

## How a small White House agency stalls life-saving regulations

By [Scot J. Paltrow](#) Filed Oct. 29, 2015, 3 p.m. GMT



FATAL ENCOUNTER: Clark Biddle, here in a photo with his wife Betty held by their daughter Sally Cress, was killed in a backover accident in a restaurant parking lot earlier this year. REUTERS/Jay LaPrete

The little-known Office of Information and Regulatory Affairs can delay, rewrite or kill rules mandated by Congress, and as the case of requiring rearview cameras on cars shows, it often uses that power.

COLUMBUS, Ohio – But for a small, little-known White House agency, Melissa Helcher might not have killed Clark Biddle in a Columbus, Ohio, parking lot on a cold February day this year.

The 24-year-old Helcher had just eaten lunch with her two children at an O’Charley’s restaurant and was backing her 2012 Ford Fusion sedan out of a tight space. Biddle and his wife, Betty, both 88 and a couple since ninth grade, were making their way across the lot toward a high-school reunion lunch.

Helcher, looking over her right shoulder and through the rear windshield, didn’t see the Biddles coming from the other direction as she eased her car out. Clark Biddle had just enough time to push Betty out of the way before Helcher’s car knocked him over.

Thirty-six hours later, Clark Biddle was dead from the brain injuries he received when he hit the pavement.

Biddle’s death, Helcher said, “is something I live with every day.” The only thing that could have prevented the accident, in her opinion, would have been a rearview camera in her car.

Helcher’s car and many others made in 2012 probably would have come from the manufacturer with rearview cameras as standard equipment if a law signed by President George W. Bush in February 2008 had been implemented, as the law specified, in 2011.

It wasn’t. The reason rests with the Office of Information and Regulatory Affairs (OIRA). This White House agency was established in 1980 and given broad powers by executive order during the anti-regulation fervor of President Ronald Reagan’s first term. Its job is to vet proposed regulations to be enforced by the executive branch. With a staff of about 45 people, it has the power to delay, weaken or even kill any such rule.

As Reuters found, OIRA sometimes exercises that power, with potentially lethal consequences.

When Bush signed the rearview camera law, an average of at least one child and an unknown number of elderly, disabled and other people were killed per week in backover accidents, according to KidsAndCars.org, a Kansas City, Missouri, group that promotes child safety in and around vehicles.

Under the law, the National Highway Transportation Safety Administration (NHTSA) drafted a requirement that auto makers install cameras as standard equipment. Cameras would be phased in starting in 2012 – the model year of Helcher’s car – so that by 2014, all cars, SUVs, pickup trucks and minivans would come with them.

NHTSA sent its draft rule to OIRA (pronounced oh-EYE-rah) for vetting before the law’s Feb. 28, 2011, deadline for implementation. The proposal then spent three years ping-ponging between the agencies as OIRA balked at it, sat on it for months at a time and repeatedly demanded that NHTSA conduct more testing of cheaper alternatives.



TIGHT SPOT: Melissa Helcher was pulling out of a parking space in the lot of this

O'Charley's restaurant in Columbus, Ohio, when her car struck Clark Biddle. REUTERS Photo/Jay LaPrete

"While rules are delayed, anything good the rule does won't be done."

Lisa Heinzerling, Georgetown University Law School professor and former EPA official

OIRA staff, according to NHTSA officials, were hostile to it from the start. Jim Simons, director of NHTSA's office of regulatory analysis and evaluation, said that in one meeting, an OIRA staffer blamed parents for backover accidents, saying, "How could anybody run over their own kid?"

The agency, he said, was "just having us go back and do things over again." The additional testing "wasn't going to make a hill of beans of difference," he said. "They were coming up with stuff to make us delay the rule."

He and others who have dealt with OIRA said the agency has an institutional bias against regulation. That bias, they said, is reinforced by the agency's requirement that regulations be assessed in terms of costs and benefits expressed in dollars and cents.

So while the cost to industry of installing rearview cameras could be easily quantified, the benefit of a life saved or the cost of anguish and suffering from a life lost was much harder to tally.

#### OTHERS TO BLAME

In an interview, OIRA Administrator Howard Shelanski declined to comment specifically on the rearview camera rule. He said that his agency acts as quickly as possible when vetting rules and that its main job is to circulate them among other agencies to ensure they don't conflict with existing regulations or policies. "Nobody ... wants a single more person to get hurt, to get sick," he said. Other agencies, he said, often are to blame for slow responses to OIRA requests for additional research and testing. Delays also occur because "our objective is to help make rules better," he said.

Jim Tozzi, who as deputy administrator of the Office of Management and Budget in 1980 played a key role in establishing OIRA, said the agency serves a necessary function. Imposing too many onerous rules "has huge economic costs which translate into lack of competitiveness," he said, adding that once adopted, regulations are difficult to get rid of, even if they have unintended harmful consequences.

But as Lisa Heinzerling, a Georgetown University Law School professor and former Environmental Protection Agency official, said, delays carry costs, too. "While rules are delayed, anything good the rule does won't be done," she said. "If that good thing is saving lives, that won't be done."

Among other potentially life-saving regulations OIRA has held up or weakened in recent years:

- In 2011, the Occupational Safety and Health Administration sent to OIRA a draft regulation to protect workers from silica dust, common in many industries and a known cause of cancer and deadly silicosis. The regulation would cut by 50 percent the allowable exposure to the dust, ban certain work practices and give workers regular medical testing. OSHA has estimated that the regulation would save "nearly 700 lives" and prevent 1,600 new cases per year.

OIRA released the draft back to OSHA in August 2013 with few changes, but required OSHA to hold another long comment period and public hearings. OSHA has yet to produce a final draft, which OIRA will review before it is adopted.

- In October 2009, the Environmental Protection Agency (EPA) sent to OIRA a draft regulation for handling coal ash, a product of coal-fired power plants that contains arsenic, lead, mercury and other toxins. The regulation was prompted by a series of incidents in which containment ponds failed, sending billions of cubic feet of coal ash into rivers. The final version wasn't adopted until December 2014, and then only after it was watered down. OIRA, siding with industry and state governments, nixed the EPA's original proposal that coal ash be designated a "hazardous waste," subject to strict handling rules. Instead, at OIRA's insistence, the final version classified coal ash as "solid waste," similar to household garbage. OIRA also reduced or eliminated other proposed safety requirements.

- In May 2010, the EPA sent to OIRA a proposed regulation that would create a list of possibly hazardous "chemicals of concern," based on reports from chemical makers, and require manufacturers to disclose chemicals used in their products. The chemical industry resisted. OIRA held up the rule for more than three years, until September 2013, when the EPA withdrew it. The EPA said the regulation wasn't needed because it already had developed plans to deal with more than 80 chemicals.



TAKING TIME: OIRA Administrator Howard Shelanski said rules are sometimes delayed in order to make them better. REUTERS/The White House/Handout

EPA Administrator Gina McCarthy declined to comment on specific regulations. Of OIRA, she said: “They make sure we’re thinking outside of our own views.”

As part of the Office of Management and Budget, OIRA falls under the direct control of the president, who has the power to intervene in the rule-making process.

President Obama at any time could have forced implementation of the rearview camera rule. Activists, members of Congress and his own transportation secretary, Ray LaHood, pleaded with him to do so.

At the same time, the auto industry was pushing back against the rule as financially onerous -- the same auto industry that was only beginning to recover from the crisis that had prompted a government takeover of General Motors Co. Congressional Republicans, too, were hammering the president for what they said was job-killing over-regulation. How much the industry pushed back is hard to determine. Under a revised 1993 executive order from President Bill Clinton, OIRA must disclose records of a review, including correspondence, as soon as the relevant rule is adopted or killed and identify any changes it made. But OIRA rarely makes such disclosures because Obama, like his predecessors, has allowed it to ignore transparency requirements. Federal courts have ruled that the judiciary has no authority to enforce an executive order.

In an email response to questions, a White House spokesman said: “With the rearview camera rule, certain components within the White House held discussions with the Department of Transportation and other stakeholders that focused on maximizing both safety and effectiveness.”

Only after a federal lawsuit was filed to end the delay did the Transportation Department in March last year announce approval of the final rule. The phase-in period began this year. By the 2017 model year, 40 percent of new cars must have the cameras. All cars must have them in 2018 -- four years later than would have been the case had the rule taken effect when Congress intended.

“Every model year that you delay, you lose chances of preventing those accidents,” said Simons, now retired. “The most lives saved per year is when every car has a camera. Every year that you lose in doing that means more death.”

#### BUREAUCRATIC BRAKES

On the evening of Oct. 20, 2002, Greg Gulbransen, a pediatrician in Oyster Bay, New York, returned home from work, ran into his house to peek in on his sleeping two-year-old son, Cameron, and went back outside to move his wife’s SUV. Gulbransen put the vehicle into reverse, checked the side-view mirrors and looked over his shoulder. He saw nothing and began backing up. That’s when he killed his son. He didn’t know that Cameron had awakened and followed him outside.

Gulbransen said that beyond his own grief, he had an obligation “as a pediatrician and father to do good” by trying to help save others from similar tragedies. He soon had become a leading voice of a growing movement to require rearview cameras in cars.

Since 2000, 1,185 children have been killed in backovers, according to KidsAndCars.org. The actual number is probably much higher, said Janette Fennell, founder and president of the group, because many state and local agencies don’t report accidents on private property, where many backovers occur, or don’t collect accurate data.

From 2008 through 2011, an average of 232 people a year, including 95 children age 14 or younger, were killed in backovers, according to an April 2014 NHTSA report. The agency’s data show that most often the driver is a relative of the victim.



GRIEVING FATHER: Greg Gulbransen, a pediatrician in Oyster Bay, New York, helped lead the push for requiring rearview cameras in cars after he killed his own son in a backover accident in 2002. REUTERS/Lucas Jackson

More than a dozen tests showed that a child stood a far better chance of survival behind vehicles with rearview cameras than with mirrors or sensors.

Gulbransen teamed up with KidsAndCars.org and other groups to hold rallies across the country and pressure members of Congress to act.

It worked. In 2007, lawmakers introduced a bill that would require the Department of Transportation to adopt a regulation specifying a method “to detect areas behind the motor vehicle to reduce death and injury resulting from backing incidents, particularly incidents involving small children and disabled persons.”

The regulation would include technical specifications for auto makers to follow. “Such standard may be met by the provision of additional mirrors, sensors, cameras, or other technology,” the bill stated. The rule was to be adopted by Feb. 28, 2011.

It easily passed both houses of Congress. On Feb. 28, 2008, President Bush signed into law the Cameron Gulbransen Kids Transportation Safety Act.

The law ordered the Transportation Department to do research to determine the most effective method for preventing backover accidents. Transportation Secretary LaHood and his NHTSA administrator, David Strickland, embraced the rule, according to current and former DOT officials. Both declined to comment.

At NHTSA’s testing facility in East Liberty, Ohio, technicians began running simulations using drivers in cars equipped with various configurations of mirrors, electronic sensors, or rearview cameras. Over and over again, drivers, not told of the specific purpose of the tests, backed out of parking spaces where testers had placed a 36-inch-tall corrugated plastic cutout of a child in the “kill zone” behind the vehicle. “Timmy,” the testers called him.

By late 2008, more than a dozen tests showed that Timmy stood a far better chance of survival behind vehicles with rearview cameras than he did with mirrors or sensors, according to NHTSA documents and staff. By 2012, NHTSA had conducted more than 100 such tests.

In the tests, 93 percent of vehicles with ultrasound sensors took out Timmy, compared to between 30 percent and 67 percent for those with rearview cameras, depending on the size of the video screen and where it was mounted, according to NHTSA.

Based on those results, NHTSA drafted its rule to require rearview cameras in all cars, SUVs, vans and pickup trucks by the 2014 model year.

The Transportation Department sent a draft of the rule to OIRA for initial review in August 2010. In November, OIRA approved the rule and sent it back to the department. Any changes OIRA made to the rule were not disclosed.

On Dec. 7, 2010, the DOT released its proposed rule for 60 days of public comment, after which it sent the rule back to OIRA for additional review.

Then, on Feb. 25, 2011 – just three days before the deadline set by the Kids Transportation Safety Act – the department announced that it needed to reopen the comment period and evaluate more data. It said it now expected to adopt a final rule by Dec. 31, 2011.

It was able to do that because of a loophole in the law: Adoption of the rule could be delayed indefinitely, provided the transportation secretary formally notified relevant congressional committees why the DOT needed more time.

Lawmakers often include such provisions in laws requiring new regulations.

## Stuck at the office

Largely because of OIRA's demands and delays, the regulation requiring rearview cameras in all new cars takes effect four years later than when Congress intended.

Date	What happened
Feb. 28, 2008	Cameron Gulbransen Kids Transportation Safety Act signed into law
Aug. 17, 2010	Proposed Department of Transportation rule goes to OIRA
Nov. 30, 2010	OIRA sends proposed rule back to DOT, demands further testing
Dec. 7, 2010	DOT publicly announces proposed rule; opens comment period
Nov. 16, 2011	DOT sends proposed rule back to OIRA
June 20, 2013	DOT withdraws rule after it is with OIRA for 19 months, tells Congress it will have final rule by January 2015
Sept. 25, 2013	Public Citizen Litigation petitions federal appeals court to order DOT to adopt rule
Dec. 25, 2013	Proposed rule goes back to OIRA
March 31, 2014	OIRA officially sends approved rule back to DOT, which later that day announces rule has been officially adopted

On the very day of the DOT's announcement, Transportation Secretary LaHood sent such a letter to House Energy and Commerce Committee Chairman Fred Upton and three other lawmakers. In it, LaHood said that based on comments received already, "We anticipate that a significant amount of analysis, additional vehicle testing, and testing with human subjects will be required."

That was the first of at least five letters LaHood sent to Congress over the next couple of years to extend the deadline as the rule was tossed back and forth between the agencies, languishing with OIRA for months at a time -- including one 19-month stretch.

LaHood, a Republican and seven-term congressman from Illinois, had surprised the auto industry and consumer groups after his 2009 appointment as he backed regulations to limit texting while driving and, against industry opposition, promote truck safety.

People who worked for LaHood and NHTSA chief Strickland said both men strongly supported the camera requirement and wanted it adopted quickly. "Ray LaHood felt very passionately about this rule for safety reasons," said a former aide to the secretary.

LaHood bristled at having to continually take public responsibility for the delays, these people said, but he considered it unseemly for a department secretary to criticize a White House agency.

As the first deadline passed, NHTSA officials began a series of meetings with OIRA staff. From the start, according to Simons and other DOT officials, the OIRA people were skeptical of the necessity of rearview cameras and continually pressed for cheaper alternatives and demanded more testing.

"They believed 'I can just turn around and look out my back window. Do I really have to have a camera?'" said a DOT official who attended the meetings.

Another quoted an OIRA staffer as saying at one of these meetings: "I'm a good driver. There's no way that I would ever back up on my child."

At OIRA's insistence, NHTSA did more tests on ultrasound sensors, which trigger an alarm when they detect an object. The tests came up with the same result as before, Simons said. Fabric absorbs the sound waves the sensors use; the sensors failed to detect clothed objects behind vehicles 85 percent of the time. What's more, Simons said, sensors cost more than cameras, and while OIRA staff promoted them, the industry had never proposed using them.

Auto makers, too, were trying to throw up roadblocks.

When Congress passed the Kids Transportation Safety Act, the industry publicly expressed enthusiasm. “This industry is 100 percent behind this legislation, and we’re committed to using these initiatives to further enhance child safety in and around motor vehicles,” said Dave McCurdy, then president of the Alliance of Automobile Manufacturers, in an article in the Detroit News.

But in private PowerPoint presentations to OIRA and letters to the agency, reviewed by Reuters, the alliance complained that the regulation would result in “significant additional cost per vehicle.” It also said rearview mirrors were adequate to meet the law’s requirements because many backover accidents occurred when children ran or cycled behind a car from the side.

Auto makers initially estimated that under the rule, the cost would exceed \$200 per camera. When NHTSA adopted the rule in 2014, it said the actual cost per camera would be between \$132 and \$142 for vehicles that did not already have dashboard monitors, and \$43 for cars that did.

NHTSA researchers hauled out Timmy the test dummy again to test the scenarios the industry described. And again, Timmy proved that cameras were superior.

Through it all, Simons and other DOT officials said, OIRA remained unconvinced.



ULTIMATE POWER: U.S. President Barack Obama, here announcing the nomination of Anthony Foxx (left) to replace Ray LaHood as transportation secretary, could have intervened at any time to direct OIRA to approve, alter or reject the rearview camera rule. REUTERS/Larry Downing/Files

“There was no way for us to estimate the value of a parent’s loss in a case like this.”

Jim Simons, retired director of NHTSA’s office of regulatory analysis and evaluation

OIRA’s method of evaluating a new regulation presented another obstacle. The agency traditionally used cost-benefit analysis, expressed in dollars and cents. That method became even more rigorous under Cass Sunstein, a longtime friend of President Obama from their teaching days at the University of Chicago Law School who was appointed to head the agency in 2009.

Sunstein is well-known for his work in behavioral economics. In his scholarship, he has propounded that rigorous methods are needed to remove emotional biases from decision-making.

It fell on Simons to do the analysis for the camera rule. “The problem was that our cost-benefit analysis never showed it to be cost-effective,” Simons said.

Simons and others involved in the process said Sunstein seemed sympathetic to the regulation. In one meeting, Simons said, the OIRA chief wondered aloud whether there was a way to come up with the dollar-denominated cost of parents’ anguish to tip the balance.

But, Simons said, “there was no way for us to estimate the value of a parent’s loss in a case like this.”

NHTSA sent Simons’s report to OIRA in November 2010. It contained a plea to make an exception: “The emotional well-being of the extended family members, friends, and other associates of the injured is not included in the cost-benefit analysis. ... [T]here can be an even greater emotional cost when a driver injures their own child or a child for which the driver is responsible.”

However sympathetic Sunstein was to the rule, “OIRA’s staff is not as oriented to safety as they are the cost of regulations,” said Allan Kam, a former NHTSA lawyer.

In August 2012, Sunstein resigned. Now a Harvard Law School professor, he declined multiple requests for comment. Sunstein was succeeded by Boris Bershteyn, who served in a largely caretaker role until Shelanski’s appointment in early 2013.

Advocates for the rule turned their attention to the president, who can, at his discretion and in secrecy, direct OIRA to approve, kill or delay any regulation.

In a Feb. 2, 2013, letter to the president and first lady, Gulbransen pleaded with Obama to order OIRA to clear the regulation. “Unfortunately OMB [OIRA’s parent agency] is stalling while backover accidents are claiming approximately 2 toddlers every week,” he wrote. He said he never received a reply.

Joan Claybrook, head of NHTSA from 1977 to 1981 and then longtime president of Public Citizen, a nonprofit consumer-advocacy group, said that in a February 2013 meeting with LaHood, he suggested “that we call the chief of staff at the White House.”

Jan Schakowsky, a Democratic congresswoman from Illinois and a sponsor of the Gulbransen Act, said that on a March 15, 2013, flight with President Obama on Air Force One, she brought up the delays. “We’ve got to get this moving,” she said she told the president.

As she pulled out photos of children who had been killed in backovers, she said, the president said: “Believe me, I know. Ray LaHood has made it perfectly clear to me that this was important.”

Obama gave her no assurance that he would act, Schakowsky said.

LaHood sent his last delay letter to Congress on June 20, 2013, saying that his department would adopt a final rule by January 2015 – one month shy of three years after the original deadline. A few weeks later, he left his job – he had announced his resignation six months earlier – and was replaced by Anthony Foxx.

On Sept. 25, 2013, Public Citizen Litigation Group, an arm of Public Citizen, filed a lawsuit on behalf of Gulbransen, a mother who had seriously injured her three-year-old daughter in a backover accident, and three consumer and safety organizations. The suit asked the U.S. Second Circuit Court of Appeals in New York to order the Transportation Department to issue a regulation within 90 days.

The suit said that the multiple delays in adopting the rule came “at a significant cost in human lives.”

The court scheduled a public hearing for April 1, 2014.

On March 31, 2014 – the day before the hearing – OIRA approved the regulation. It was largely unchanged from the original, but with the phase-in period ending in 2018. Later that day, DOT announced that the regulation had been officially adopted. The hearing was canceled.

“They didn’t want to have to explain themselves in front of the Second Circuit,” said Public Citizen Litigation Group attorney Scott Michelman.

Shelanski and spokesmen for the White House and Transportation Department declined to comment on the timing of the decision to approve the regulation.

Through the long delay, some auto makers got ahead of the regulators. Honda Motor Co, for example, is now producing all Honda and Acura models with cameras as standard equipment. Others, including Ford Motor Co and GM, are putting cameras on more models as standard equipment while still offering them only as options on others.

So far this year, at least 41 children have been killed in backover accidents, according to KidsAndCars.org. How many of those accidents involved cars that would have had cameras if the Gulbransen Act had been implemented on schedule isn’t known.

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