brief, In the Court of Appeals for the District of Columbia Circuit, December 31, 1984.

The MUL passed in New York became an early source of controversy. Evidently with the New York law in mind, the Secretary's final rule said that the Department would consider granting a waiver for any law passed before August 1, 1984, that did not meet the minimum criteria but substantially complied with them. The New York law had a maximum fine of $50 rather than a minimum one of $25. Also Governor Cuomo, in signing the law, added a memorandum stating that he interpreted it as requiring lap belts and that shoulder belts might not be used if they caused discomfort. The Insurance Institute for Highway Safety used this as the basis for petitioning DOT to rule that the New York law did not meet its minimum requirements.[117] DOT did not respond to this or other requests for assessing whether specific bills or laws met its criteria; the reasons, according to both James Burnley and Diane Steed, were to let the process play itself out and to realize the maximum safety benefits both from MULs and from the spread of automatic restraints.[118] Proponents of automatic restraints began to follow the strategy articulated by Charles Hurley, Washington representative of the National Safety Council, when he said it would lobby for state seat belt laws "that include language making it clear that such laws are not aimed at overturning the federal rule."[119] In other words, they would aim to include a provision that was contrary to at least one of the minimum criteria, so as not to promote rescission of the automatic restraint standard.[120] Although neither James Burnley nor Mrs. Dole commented at the time, Burnley later said that they were dismayed by this strategy, because the criteria were aimed at making the MULs meaningfully enforceable.[121] There is no clear evidence whether Mrs. Dole originally hoped, or expected, that MULs would lead to rescission.

While the decision argued that the climate of opinion on seat belt laws was changing, the decision itself probably was the greatest force in bringing that change about. Both the automobile manufacturers and those favoring the automatic restraint standard worked vigorously for their versions of MULs. The result was relatively rapid passage of laws that were almost always a compromise between the two forces and, therefore, did not strictly meet all the minimum criteria. New Jersey quickly followed New York in passing a belt use law that could be enforced only if a car was first stopped for some other reason — a "secondary enforcement law." Although this limitation was not explicitly prohibited by the criteria, the law was soon amended to carry a maximum fine of $20, below the minimum specified fine of $25. Illinois was the next state to pass a law, one that entailed secondary enforcement and prohibited reduction of civil damages because of failure to use seat belts.[122]

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117. *Ibid*., November 3, 1984, pp. 1-2.
118. Interviews with Burnley and Steed.
119. *Status Report*, October 13, 1984, p. 6.
120. Dr. Haddon put it in a more general way: "Seat-belt laws can help reduce this [highway injury] toll. But they should complement automatic protection. They should not be enacted in a manner that would defeat attainment of the goal of automatic protection for everyone." "The Trapdoor," an editorial reprinted from the Baltimore Sun, in Status Report, January 19, 1984, p. 2.
121. Interview with James Burnley.
122. *Status Report*, January 19, 1984, p. 4.

By November 1985, 16 states had passed MULs, or 17 if Nevada's law was counted — it was effective only if the national speed limit was raised to 70 mph. Massachusetts' law included a provision that would require automatic protection for all cars sold in the state if the federal requirement was rescinded. After lengthy consideration, the California law included both a similar provision and something called a "poison pill" — a concept borrowed from corporate anti-merger tactics. If the state's law was counted by DOT toward rescinding the automatic protection standard, it would be immediately revoked. James Fitzpatrick, of Arnold and Porter, says the "poison pill" was brought into the California negotiations by his firm.[123]

While state legislatures were considering mandatory use laws, the legal challenge to "the trapdoor" was slowly working its way through the Court of Appeals. DOT argued against any decision on the merits of its rule on the ground that it was not "ripe," since the decision that was being opposed had not yet been made. The Court was forced to hear the arguments twice since one of the members of the panel, Judge Edward Tamm, died after the first hearing and was replaced by Antonin Scalia. Judge Kenneth Starr wrote the majority decision issued September 18, 1986, agreeing that the issue was not yet ripe, but noting that the MULs passed in states covering 50 percent of the population apparently did not conform to the minimum criteria. The decision said that the petitioners could get judicial review if the Secretary were to bend the requirements of the minimum standards to justify counting MULs as long as they were in substantial compliance. Also rejected was New York State's argument that the final rule did not justify the rejection of an airbag-only standard or one requiring automatic belts to be nondetachable. Judge Mikva dissented from this part of the decision.

Brian O'Neill, the new president of IIHS, declared that the Court of Appeals decision meant the automatic protection standard would stand.[124] By the end of the year, there was some retreat from the high point of 27 states with MULs when Nebraska and Massachusetts repealed their laws.[125]

The Spread of Driver-Side Airbags

Although almost all the automobile manufacturers petitioned for reconsideration of one or another aspect of the final rule and put substantial effort into lobbying for seat belt use laws, they also began planning to meet the phase-in requirements for automatic restraints. They could not gamble on the rescission threshold being met before the 1987 model year.[126] Although Helen Petrauskas has said that Ford's long term strategy was to go to 100 percent airbags over time, that assumed that the open issues — especially those related to passenger airbags — could be resolved. For the immediate future, Ford was going to use automatic belts. Most of the manufacturers still planned to use detachable automatic three-

123. Interview with James Fitzpatrick. For the various laws, see the special issue on seat belt laws in *Status Report*, November 2, 1985.
124. 802 F.2d 474 (D.C. Cir. 1986), and *Status Report*, October 4, 1986, pp. 1,7. Dr. William Haddon died prematurely in 1985.
125. *Status Report*, December 13, 1986, pp. 1, 5-7.
126. Interviews with Roger Maugh, Helen Petrauskas, David Martin, Christopher Kennedy.

point belts to meet the standard. But Ford studied VW's experience with the Rabbit's two-point belts and Toyota Cressida's two-point motorized belt and concluded that they were almost as effective as three-point manual belts. So Ford made motorized belts its first choice to meet the standard in spite of adding $150 to the cost of the car.[127]

Thanks apparently to Ray Peck's earlier initiatives, driver-side airbags were becoming available even before Mrs. Dole's final rule took effect. Mercedes-Benz was selling out its optional driver-side airbags by the time the rule was issued.[128] A few weeks after the final rule, Ford followed up on its earlier announcement to provide driver-side airbags in 1985 model year Tempos by saying that they would be available as options on the 1986 Tempo and Mercury Topaz for $830, a price that Roger Maugh acknowledged to be unattractive.[129] Ford would be the first American manufacturer to offer airbags to consumers since General Motors stopped its sales at the end of the 1976 model year. According to Maugh, Ford had concluded that it had to have the people in its cars "restrained or we were forever going to be exposed to problems in litigation and the public's perception of us as people building cars where they were getting hurt."[130] Both Maugh and Petrauskas have said that Ford's marketers concluded that safety was an aspect of the strategy expressed in its slogan "Quality is job 1." With it they would sell more cars. The decisions to provide both motorized safety belts and driver-side airbags were driven by this strategy.

In October 1984, Ford petitioned NHTSA to permit manufacturers to meet the phase-in requirement with a driver-side airbag and a manual, rather than automatic, belt for the front outboard passenger. After some delay, the petition was granted in August 1985. A car so equipped would be counted only once rather than the 1.5 times it would be counted if it had both a driver-side airbag and a passenger-side automatic belt.[131] In the 1985 model year, Mercedes-Benz made the driver-side airbag standard on some of its models; by the next model year it was standard on all of its models.[132] The Insurance Institute for Highway Safety estimated at the end of 1985 that at least 100,000 cars with driver-side airbags would be sold in 1986. This was based on all of Mercedes-Benz's 85,000 sales, 5 percent of the expected 350,000 Ford Tempos and Mercury Topazes sold, and about 1,500 BMWs.[133] Chrysler was considering offering airbags in two of its 1987 models. Early in 1986, Roger Smith, CEO of General Motors, announced that driver-side airbags would be options — to supplement manual belts — in selected 1988 models, not because of regulation, but to meet consumer demand.[134]

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127. Interviews with Roger Maugh and Helen Petrauskas.
128. *Status Report*, July 28, 1984, p. 5.
129. *Status Report*, September 22, 1984, pp. 1, 6.
130. Interview with Roger Maugh.
131. Department of Transportation, National Highway Traffic Safety Administration, 49 CFR 571, [74-14; Notice 40; Occupant Crash Protection; Response to Petitions for Reconsideration, 50 *Federal Register*, August 30, 1985, pp. 35233-35237.
132. *Status Report*, October 5, 1985, p. 2.
133. *Status Report*, December 7, 1985, pp. 1, 6.
134. *Status Report*, February 22, 1986, pp. 1, 7.

Also early in 1986, Roger Maugh told Diane Steed that Ford did not have the engineering resources to continue work on the still unresolved problems with passenger-side airbags, while at the same time designing automatic protection for all its lines by the deadline of the 1990 model year. With the ending of credits for driver-only airbags, Maugh argued that airbags would disappear unless Ford and other manufacturers had time to solve the passenger-side problems and to adapt their engineering to complete car design cycles. To achieve this room to maneuver, Ford wanted the one-car credit for driver-side airbags extended beyond the phase-in period. The extension would also allow airbag manufacturers to increase their still limited production capacities. Steed was afraid that acquiescence might seem to undermine the final rule. She suggested that Maugh discuss the issue with the Insurance Institute for Highway Safety, and he met with Brian O'Neill in March 1986. O'Neill's reaction was sympathetic, but he wanted the case to be presented to his board of directors, composed of insurance company and trade association executives and including this author. Maugh was leaving the Ford safety director post, and his boss, Helen Petrauskas, talked to the IIHS Board in May. She made it clear that if NHTSA prolonged the driver-side airbag credit, Ford would supply massive numbers of cars so equipped while continuing to work on passenger-side airbags.[135] With support from O'Neill, the board decided to back Ford's petition.

On June 11, 1986, Ford petitioned NHTSA to extend the driver-side airbag credit, repeating the arguments Steed had already heard and requesting a quick decision.[136] Ford listed a fair number of issues still to be resolved for passenger side airbags: the low temperature characteristics of the igniter, the optimum design of the aspirator, the material of the inflator canister, the optimum characteristics of the deployment door, and, most importantly, hazards to out-of-position occupants, especially children. If its petition were granted, Ford said that it would "in all likelihood" equip the majority of its American-made family cars with driver-side airbags in the 1990 model year. At least 60 percent of passenger cars would have to be occupied by belt users to achieve similar safety benefits. IIHS filed its support, but suggested that the driver side credit be extended only until the 1994 model year, saying that was time enough to engineer passenger side airbags. Brian O'Neill hailed Ford's position as the breakthrough that would make airbags standard equipment at a reasonable price.[137]

Maugh had asked O'Neill not to discuss the petition, before it was filed, with Joan Claybrook of Public Citizen and Clarence Ditlow of the Center for Auto Safety. O'Neill arranged for Ford to make its case at a meeting of the National Coalition to Reduce Car Crash Injuries; Claybrook and Ditlow were essentially the only major players in the coalition not won over by Ford's arguments. Claybrook and Ditlow believed that Ford had the resources to do all the engineering needed, exaggerated the problems of

135. Interviews with Roger Maugh, Diane Steed, Helen Petrauskas, and Brian O'Neill.
136. The Ford petition is in docket 74-14, Gen. Ref. 654 and 654A. IIHS' supporting document is in 74-14, Gen. Ref. 654.
137. *Status Report*, June 28, 1986, pp. 1-2.

passenger-side airbags, and was motivated strictly by profit considerations.[138] Ralph Nader took no public position on the matter. Congressional supporters of airbags, like Representative Tim Wirth and Senator John Danforth, initially shared Claybrook's skepticism.

In November NHTSA published a notice of proposed rulemaking embodying Ford's petition, but extending the credit for the driver-side airbag only until September 1, 1993, as IIHS had suggested.[139] An earlier petition by Porsche and IIHS for a double credit for cars with both driver and passenger airbags was denied in the same notice, because NHTSA said such a credit would not significantly affect their production. Diane Steed has said that IIHS' support for Ford's petition helped to verify its safety benefit. All the automobile manufacturers also supported the petition. At a Senate Commerce Committee hearing chaired by Sen. Danforth, Helen Petrauskas said that if Ford's petition were granted, its annual driver-side airbag production would come closer to a million than a half million. Chrysler said that driver-side airbags would be standard equipment on at least one 1988 Chrysler model and on most by the 1990 model year. Danforth said at the hearings that he had started out as a skeptic, but was now convinced.[140] General Motors later declared that if the driver-side airbag credit were extended, it would produce a half million cars with that equipment by the 1990 model year, reaching nearly 3 million by the 1992 model year if programs under study proved feasible. Volvo said that all its models would have driver-side airbags by the 1989 model year.

On March 25, 1987, the Department of Transportation announced the extension of credits until September 1, 1993, for cars equipped with driver-side airbags and manual belts for the front outboard passenger seat. The Secretary's written statement noted:

> The action we are taking today will result in the installation of more airbags sooner than would have occurred without this rule. It will also encourage the orderly development and production of passenger-side airbag systems.[141]

In the final rule, NHTSA noted the widespread support for the extension of these credits. All car manufacturers and airbag suppliers said credits were needed, because of both scarce engineering resources and limited airbag production capacity. Only the Center for Auto Safety and Robert Phelps, a private citizen, opposed the extension. NHTSA rejected the Center's arguments that Ford's submission had not been made public, noting that all but some competitively sensitive information had been published. The Center had also argued that the extension would discourage Mercedes-Benz, Jaguar and Porsche from providing full, frontal airbag systems, an assertion contradicted by the manufacturers' filed comments. In fact, Porsche was already offering full, frontal airbags on the 1987 model 944 Turbo.

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138. Interview with Joan Claybrook.
139. DOT, NHTSA, 49 CFR Part 571, [74-14; Notice 48], FMVSS; Occupant Crash Protection; NPRM, 51 *Federal Register*, November 25, 1986, pp. 42598-42603.
140. *Status Report*, January 24, 1987, pp. 6-7.
141. Department of Transportation, "News: Dole Announces Final Rule to Encourage Early Installation of Airbags," March 25, 1987.

Interestingly, while the DOT announcement spoke of "more airbags sooner," NHTSA maintained that the rule did not aim to favor any one automatic protection technology, but aimed

> to encourage the development of a variety of automatic restraint systems. Ultimately, the types of automatic restraints that prevail in the marketplace will be determined by the choices made by consumers.[142]

Consumer Reaction and Accident Experience

During January and February 1986, NHTSA sponsored a national survey to measure the public's understanding and acceptance of occupant protection systems.[143] Only 40 percent of the public had heard of automatic belts and most of them did not know how they worked. Sixty percent preferred manual to automatic belts when buying or renting a car, although more than 40 percent said they'd be willing to pay as much as the cost of a radio for automatic belts. In contrast, more than 90 percent said they had heard of airbags and 76 percent had accurate information about them. Favorable opinions about airbags outweighed the unfavorable, but there were concerns about inadvertent inflation, loss of control or impeded vision after inflation, and cost. Only a third said they would be willing to pay as much for airbags as the cost of an AM/FM stereo radio/cassette player — roughly equivalent to DOT's cost estimate. While airbags clearly were favored over automatic belts, the public's willingness to pay a price close to the manufacturers' offer had yet to be established.

In its upscale market, Mercedes-Benz seemed to have little trouble selling its expensive combination of driver-side airbag and belt tensioner. Ford's early experience with their much lower priced cars was different during 1986 and 1987. By February 1987 only 455 Tempos and 294 Topazes had been sold. A sales push managed to raise the totals to 1,014 and 439, respectively, by May 1. Dealers' attitudes toward airbag-equipped cars seemed to be negative, especially since they had to be specially ordered. CEO Donald Petersen had already said that Ford was committed to offering full, frontal airbags. He now took command of the sales effort, raising Ford's production capacity for driver-side airbags from 12,000 in 1986 to 36,000 in 1987 and writing letters to all Ford and Lincoln-Mercury dealers stressing the need for support of the airbag program. In May the price of airbags was temporarily reduced from $815 to $295. Helen Petrauskas believes that none of these steps really eliminated the skepticism about airbags as much as the media stories about drivers surviving severe crashes with airbags (see Chapter 6). [144]

The climate for occupant protection was changing in other ways. Manual belt use was up to 39 percent in NHTSA's 19 city survey during the first half of 1986; in states with mandatory belt use laws it was 46 percent. A year later belt use was up to 42 percent.[145] A series of surveys by the Insurance

142. DOT, NHTSA, 49 CFR Part 571, [Docket No. 74-14; Notice 50] FMVSS; Occupant Crash Protection; Final Rule, 52 *Federal Register*, March 30, 1987, pp. 10098.
143. Suzanne Loux, et. al., *National Understanding and Acceptance of Occupant Protection Systems*, SRA Technologies, Inc. Alexandria VA, July 1986, DOT HS 807 025.
144. Interviews with Roger Maugh and Helen Petrauskas; Graham, op. cit., pp. 204-206; Status Report, October 4, 1986, pp. 1-2, and November 8, 1986, pp. 1, 6, 11.
145. *Status Report*, May 30, 1987, p.3 and December 5, 1987, p. 6.

Institute for Highway Safety showed that initial increases in belt usage seen immediately after MULs were passed was followed by later declines. Use was greater in states where enforcement was "primary," i.e., did not depend on another violation, and where it was vigorous. But by the end of 1986 only 8 of 25 states with MULs had primary laws.[146] There seemed to be initial evidence that MULs were producing lower injury and death rates, but both the Highway Loss Data Institute, an affiliate of IIHS, and NHTSA reported in September and October 1988 that insurance data showed that airbags made no real difference in insurance injury costs.[147]

On the other hand, the small groups of cars with driver-side airbags were beginning to accumulate some experience. Reports from the GAO fleet, from police cars retrofitted with airbags, and from Mercedes-Benz, both in Europe and the United States, showed that the airbags deployed appropriately. Injuries were nonexistent, minor, or, very occasionally, unavoidable.[148] But the experience was still not credible statistically. In the absence of clear evidence, insurers took differing approaches toward premium discounts. Early in 1986 Nationwide reduced its premiums for injuries to occupants by 40 percent for full, frontal airbags, 25 percent for driver-side airbags, and 10 percent for automatic belts. On the other hand, Government Employees Insurance Company (GEICO) was giving a 30 percent discount for any kind of automatic protection.[149] By late 1987 the Insurance Institute for Highway Safety noted that most auto insurers had automatic restraint discounts, frequently at the same rate for both belts and airbags. The Insurance Service Office, filing rates on behalf of many companies, gave 30 percent discounts for both full, frontal airbags and automatic belts, but only 20 percent for driver-side airbags.[150] Insurers did not distinguish between detachable and nondetachable automatic belts in spite of strong evidence from the Insurance Institute for Highway Safety that detachable automatic belts, such as those provided by General Motors and Chrysler, were much less likely to be used than the motorized, nondetachable belts in Fords, Toyotas, and Nissans.[151]

James Burnley became Secretary of Transportation late in 1987, after Elizabeth Dole was named Secretary of Labor. At his confirmation hearing he told the Senate Commerce Committee: "It's very clear that while we have a great many seat belt laws... rule 208, the passive restraint rule is going to be fully implemented."[152] At a subsequent meeting with the board of directors of the Insurance Institute for Highway Safety, Burnley challenged auto insurers to encourage auto buyers to choose airbags and other safety options. General Robert McDermott, the CEO of USAA, a major auto insurer, announced in April

146. See, for example, *Status Report*, February 1, 1986, pp.1-2; June 28, 1986, pp.1, 6; October 4, 1986, pp. 1, 5, 6; and December 13, 1986, pp. 1,5,6.
147. *Status Report*, May 12, 1986, pp. 1, 6, 7; August 23, 1985, pp. 1-2; September 7, 1986, pp. 1,4; September 17, 1988, p. 6; October 15, 1988, pp. 4-5.
148. *Status Report*, August 10, 1985, pp. 1-3; April 26, 1986, p.4; April 16, 1988, pp. 4-5.
149. *Status Report*, February 1, 1986, p. 5.
150. *Status Report*, October 17, 1987, p. 2.
151. *Status Report*, June 27, 1987, pp. 1, 7; November 21, 1987, pp. 1-3.
152. *Status Report*, December 5, 1987, p. 3.

1988, that, as a direct consequence of that challenge, the company would give a $300 "safety bonus" to members (i.e., policyholders) who bought airbags as optional equipment and also grant a 60 percent discount on first party injury premiums for cars with airbags. At about the same time State Farm dropped its resistance to anticipating claims experience and announced a 40 percent discount for cars equipped with both airbags and automatic belts (a combination then not available), a 20 percent discount for driver-side airbags, and a 10 percent discount for automatic belts.[153]

Although Ford, Chrysler, and even General Motors had told both NHTSA and Congress that they were planning to supply driver-side airbags in massive numbers, no American auto company had yet committed to airbags as standard equipment. In May 1988 Lee Iacocca, the CEO of Chrysler, smallest of the "big three," stole a march on Ford and made that announcement. It was widely reported by the television networks and in the press, and Chrysler amplified that coverage with full-page ads in major newspapers. Iacocca had been a bitter opponent of airbags when he was president of Ford in the 1970s and he had reaffirmed that stance in his best-selling autobiography. Now Chrysler ads were headlined: "Who says you can't teach an old dog new tricks?"[154] The next month Ford announced that it would be the first domestic manufacturer to make airbags standard equipment, for both the driver and the front seat passenger in 1989 Lincoln Continentals. By the following model year, airbags would be standard in 11 of Ford's lines.[155] By the end of 1988, the Insurance Institute for Highway Safety reported, based on its survey of carmakers and airbag suppliers, that production of cars with driver-side airbags would jump from 480,000 in the 1989 model year to 3.3 million in the 1990 model year. Auto manufacturers were beginning to report receiving fan mail from customers who thought their lives had been saved, or serious injury avoided, by airbags.[156]

The official end of the regulatory battle for airbags passed almost unnoticed except by a few interest groups. On April 1, 1989 because a sufficient proportion of the population was not covered by seat belt use laws that met NHTSA's standard, the automatic occupant restraint rule would go into effect for all 1990 passenger cars.[157] Thanks to the maneuvering of the agency and most safety advocates, and the leadership role taken by Ford, the automatic restraints installed in cars were increasingly likely to be airbags.

Summary

The new Reagan Administration had given every sign that automobile manufacturers were finally going to win their struggle against mandates for passive restraints and airbags. Under the combined slogans of deregulation and financial relief for an ailing automobile industry, the administration did delay

153. *Status Report*, April 16, 1988, pp. 1-3.
154. *Wall Street Journal*, May 19, 1988; New York Times, May 20, 1988.
155. *Status Report*, July 9, 1988, pp. 1, 7.
156. *Status Report*, December 3, 1988, pp. 1, 3, 9-11.
157. *Status Report*, April 22, 1989, p. 6.

the phase-in of the automatic occupant protection standard and then tried to completely rescind it. But the rationale that Administrator Peck gave for the standard's rescission — that manufacturers would equip almost all cars with detachable automatic belts, which might not be used more than manual belts — was dismissed as arbitrary and capricious by the Supreme Court.

Although voters seemed to accept the ideology of deregulation championed, in somewhat different ways, by both the Carter and Reagan administrations, they were also showing increasing concern about highway safety. Starting with Tennessee in 1978, every state had passed an automobile child restraint law by 1985, most of them during Reagan's first term. The movement against drunk driving, spearheaded by Mothers Against Drunk Driving, led to many state laws and, in 1985, to the federal Uniform Minimum Drinking Age Act. Surveys of car buyers found serious concerns about the safety of cars. This changing climate of opinion strengthened the positions of safety engineers at both Mercedes-Benz and Ford, who believed that airbags, which they thought had great safety potential as "supplemental restraint systems" to manual seat belts, might also have great sales potential. So Ford and Mercedes-Benz responded positively to Peck's efforts to save the airbag industry from the complete extinction that might have resulted from a rescission of the automatic restraint standard.

Even before the rescission, the airbag industry was facing disaster because of the decision of all manufacturers to use automatic — mostly detachable — seat belts to meet automatic occupant protection performance standards. In spite of his quick acceptance of the effectiveness of airbags, Peck believed that the Safety Act's requirement to enact performance standards left him no way to explicitly require airbags. Instead, he resorted to jaw-boning and the use of federal contracts, which allowed a residual airbag industry to survive. The Supreme Court, however, was apparently not restrained by the concept of performance standards. One of the reasons why it struck down the rescission was that NHTSA had paid no serious attention to the possibility of an airbag-only standard; another was that NHTSA had not seriously considered the possibility of requiring nondetachable automatic belts. Both of these reasons were worded in terms of specific designs, rather than performance terms, although they could have been rephrased in performance terms.

The new team at DOT, led by Elizabeth Dole, was faced with a Supreme Court decision that would require it to overcome apparently insuperable hurdles to reinstate the rescission, in an environment marked by a recovering auto industry and the public's greater interest in safety. The rule that Mrs. Dole issued was the single most influential decision in the history of airbag regulation. It combined an automatic protection standard with its potential rescission if enough states passed seat belt use laws — something that DOT said would provide more immediate safety benefits — along with incentives for driver-side airbags. This led, on the one hand, to intense competition between the auto industry and the insurance industry about the details of state seat belt legislation, and, on the other hand, to collaboration between them on driver-side airbags. The result of the competition sparked by Dole's decision was the

passage of many state seat belt laws in fairly short order after years of unsuccessful efforts. But, thanks to the work of insurers and consumer safety groups, most of the laws did not meet DOT's standards and did not allow direct, i.e., primary, police enforcement. This last limitation reduced the laws' effectiveness, as was soon shown by IIHS research.

Dole's decision did lead *both* to a large number of seat belt use laws as well as to the requirement for automatic restraints. As we shall see, the laws did significantly increase belt use, and airbags very quickly became the automatic restraint of choice. This was the result that critics of the "trapdoor" said should have been required in the first place. If this was Dole's ultimate intention, she has never said so.

Could Dole have achieved mandatory belt use in a more direct way, one that might have been more effective nationally and explicitly emphasized the importance of airbags and seat belts working together? She had the power to propose a new federal highway safety standard under the Highway Safety Act, as Secretary Volpe had once planned to do and as Gregory had once proposed to Coleman. The Highway Safety Act had been amended in 1976, eliminating the requirement that states comply with every uniform standard. Still, introducing MULs into the uniform standards might have been a prelude to proposing stronger federal legislation. Although the regulatory record shows that Dole and her team were aware of these possibilities, they were dismissed with the argument that the either/or approach gave a greater incentive for the passage of MULs (to try to avoid the requirement of automatic restraints!).

The collaboration between Ford and IIHS, along with its insurance industry supporters, on extending the driver-side airbag credit was facilitated by NHTSA's suggestion that such an extension would probably be granted if both manufacturers and insurers agreed that the action had safety benefits. It may seem surprising that insurers like Allstate, which had for so long battled carmakers in a public relations campaign for airbags, and State Farm, which had taken the battle all the way to the Supreme Court, were now willing to accept Ford's good faith representations in petitioning for extension of the credit. But by the time this alliance was struck, it was clear that there was little chance state laws would meet DOT's rescission deadline. At the same time, manufacturers did not have the resources to design both automatic belts and airbags in time to meet the phase-in calendar. Although automatic belts had far less consumer appeal than airbags, at their initial prices driver-side airbags sold well only in the highest priced cars. So insurers were confident that circumstances were finally forcing Ford, for one, to behave rationally and support the superior safety technology of airbags. These same circumstances, lubricated by NHTSA's extension of the driver-side airbag credit, led the rest of the automobile industry to follow Ford's lead, first making driver-side airbags available as options and then as standard equipment.