

**ALL ABOARD! MAKING THE CASE FOR A
COMPREHENSIVE REROUTING POLICY TO REDUCE THE
VULNERABILITY OF HAZARDOUS RAILCARGOES TO
TERRORIST ATTACK**

ROSS C. PAOLINO*

Graniteville, South Carolina, two a.m. While most of Graniteville's residents are sound asleep in their homes, a Norfolk Southern Railway Company freight train is steadily approaching their small town. Graniteville's residents are oblivious to the abrupt devastation that will rouse them from their sleep within the hour. As three a.m.¹ approaches, a deafening explosion rocks Graniteville as the Norfolk Southern train collides with a parked train at a railroad crossing.² Although the collision derails three locomotives and sixteen railcars, it is the rupturing of a single tank car carrying chlorine gas that results in catastrophe.³ The ruptured chlorine tanker sends an estimated 11,500 gallons of toxic chlorine gas spewing into the air.⁴ The toxic cloud of chlorine gas ultimately leads to eight deaths, 630 injuries, and the evacuation of 5400 residents.⁵ After the accident, the neighborhoods surrounding Graniteville are uninhabitable for days.⁶

* J.D. Candidate 2008, The George Washington University Law School; Associate, The George Washington Law Review. I would like to extend a special thanks to Steven Roberts for without his help and expertise in the area of Homeland Security, this note would not be possible. I would also like to thank Professor Michael Allen, Stetson University College of Law, for his invaluable guidance throughout the writing process, as well as my parents, Jeffrey and Rosemary Paolino for their unconditional support. Please note the positions and views in this note are solely that of the author and do not represent the opinions of those who have provided their expertise in the subject matter.

¹ The collision occurred just before 3:00 a.m. on 6 January 2005. Environmental Protection Agency, *Norfolk Southern Graniteville Derailment*, Jan. 21, 2005, <http://www.epa.gov/region04/graniteville/index.htm> (last visited Dec. 5, 2007).

² Pierre Thomas, *Growing Potential for Hazmat Accidents*, Jan 7, 2005, <http://abcnews.go.com/WNT/story?id=393986&page=1>.

³ Rail Transportation Security, 71 Fed. Reg. 76,852 (Dec. 21, 2006) (to be codified 49 C.F.R. pts. 1520 and 1580) (discussing chemical accidents which provided the impetus for the proposed legislation).

⁴ S. 419 Amended, 2005–2006 Leg. (Ca. 2005), available at <http://www.kcra.com/download/2006/0524/9269062.pdf>.

⁵ Rail Transportation Security, 71 Fed. Reg. 76,852; NAT'L TRANSP. SAFETY BD., RAILROAD ACCIDENT REPORT, COLLISION OF NORFOLK SOUTHERN FREIGHT TRAIN 192 WITH STANDING NORFOLK SOUTHERN LOCAL TRAIN P22 WITH SUBSEQUENT HAZARDOUS MATERIALS RELEASE AT GRANITEVILLE, SOUTH CAROLINA JANUARY 6, 2005 at 1 (2005).

⁶ D.C. Councilmember Kathy Patterson, Chair, Committee on the Judiciary, Statement on Introduction of the Prevention in Hazardous Materials Transportation Emergency Act of

Every day, more than one million shipments of hazardous chemicals are transported throughout the nation's infrastructure; a large percentage of these chemicals are transported by rail and are prone to becoming airborne, and potentially deadly, in the event of an accident.⁷ Although the devastation in Graniteville was accidental, it illustrates the potential catastrophic human and economic losses that could result from a coordinated terrorist strike on a train transporting these chemicals.⁸ Despite the danger of an attack that could dwarf the fatalities of the September 11th attacks, and the known use of this devastating method of attack by terrorist insurgents in Iraq, the Federal Government has essentially done little to protect Americans from the dangers posed by these toxic chemicals.⁹

Unwilling to leave their citizens vulnerable while the Federal Government remains stagnant on the issue, state and local lawmakers have begun to consider legislation for rerouting trains carrying toxic

2005 at 3 (Feb. 1, 2005) [hereinafter Patterson Introductory Statement] (on file with author).

⁷ See H.R. 99, 110th Cong. § 2(1) (2007); Michael Pimentel, *The Preempt Bill: On Track Toward Addressing Rail-Related Terrorism?*, 32 TRANSP. L.J. 57, 63 (2004) ("Nearly half of the hazardous materials shipped in the U.S. move by rail. Sometimes these freight trains travel through densely populated urban areas, which creates the potential for a very serious accident. For instance, the New York City area had two million tons of hazardous materials travel through it on freight cars in 2004."); see also Thomas, *supra* note 2 ("Every day, sulphuric and hydrochloric acid, ammonia and chlorine are shipped by the ton via rail and truck. They are among the industrial chemicals used to manufacture everything from purified water to fertilizer, plastics and artificial turf used in stadiums. The chemicals are also lethal, capable of killing everyone in a small city in short order."); Matthew L. Wald, *Tighter Rule on Hazardous Railcargo Is Ready*, N.Y. TIMES, Dec. 14, 2006, at A1 ("Each year, the railroads carry 1.7 million shipments of hazardous materials, of which 100,000 are toxic chemicals prone to becoming airborne in an accident. About 80 percent of the shipments that can become poison gases are chlorine, for purifying water and other applications, or anhydrous ammonia, for fertilizer.");

⁸ See D.C. CODE ANN. § 8-1421(1) (LEXIS 2007); Patterson Introductory Statement, *supra* note 6 (arguing that a terrorist attack near the U.S. Capitol, using a chemical rail shipment, could result in thousands of deaths and \$5 billion in damages).

⁹ See PBS: *Toxic Transport* (PBS television broadcast June 6, 2006) [hereinafter *PBS: Toxic Transport*], transcript available at <http://www.pbs.org/now/transcript/226.html> ("I'm sorry to say since 9/11 we have essentially done nothing in this area [of chemical transportation security]. We've made no material reduction in the inherent security of our chemical sector. If a terrorist were to attack that sector, there is the potential for casualties on the scale or in excess of 9/11."—Richard Falkenrath, former deputy Homeland Security advisor to President George W. Bush, now currently serving as New York City's deputy commissioner for counter-terrorism). See also *infra* notes 20–21 and accompanying text.

chemicals away from urban population centers.¹⁰ The inherent problem with such legislation is the likely invalidation for violating the Commerce Clause of the U.S. Constitution, as well as preemption by existing federal law.¹¹ Despite such invalidation, it is entirely unacceptable to allow the American people to dangle in the cross-hairs of a very real and dangerous terrorist threat until the Federal Government acts decisively.

This article argues for the adoption of a system of petitionary exceptions, whereby a state or local government, through a petition to the Department of Homeland Security (DHS), can receive the authority to reroute trains carrying toxic chemicals away from densely populated urban areas until the Federal Government passes comprehensive legislation to protect the nation's railway infrastructure. Such a system would allow DHS to engage in a risk-based approach¹² in granting rerouting authority, thereby minimizing the effects on interstate commerce. Furthermore, DHS could remain consistent with the opinions of security experts in immediately eliminating the potential for a terrorist attack,¹³ yet still leave open the opportunity for federal action on the issue.

Part I of this article articulates the vulnerability of the Nation's railway infrastructure to terrorist attack and the inadequacies of the protections currently in place. Part II discusses the Washington, D.C. City Council's local efforts to combat the threat posed to hazardous railcargoes. Part III describes the actions of numerous localities in following the D.C. City Council's lead to protect their jurisdictions from terrorist attack, but also predicts the ultimate failure of these efforts on

¹⁰ See Robert H. Jerry, II & Steven E. Roberts, *Regulating the Business of Insurance: Federalism in an Age of Difficult Risk*, 41 WAKE FOREST L. REV. 835, 852 (2006) (citing D.C. CODE ANN. § 8-1421 (LEXIS 2007)) (discussing the Washington D.C. City Council's efforts to pass the Terrorism in Prevention in Hazardous Materials Transportation Emergency Act of 2005, which banned certain shipments of hazardous cargo from passing within a 2.2 mile radius of the U.S. Capitol).

¹¹ *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 669-70 (D.C. Cir. 2005).

¹² See U.S. DEP'T OF HOMELAND SEC., NATIONAL INFRASTRUCTURE PROTECTION PLAN 91 (2006) [hereinafter NATIONAL INFRASTRUCTURE PROTECTION PLAN], available at http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf (stating that a risk-based approach relies on the maxim that resources should be directed to the areas of greatest priority in order to enable the effective management of risk.).

¹³ See S. 1256, 109th Cong. (2005) (explaining that, according to security experts, rerouting is the only way to immediately eliminate the dangers posed by hazardous railcargoes).

various grounds. Part IV sets forth a system of petitionary exceptions to reduce the vulnerability of hazardous railcargoes to terrorist attack. Finally, Part V explains how this system of petitionary exceptions should ultimately constitute one layer of a multi-faceted and comprehensive policy to protect the Nation's railway infrastructure from terrorist attack.

I. The Vulnerability of the Nation's Railway Infrastructure

This section addresses the vulnerabilities of the U.S. rail infrastructure by examining the reality of the threat posed to the infrastructure by a terrorist attack, as well as the inadequacy of the safeguards currently in place to avert such an attack.

A. The Reality of the Threat

The greatest threat to the security of the American people is a terrorist armed with a chemical, biological, radiological, or nuclear weapon.¹⁴ History is riddled with examples of chemical catastrophes that, although accidental, provide a riveting example of the potential devastation of a chemical terrorist attack on American soil.¹⁵ Within only the past few years, accidents involving chemical railcars have killed several people and prompted the evacuation of thousands more.¹⁶ Rail

¹⁴ See *Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 2 (2007) (testimony of Robert Mueller, Director of Federal Bureau of Investigation), available at <http://intelligence.senate.gov/070111/mueller.pdf> (indicating al-Qa'ida remains interested in acquiring chemical, biological, radiological, and nuclear materials to attack the United States); see also Pimentel, *supra* note 7, at 60 ("The use of biological or chemical weapons in the rail system is a real and not a theoretical threat.").

¹⁵ "On December 3, 1984, near Bhopal, India, highly toxic methyl isocyanate escaped from a chemical plant operated by Union Carbide India Ltd. The toxic cloud killed approximately 3,800 people and maimed thousands more." Jerry & Roberts, *supra* note 10, at 851; see also Union Carbide Corp., Chronology, <http://www.bhopal.com/pdfs/chrono05.pdf> (last visited Dec. 5, 2007).

¹⁶ In October 2007, railcars carrying spent nuclear fuel derailed outside the Shearon Harris nuclear power plant near Raleigh, North Carolina. *Nuclear Fuel on Derailed Train*, ST. PETERSBURG TIMES, Oct. 27, 2007, http://www.sptimes.com/2007/10/27/Business/Nuclear_fuel_on_derai.shtml. In August 2007, human error allowed a "runaway" chlorine railcar to barrel down the tracks outside Las Vegas, Nevada at speeds over fifty miles-per-hour. Edward Lawrence, *New Details About a Runaway Railcar Carrying Chlorine*, LAS VEGAS EYEWITNESS NEWS, Oct. 8, 2007, available at http://www.klas-tv.com/Global/story.asp?S=7185563&nav=menu102_1. In March 2007, a train carrying liquefied propane derailed and exploded, forcing evacuations in the town

shipments of toxic chemicals often pass through highly-populated urban areas and represent an extremely attractive target for terrorists.¹⁷ Although opponents to rerouting maintain that it only transfers the risk to other jurisdictions, the transferred risk would no longer be that of a terrorist attack, but rather the pre-existing risk of non-terrorist related transportation accidents.¹⁸

The U.S. Naval Research Laboratory estimates that nearly 100,000 deaths or injuries could result, within only thirty minutes, from an attack on a chemical railcar during a populated event on the National Mall.¹⁹

of Oneida, N.Y. William Kates, *Train Tank Cars Explode in Upstate N.Y.*, WASH. POST, Mar. 12, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/12/AR20070312200329.html?sub=AR>. In February 2007, the derailment of a train carrying hazardous chemicals prompted the evacuation of roughly 300 residents of Kanawha County, West Virginia. *Train Derailment Evacuates Community*, THE VALLEY'S FOX NEWS, Feb. 6, 2007, available at <http://www.whsv.com/news/headlines/5597976.html>. In January 2007, a runaway railcar carrying 30,000 gallons of highly toxic butyl acetate resulted in an explosion requiring the evacuation of nearby homes and businesses. Cassondra Kirby, *Human Error Likely Cause of 4 Runaway Cars—Railworkers May Have Forgotten to Set Brake*, LEXINGTON HERALD, Jan. 17, 2007, at A1. In January 2007, the derailment of a train transporting highly flammable chemicals outside of Louisville, Kentucky caused a toxic fire resulting in a state ordered evacuation of all homes within a one-mile radius and directions for residents to keep their windows shut and to take their pets inside. Theo Emery & Matthew Wald, *Chemical Train Derails in Kentucky: Evacuations Are Ordered*, N.Y. TIMES, Jan. 17, 2007, at A13. In March 2005, a leaking chemical railcar caused the evacuation of more than 6,000 people in Salt Lake City, Utah; in January 2006, the derailment of a train carrying chlorine gas resulted in nine deaths in Graniteville, South Carolina; in June 2004, the derailment of train carrying chlorine gas and sodium hydroxide resulted in forty-four injuries and three deaths; in August 2002, a malfunction during the offloading of chlorine gas from a railroad tanker resulted in sixty-seven injuries. S. 419 Amended, 2005–2006 Leg. (Ca. 2005).

¹⁷ S. 1256 § 1(b)(4).

¹⁸ See *infra* Part IV.C.1.

¹⁹ § 1(b)(9). The U.S. Naval Research Laboratory is not alone in its estimations:

A report by the Chlorine Institute found that a 90-ton rail tanker, if successfully targeted by an explosive device, could cause a catastrophic release of an extremely hazardous material, creating a toxic cloud 40 miles long and 10 miles wide. The Environmental Protection Agency estimates that in an urban area a toxic cloud could extend for 14 miles.

Id. § 1(b)(7)–(8). Even more troubling is that so little can be done in the moments following such an attack. Although the full extent of the damage is determined by a number of factors, such as the chemical involved, prevailing wind conditions and other environmental factors, initial first responders not wearing protective materials could be

Terrorist insurgents in Iraq have taken advantage of this potential for devastation by using explosives to weaponize chlorine tankers, killing, injuring, and sickening scores of innocent civilians.²⁰ American and Iraqi officials have stated that the use of weaponized chlorine gas as “dirty bombs” has brought fears of a new and deadly insurgent tactic with the potential to create mass casualties and large-scale panic.²¹

The recognition of using a railcar loaded with toxic chemicals as a weapon of mass destruction (WMD)²² is not new. In fact, the U.S. intelligence community recognizes that al-Qa’ida²³ is focused on targeting the U.S. rail infrastructure for an attack, particularly by using “hazardous material containers” to carry out the attack.²⁴ These concerns are further heightened by the FBI’s seizure of al-Qa’ida photographs of U.S. railroad engines, cars, and crossings.²⁵

overwhelmed by the toxic gases and die shortly after exposure. See Patterson Introductory Statement, *supra* note 6.

²⁰ Insurgents began weaponizing chlorine gas in early January 2007 in an effort to spread havoc and derail the U.S. military campaign in Iraq. Kirk Semple, *Suicide Bombers Using Chlorine Gas Kill 2 and Sicken Hundreds in Western Iraq*, N.Y. TIMES, Mar. 18, 2007, available at 2007 WLNR 5097748.

²¹ See, e.g., Charlie Savage, *Chlorine Attacks in Iraq Spur Warnings in U.S.: Water-Plant Vigilance Urged*, BOSTON GLOBE, July 24, 2007, in National Section; Richard A. Opiel, et al., *14 More American Servicemen Are Killed in Iraq, Most of Them by Makeshift Bombs*, N.Y. TIMES, June 4, 2007, at sec. A; Damien Cave, *Iraq Insurgents Use Chlorine in Bomb Attacks*, N.Y. TIMES, Feb. 22, 2007, available at <http://www.nytimes.com/2007/02/22/world/middleeast/22iraq.html?ref=world>; *Scores Choke in Poison Gas Attack*, CNN, Feb. 21, 2007, <http://www.cnn.com/2007/WORLD/meast/02/20/iraq.main/index.html>; Borzou Daragahi, *2 Are Killed by Another Bomb with Chlorine*, L.A. TIMES, Feb. 21, 2007, available at <http://www.latimes.com/news/nation/world/world/la-fg-iraq22feb22,0,6794172.story?coll=la-home-headlines>.

²² See Jerry & Roberts, *supra* note 10, at 853 (“A railcar loaded with ultra-hazardous material is similar to a warhead loaded with a chemical agent.”); see also S. 1256 § 1(b)(3) (“According to security experts, certain extremely hazardous materials present a mass casualty terrorist potential rivaled only by improvised nuclear devices, certain acts of bioterrorism, and the collapse of large occupied buildings.”).

²³ Al-Qa’ida is the official spelling of this terrorist organization. See U.S. Dept. of State, *Foreign Terrorist Organizations*, Oct. 11, 2005, <http://www.state.gov/s/ct/rls/fs/37191.htm>.

²⁴ Press Release, Federal Bureau of Investigation, FBI Issues Threat Communication on Al-Qaeda Targeting U.S. Railway Sector (Oct. 24, 2002) [hereinafter *FBI Press Release*], available at www.fbi.gov; see also S. 1256 § 1(b)(4); *supra* note 13 and accompanying text.

²⁵ *FBI Press Release*, *supra* note 24; see also Pimentel, *supra* note 7, at 68 (“[B]ecause aviation is now more protected and predictable, it is more likely terrorists will target the vulnerable rail transportation system.”).

Deadly attacks on rail systems throughout the world present the troubling reality that America's rail infrastructure is a vulnerable terrorist target. Since September 11th, al-Qa'ida has orchestrated attacks on the rail systems in Madrid, killing 191 people and wounding more than 1500; in London, killing fifty-two people and injuring 700; and in Mumbai, India, killing nearly 200 people and injuring hundreds more.²⁶ In the first few months of 2007 in New York City alone, "there have been [twenty-two] bomb threats and [thirty-one] intelligence leads related to subway attack plots."²⁷ The terrorist threat to the nation's rail infrastructure is obviously real—an attack using a weaponized chemical railcar would not only result in mass casualties, but also cripple the infrastructure. Given the reality of the threat, why is the attention and funding afforded to the nation's rail system equivalent to what one expert equates to "an embarrassment?"²⁸

B. The Inadequate Efforts to Combat the Threat

After the September 11th attacks, the Federal Government developed standardized and heightened security measures to protect U.S. airlines, airports, and maritime ports, yet did not afford proportional protection to the U.S. rail system.²⁹ Given the fact that attacks on the rail system are far more likely than attacks on the aviation infrastructure, largely because rail security has lagged behind other transportation infrastructures, the vulnerability of the U.S. rail system is particularly troubling.³⁰ A federal civil action brought by the State of Nevada in June of 2002 highlighted the problem.³¹ Nevada sued "the Department of

²⁶ Lieutenant Colonel Andrew S. Williams, *The Interception of Civil Aircraft over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73, 78 (2007); *PM Asks Pak to Walk the Talk on Terror*, HINDU TIMES, Oct. 4, 2006, available at 2006 WLNR 17238270.

²⁷ Carol Eisenberg, *Waking Up to Terror*, NEWSDAY, Mar. 7, 2007, at A3, available at 2007 WLNR 4376606.

²⁸ *Id.*

²⁹ The two pieces of comprehensive legislation passed in the wake of the September 11th attacks include the Maritime Transportation Security Act of 2002 and the Aviation and Transportation Security Act of 2002. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (2002); Aviation and Transportation Security Act of 2002, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended at 49 U.S.C. § 44917 (Supp. 2004)); see also S. 419 Amended, 2005-2006 Leg. (Ca. 2005) (indicating the absence of federal legislation dealing with the nation's railroads following the September 11th attacks).

³⁰ Pimentel, *supra* note 7, at 62.

³¹ *Id.* at 63-64.

Energy for failing to ‘address the environmental impacts and terrorism risks from tens of thousands of . . . rail . . . shipments of high-level radioactive waste through 44 states, 109 major cities and 703 counties with a combined population of 123 million.’”³²

On 11 March 2004, terrorists attacked commuter trains in Madrid, Spain, killing 191 people.³³ The attack on public commuter trains seemed to provide an impetus for the U.S. Congress finally to take the security of the nation’s rail infrastructure seriously. Shortly after the attacks in Madrid, the Senate Commerce, Science, and Transportation Committee approved the Rail Security Act of 2004.³⁴ Unfortunately, the legislation never left the Senate and never became law.³⁵ Recent efforts to reintroduce similar legislation, particularly the Rail Security Act of 2005, never advanced.³⁶ Legislation aimed at rerouting hazardous railcargoes away from highly populated areas has been introduced in the past two Congresses to no avail, and present motivations by Congress to enact greater security to the Nation’s transportation infrastructures, namely The Improving America’s Security Act of 2007³⁷ (which incorporates the Surface Transportation & Rail Security Act of 2007³⁸) will likely run aground by a veto by President Bush.³⁹ As it currently stands, the Nation’s rail system is the last major transportation

³² *Id.* (quoting *Nevada Suit Alleges Irregularities in EIS Are ‘Tantamount to Fraud,’* NUCLEAR WASTE NEWS, June 12, 2002).

³³ *Terrorism: Key Dates*, CNN, Sept. 27, 2006, <http://www.cnn.com/2006/POLITICS/09/27/elec.keydates.terrorism/index.html>.

³⁴ S. 2273, 108th Cong. (2004). The Rail Security Act of 2004 would have monumentally increased funding for rail security and required DHS to conduct vulnerability assessments of the U.S. rail infrastructure and to ultimately make recommendations for securing the infrastructure.

³⁵ *Id.*

³⁶ H.R. 2351, 109th Cong. (2005); 151 Cong. Rec. 63 E972 (2005).

³⁷ S. 4, 110th Cong. (2007).

³⁸ S. 184, 110th Cong. (2007). The Surface Transportation & Rail Security Act of 2007 has been incorporated into The Improving America’s Security Act of 2007 by amendment. DEMOCRATIC POLICY COMM., SUMMARY AND BACKGROUND OF THE IMPROVING AMERICA’S SECURITY ACT OF 2007 (Feb. 28, 2007), http://democrtas.senate.gov/dpc/dpc-new.cfm?doc_name=lb-110-1-34.

³⁹ Press Release, Rep. Edward J. Markey, House Committee Approves Rep. Markey Amendment to Re-Route Security-Sensitive Materials Around High Population, Urban Centers (Mar. 13, 2007), available at 2007 WLNR 4777959 [hereinafter Rep. Markey Press Release]; Nicole Gaouette, *Senate Anti-Terrorism Debate Starts with Turmoil*, LOS ANGELES TIMES, Mar. 1, 2007, available at <http://www.latimes.com/news/nation/world/washingtondc/la-na-terror1mar01,1,1162828.story?ctrack=1&cset=true>.

infrastructure without comprehensive legislation addressing the vulnerability to a catastrophic terrorist attack.⁴⁰

If unsuccessful congressional action were not enough, the Bush Administration has made no material effort to reduce the risk to trains carrying hazardous chemicals and continues to defend the status quo.⁴¹ As evidence of the current state of rail *insecurity* in the United States, *Pittsburgh Tribune* journalist Carl Prine was able to walk into rail yards and gain access to rail tankers containing some of the deadliest chemicals in the country.⁴² To understand the inherent vulnerability of a railcar carrying hazardous chemicals, one need only look at most graffiti-laden railcars and ask: “If an adolescent graffiti artist can get access to a railcar, can’t a terrorist?”⁴³ Richard Falkenrath, New York City’s Deputy Commissioner for Counter-Terrorism and President George W. Bush’s former Deputy Homeland Security Advisor, maintains that America has made no material reduction in the inherent vulnerability of its chemical sector.⁴⁴

Additionally, the failure to secure the railway transportation of hazardous chemicals is particularly astonishing, given the negligence actions brought in the wake of the 1993 World Trade Center (WTC) bombing.⁴⁵ Plaintiffs injured in the 1993 attack on the WTC alleged that the Port Authority of New York and New Jersey failed to implement proper security measures after becoming aware that the WTC was a highly symbolic target, vulnerable to a terrorist attack.⁴⁶ An interesting aspect of the litigation was not the claims for negligent security, but rather the apparent rise of a new tort for negligent failure to plan.⁴⁷ Under negligent failure to plan, a defendant is liable for failing to take reasonable steps to eliminate or diminish known or reasonably

⁴⁰ See *FBI Press Release*, *supra* note 24; see also S. 1256 § 1(b)(4), 109th Cong. (2005); *supra* note 13 and accompanying text.

⁴¹ P.J. Crowley, *Get on the Right Track*, CENTER FOR AM. PROGRESS, Dec. 14, 2006, http://www.americanprogress.org/issues/2006/12/rail_security.html.

⁴² Rep. Markey Press Release, *supra* note 39.

⁴³ Crowley, *supra* note 41.

⁴⁴ See *PBS: Toxic Transport*, *supra* note 9; see also S. 1256 § 1(b)(10) (“The Federal Government has made no material reduction in the inherent vulnerability of hazardous chemical targets inside the United States.”).

⁴⁵ *In re World Trade Ctr. Bombing Litig.*, 776 N.Y.S.2d 713 (N.Y. Sup. Ct. 2004) (alleging negligent security caused injuries suffered in the wake of the 1993 World Trade Center bombing).

⁴⁶ *Id.*

⁴⁷ *Id.* at 467–74.

foreseeable risks that could ultimately cause harm.⁴⁸ Although there is scant case law on the tort of negligent failure to plan, after the events of September 11th, acts of terrorism on American soil can no longer be dismissed as improbable. Evidence that terrorists are interested in using chemical-laden railcars as potential WMDs, paired with the Federal Government's failure to provide comprehensive and adequate security to the nation's railcars, creates a recipe for enormous liability in the post-9/11 world.⁴⁹

On 15 December 2006, DHS proposed new rail regulations for the transportation of hazardous materials, designed to strengthen the security of hazardous cargo traversing the nation's railroads.⁵⁰ The new regulations require heightened physical security at rail yards; better communication, coordination, and security awareness during movements; and fewer delays during the transportation of hazardous chemicals. Nonetheless, the new regulations still leave open the possibility for attack, because they do nothing to actually reduce the amount of chemical railcars traveling through the heart of the nation's most densely populated cities.⁵¹ Although welcomed, the new regulations fall short of what many cities are demanding and what numerous security experts maintain as the only immediate method of eliminating the inherent danger of chemical railcars as WMDs: rerouting.⁵²

⁴⁸ See Ken Lerner, *Governmental Negligence Liability Exposure in Disaster Management*, 23 URB. LAW. 333, 341-45 (1991) (discussing the liabilities for negligent failure to plan).

⁴⁹ See *supra* notes 19-29 and accompanying text.

⁵⁰ Press Release, Dep't of Homeland Sec., DHS Targets High Risk Hazardous Materials in Transit (Dec. 15, 2006), available at http://www.dhs.gov/xnews/releases/pr_1166200220343.shtm.

⁵¹ Crowley, *supra* note 41; see Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276 (Dec. 28, 2006) (to be codified at 6 C.F.R. pt. 27); Rail Transportation Security, 71 Fed. Reg. 76,852 (Dec. 21, 2006) (to be codified 49 C.F.R. pts. 1520 & 1580); Hazardous Materials: Enhancing Rail Transportation and Security for Hazardous Materials Shipments, 71 Fed. Reg. 76,834 (Dec. 21, 2006) (to be codified at 49 C.F.R. pts. 172 & 174).

⁵² Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276; Rail Transportation Security, 71 Fed. Reg. 76,852; Hazardous Materials: Enhancing Rail Transportation and Security for Hazardous Materials Shipments, 71 Fed. Reg. 76,834; see also Tony Quesada, *New Hazardous Materials Transport Rules "Don't Help" Cities*, AM. BUS. DAILY, Dec. 25, 2006, [http://www.mlive.com/business/ambizdaily/bizjournals/index.ssf?;S.1256 § 1\(b\)\(12\), 109th Cong. \(2005\)](http://www.mlive.com/business/ambizdaily/bizjournals/index.ssf?;S.1256%5B1(b)(12),109th%20Cong.(2005).).

II. Frustrations over Federal Inaction in Protecting the Vulnerabilities of Hazardous Railcargoes to Terrorist Attacks Motivate Washington, D.C. to Take Action

This section discusses the motivations behind Washington, D.C.'s efforts to enact an ordinance rerouting hazardous railcargoes to prevent the catastrophic effects of a terrorist attack. This section also examines the reasoning of the U.S. Court of Appeals for the D.C. Circuit in preventing the enforcement of this rerouting ordinance.

A. The D.C. City Council Finds the Status Quo Unacceptable

In order to better allocate terrorism-prevention funding to high-risk targets and facilities, DHS compiled a list of hypothetical "worst case" scenarios. At the top of the Department's list was the potentially mammoth death toll resulting from a chlorine railcar explosion.⁵³ Federal agencies realize this danger, yet the few existing regulations in place remain focused on safety, not security, and will not prevent the use of a chlorine railcar as a WMD.⁵⁴

Confronted by the dangers of a post-9/11 world and the perceived failure of the Federal Government to adequately address the rerouting of hazardous chemicals away from highly populated areas, the Washington, D.C. City Council (D.C. Council) felt compelled to take action to protect its citizens, businesses, and visitors.⁵⁵ The D.C. Council, led by Councilmember Kathy Patterson, passed the Terrorism Prevention in

⁵³ Kara Sissell, *DHS Scenarios Include Chlorine, Refinery Attacks*, CHEMICAL WK., Mar. 23, 2005, <http://chemweek.com/inc/articles/t/2005/03/23/052.html>.

⁵⁴ See 68 Fed. Reg. § 14,514 (2003); *supra*, note 40. For example, in line with the newly proposed DHS rail security regulations requiring increased tracking of chemical railcars, the Dow Chemical Company recently announced the "Dow Chemical Company Railcar Shipment Visibility Initiative"—an advanced communications network aimed at enhancing supply chain security and tracking of rail-bound hazardous chemical shipments by using Global Positioning Systems. *Dow Chemical, CHEMTREC Launch New Track and Trace Program for Chemicals*, SUPPLY & DEMAND CHAIN EXECUTIVE, Mar. 21, 2007, available at [http://www.sdexec.com/web/online/FulfillmentLogistics-News/Dow-Chemical--CHEMTREC-Launch-New-Track-and-Trace-Program-for-Chemicals/29\\$9318](http://www.sdexec.com/web/online/FulfillmentLogistics-News/Dow-Chemical--CHEMTREC-Launch-New-Track-and-Trace-Program-for-Chemicals/29$9318). The system will allow Dow to pinpoint the locations and conditions of its chemical railcars and allow for better coordination with emergency responders in the case of an accident. *Id.* While Dow's efforts should be recognized, this monitoring system is arguably aimed primarily at increasing the efficiency of emergency response, not preventing the attack from occurring in the first place.

⁵⁵ Patterson Introductory Statement, *supra* note 6.

Hazardous Materials Transportation Emergency Act of 2005⁵⁶ (D.C. Act), becoming the first local jurisdiction prohibiting the rail or truck transportation of hazardous materials through highly populated urban areas.⁵⁷

B. Swift Opposition Jeopardizes the D.C. Act

The D.C. Council's action was immediately challenged. CSX Transportation, Inc. (CSX), a rail transporter of hazardous materials, filed for an injunction to prevent the enforcement of the D.C. Act.⁵⁸ CSX alleged, inter alia, that the D.C. Act violated the Commerce Clause of the U.S. Constitution and was preempted by the Federal Railroad Safety Act (FRSA),⁵⁹ the Hazardous Materials Transportation Act (HMTA),⁶⁰ and the Interstate Commerce Commission Termination Act.⁶¹ Essentially, the issue before the D.C. Circuit was "whether the [D.C. Council] could use its police powers to temporarily prohibit rail transportation of hazardous materials within D.C. until the Federal Government had more thoroughly addressed the threat of terrorist attack on trains and put sufficient safeguards in place."⁶² Although the U.S. District Court for the District of Columbia denied the injunction, the D.C. Circuit ultimately granted the injunction, opining that the FRSA preempted the D.C. Act.⁶³

The FRSA authorizes a state to enact its own railroad safety laws until the Department of Transportation (DOT) enacts a regulation that covers the subject matter of the state law.⁶⁴ Under DOT rule HM-232,⁶⁵

⁵⁶ No. 16-43, 52 D.C. Reg. 3048 (Feb. 15, 2005) (preventing the transportation of hazardous chemicals by rail or truck within a 2.2 mile radius of the U.S. Capitol, a corridor termed the "Capital Exclusion Zone").

⁵⁷ CSX Transp., Inc. v. Williams, 406 F.3d 667, 669 (D.C. Cir. 2005).

⁵⁸ *Id.* at 669-70.

⁵⁹ Federal Railroad Safety Act, 49 U.S.C. §§ 20101-21311 (2000).

⁶⁰ Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5127 (2000).

⁶¹ Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101-11908 (2000).

⁶² Elizabeth A. Moore, Note, *Federalism v. Terrorism: Damaging D.C.'s Defense Against Chemical Attacks in CSX Transportation, Inc. v. Williams*, 74 GEO. WASH. L. REV. 771, 773 (2006) (citing CSX Transp., Inc. v. Williams, No. Civ.A. 05-338EGS, 2005 WL 902130, at *1 (D.D.C. Apr. 18, 2005), *rev'd*, 406 F.3d 667 (D.C. Cir. 2005)).

⁶³ CSX Transp., 406 F.3d at 673-74; *see also id.* at 773-74 (The FRSA, originally enacted in 1970, promotes safety and aims to reduce accidents within the U.S. railroad infrastructure.).

⁶⁴ Moore, *supra* note 62, at 775 (citing 49 U.S.C. § 20106).

transporters of hazardous chemicals are required to formulate written security plans addressing security risks and ultimately put the plans into operation.⁶⁶ Because such plans would likely address the en route security of hazardous chemicals, the D.C. Circuit held that HM-232 likely covered the subject matter of the D.C. Act.⁶⁷ Regardless of whether HM-232 covered the subject matter of the D.C. Act, however, the FRSA provides a safe harbor provision allowing states to enact stricter laws than existing DOT or DHS regulations if the state law is “(1) ‘necessary to eliminate or reduce an essentially local safety or security hazard,’ (2) was ‘not incompatible’ with HM-232; and (3) did ‘not unreasonably burden interstate commerce.’”⁶⁸ The D.C. Circuit held that the D.C. Act did not address an “essentially local safety or security hazard,”⁶⁹ “appeared to be incompatible with HM-232,”⁷⁰ and unreasonably burdened interstate commerce.⁷¹ Given the absence of the three conditions needed for protection by the FRSA safe harbor provision, the D.C. Circuit held that the D.C. Act was preempted by the FRSA.⁷²

⁶⁵ Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials, 68 Fed. Reg. 14,510 (Mar. 25, 2003) (codified at 49 C.F.R. pt. 172). “The purpose of HM-232 is to ‘address security risks related to the transportation of hazardous materials’ by ‘motor vehicle, railcar, or freight container.’” Moore, *supra* note 62, at 774 (citing 49 C.F.R. § 172.800 (2003)).

⁶⁶ Moore, *supra* note 62, at 774 (quoting 68 Fed. Reg. at 14,517) (“The security plan, at a minimum, must include three elements: (1) personnel security procedures such as background checks for those employees with access to hazardous materials; (2) procedures to ‘address the assessed risk that unauthorized persons may gain access to the hazardous materials’; and (3) ‘measures to address the assessed security risks of shipments of hazardous materials . . . en route from origin to destination.’”).

⁶⁷ *CSX Transp., Inc.*, 406 F.3d at 672.

⁶⁸ Moore, *supra* note 62, at 775 (citing *CSX Transp., Inc.*, 406 F.3d at 671).

⁶⁹ See *CSX Transp., Inc.*, 406 F.3d at 672 (quoting *Norfolk & W. Ry. Co. v. Pub. Util. Comm’n of Ohio*, 926 F.2d 567, 571 (6th Cir. 1991) (explaining the intent of the FRSA exception is to apply when local situations cannot be adequately addressed by uniform national standards)).

⁷⁰ See *id.* at 673 (noting that the D.C. Act is incompatible with HM-232 because “[t]he D.C. Act’s routing restriction does not allow a carrier operating within the Capitol Exclusion Zone to exercise the discretion expressly conferred by HM-232.”).

⁷¹ *Id.* at 671–72 (quoting 49 U.S.C. § 20106). Regarding the burden on interstate commerce, the court was concerned with the cumulative effect of a number of jurisdictions passing similar legislative bans, opining that “[i]t would not take many similar bans to wreak havoc with the national system of hazardous materials shipment.” *Id.* at 673.

⁷² *Id.*

The D.C. Circuit's ruling dealt a strong blow to the D.C. Council's efforts to protect its citizenry from a catastrophic terrorist attack using hazardous railcargoes. Despite the Federal Government's lackadaisical protection of this area of the infrastructure, the D.C. Circuit refused to accept the D.C. Council's valiant efforts to fill this security gap. The ruling that was expected to send ripples throughout the country, but achieved no such result.

III. Litigation over the D.C. Act Has Not Reached Its Finality, Yet Various Localities Are Already Taking Similar Action—What Does the Future Hold for These Ordinances?

This section examines the multitude of state and local governments that have entertained rerouting ordinances similar to the D.C. Act. Additionally, this section predicts the unenforceability of these ordinances on numerous grounds, namely federal preemption under the FRSA and the HMTA, as well as invalidation under the dormant Commerce Clause.

A. Numerous Localities Are Mimicking the Actions of the D.C. City Council

The CSX battle⁷³ will likely wage on for some time, yet it is explicitly clear that while the D.C. Circuit's opinion handed a defeat to the D.C. Council, it has not dissuaded a plethora of other state and local governments from embarking on similar legislation to block certain rail shipments of hazardous chemicals within their jurisdictions.⁷⁴ State and local governments, like the D.C. Council, are frustrated with the lack of comprehensive attention, protection, and funding given to the nation's rail infrastructure, compared to other transportation infrastructures, and have followed the D.C. Council's lead in taking matters into their own

⁷³ The D.C. Act was put on hold by the D.C. Circuit until the legality of the ban could be sorted out by the lower courts. Oral arguments pertaining to the legality of the D.C. Act were heard before U.S. District Court Judge Emmet Sullivan in late January 2007—the decision could take upwards of a year to be handed down. Kara Sisell, *Oral Arguments Heard in D.C. Hazmat Rerouting Case*, CHEMICAL WK., Jan. 31, 2007, available at 2007 WLNR 2946352; *CSX Argues Again Against Ban on Hazardous Materials in D.C.*, U.S. RAIL NEWS, Feb. 7, 2007, available at 2007 WLNR 3622220.

⁷⁴ Joe Fiorill, *D.C. Train Ban Remains on Hold While Other Cities Efforts Advance*, GOV'T EXECUTIVE, Aug. 11, 2005, <http://www.govexec.com/dailyfed/0805/081105gsn1.htm>.

hands.⁷⁵ To date, the list of state and local governments that have considered such legislation is extensive: Albany,⁷⁶ Baltimore,⁷⁷ Boston,⁷⁸ California,⁷⁹ Buffalo,⁸⁰ Chicago,⁸¹ Cleveland,⁸² Hershey,⁸³ Las

⁷⁵ See *Cities Tackle Chemical Transportation Security*, OMB WATCH, Aug. 8, 2005, [hereinafter OMB WATCH], <http://www.ombwatch.org/article/articlereview/2976/1/247?TopicID=1> (indicating local efforts to reroute hazardous chemicals arose out of inadequate action on behalf of the Federal Government). In 2005, TSA spent roughly \$4.5 billion on airline security compared to a meager \$150 million spent on rail security. P.J. Crowley, *Lax Rail Security Forces Cities to Act*, CENTER FOR AM. PROGRESS, Apr. 4, 2005, <http://www.americanprogress.org/issues/kfiles/b617031.html>. “[W]e move about 25 billion American riders every year as opposed to about 800 million on airplanes. And yet, we spend 80 times more on airline security than we do on buses, trains, subways.” *Meet the Press: Terrorism Strikes Again* (NBC television broadcast July 10, 2005) [hereinafter *Meet the Press*], available at <http://www.msnbc.msn.com/id/8471990/>.

⁷⁶ Wald, *supra* note 7.

⁷⁷ Crowley, *supra* note 75. In Baltimore, City Council Kenneth Harris sponsored the legislation. See OMB WATCH, *supra* note 75; Fiorill, *supra* note 74; Wald, *supra* note 7.

⁷⁸ The Boston ordinance, a near mirror image of the D.C. Act, would prohibit the transportation of hazardous materials within a 2.5 mile radius of Copley Square. City Councilmembers Stephen Murphy and Jerry McDermott, like the D.C. Council, cited federal inaction as a key factor in pursuing the legislation. See OMB WATCH, *supra* note 75; Mimi Hall, *Cities May Ban Trains with Chemicals—Some See Risk of Terrorist Attack*, USA TODAY, June 22, 2006, http://www.usatoday.com/news/nation/2006-06-22-chemical-trains_x.htm; David Wedge, *Hub Wants Hazmat Ban on Trains Rolling into City*, BOSTON HERALD, May 25, 2005, at A4; Wald, *supra* note 7.

⁷⁹ Wedge, *supra* note 78. See also S. Res. 419 Amended, 2005–2006 Leg. (Ca. 2005) (The bill would require the creation of a hazardous rail tank car database and prohibit the railway transportation of certain hazardous chemicals above certain threshold quantities.).

⁸⁰ Hall, *supra* note 78; Wedge, *supra* note 78; Wald, *supra* note 7.

⁸¹ Wald, *supra* note 7. The efforts of the D.C. Council motivated Chicago Health Committee chairman Ed Smith in an effort to create exclusion zones within 2.2 miles of the area of the city where the most dangerous forms of hazardous chemicals are transported. See Fran Spielman, *Expert: Reroute Dangerous Cargo—Hazmat Train Shipments are Threat to City, Alderman Told*, CHI. SUN-TIMES, June 28, 2005, at A16.

⁸² Wald, *supra* note 7. In Cleveland, Councilman Matthew Zone introduced legislation prohibiting the transportation of hazardous chemicals within the city unless a permit is issued by the city’s fire chief. Cleveland’s efforts are the not the first time the city has attempted to restrict the transportation of hazardous chemicals. Several years ago, regulations restricting truck shipments of hazardous chemicals were set into place. OMB WATCH, *supra* note 75; see also CLEV., OHIO, ORDINANCE 928–05 (Aug. 16, 2006), available at <http://www.ombwatch.org/homeland/Ord928.pdf>.

⁸³ Although there is no evidence that local officials have drafted legislation to prohibit the transportation of hazardous chemicals through their locality, there is an effort by The Pennsylvania Legislative Board of the Brotherhood of Locomotive Engineers and Trainmen Union, following an accident in Derry Township, PA, to secure rail legislation that will improve the security of Pennsylvania. Hershey Philbin Assocs., *Derry Township Accident Raises Concerns on Rail Security*, <http://www.hersheyphilbin.com/news/ble/070706.html> (last visited Dec. 5, 2007).

Vegas,⁸⁴ Memphis,⁸⁵ Minneapolis,⁸⁶ Philadelphia,⁸⁷ Pittsburgh,⁸⁸ and St. Louis.⁸⁹

B. Federal Preemption and Violations of the Commerce Clause Will Cause the Demise of Ordinances Similar to the D.C. Act

Although state and local governments have taken the admirable first steps in protecting their citizenry from the dangers posed by trains transporting hazardous chemicals, the likelihood of any such legislation withstanding the onslaught of litigation by the Federal Government and the Nation's railcarriers appears grim, at best. Although the litigation over the D.C. Act has not fully run its course, it seems inevitable that federal courts will strike down all of the state and local ordinances just as the D.C. Circuit attacked the D.C. Act, namely by relying on preemption under the FRSA, preemption under the HMTA or facial challenges under the dormant Commerce Clause.⁹⁰

1. *FRSA Preemption*

As discussed in Part II.B, the safe harbor provision of the FRSA allows a state or local government to enact more stringent legislation than existing DOT or DHS regulations related to railroad security if the legislation (1) is necessary to eliminate or reduce an essentially local safety or security hazard; (2) is not incompatible with a law, regulation, or order of the U.S. Government; and (3) does not unreasonably burden interstate commerce.⁹¹

Perhaps the D.C. Circuit reached the wrong conclusion in invalidating the D.C. Act, because the D.C. Act arguably fell within the

⁸⁴ Hall, *supra* note 78.

⁸⁵ Delen Goldberg & Mark Weiner, *Tracking CSX Troubles: Accidents Are Up Since Detour; So Is Concern About Hazardous Cargo in Urban Areas*, POST-STANDARD, Mar. 18, 2007, at A1, available at 2007 WLNR 5228756.

⁸⁶ *Id.*

⁸⁷ *Id.*; Crowley, *supra* note 75; Wald, *supra* note 7.

⁸⁸ Hall, *supra* note 78.

⁸⁹ Wald, *supra* note 7.

⁹⁰ See generally *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (invalidating the D.C. Act under the basis of preemption by the Federal Railroad Safety Act and the burden placed on interstate commerce).

⁹¹ 49 U.S.C. § 20106 (2000).

purview of the FRSA safe harbor provision.⁹² The contention that the D.C. Circuit reached the wrong conclusion rests on the premise that the D.C. Act qualified as an “essentially local safety or security hazard.”⁹³ Although the D.C. Circuit may have correctly identified Washington D.C.’s monuments, embassies, and buildings as national in *character*, the heightened terrorist threat that correlates with these symbolic targets is essentially a local concern because those who work and reside within the city are more vulnerable to a terrorist attack compared to citizens from other cities across the country. For example, as one of DHS’s seven “High Threat Target Cities,”⁹⁴ Washington, D.C. is considered by the insurance industry to be 100 times more likely than other cities to be the target of a terrorist attack.⁹⁵ Additionally, for nearly four years after the September 11th attacks, Reagan National Airport was the only airport in the entire United States that required all passengers on inbound or outbound flights to remain in their seats thirty minutes after take-off or before landing.⁹⁶

The Nation’s capital faces unique and localized terrorist threats after the events of September 11th. Despite the compelling argument of D.C.’s localized terrorist threat, however, it is highly unlikely that other federal courts would afford the protection of the FRSA safe harbor provision by holding that a state or local ordinance addresses an “essentially local safety or security hazard,” when the D.C. Circuit failed

⁹² Moore, *supra* note 62, at 778–82 (arguing, *inter alia*, the D.C. Act fits within the “essentially local” exception of the FRSA).

⁹³ *Id.* at 779 (quoting Maryland Three Airports: Enhanced Security Procedures for Operations at Certain Airports in the Washington, D.C., Metropolitan Area Flight Restricted Zone, 70 Fed. Reg. 7150, 7152–7153 (Feb. 10, 2005) (codified at 49 C.F.R. pt. 1562) (“The D.C. Act does address a local safety or security hazard. ‘Because of its status as home to all three branches of the Federal Government, as well as numerous Federal buildings, foreign embassies, multinational institutions, and national monuments of iconic significance, the Washington, D.C., Metropolitan Area continues to be an obvious high priority target for terrorists.’ Uniform national security standards are not specific enough to adequately confront the unique security threats that the nation’s capital faces.”)).

⁹⁴ Friends of the Earth, D.C. Environmental Network—Terrorist Threat: Dangerous Cargo, <http://www.foe.org/camps/reg/dcen/cargo/> (last visited Apr. 4, 2007).

⁹⁵ Press Release, D.C. Dep’t of Ins., Sec., & Banking, DISR Reaches Agreement with ISO on Terrorism Loss Costs (Feb. 14, 2003), available at http://disr.dc.gov/disr/cwp/view,a,11,q,578224,disrNav_GID,1632.asp.

⁹⁶ Moore, *supra* note 62, at 779–80 (citing Spencer S. Hsu & Sara Kehaulani Goo, 30-Minute Airport Rule to Be Lifted, WASH. POST, July 14, 2005, at A1).

to accept Washington, D.C.'s vast monuments, embassies, buildings, and infrastructure as "essentially local."⁹⁷

2. HMTA Preemption

Although the D.C. Circuit did not expressly hold that the HMTA preempted the D.C. Act, the concurring opinion of Judge Karen Henderson emphasized the HMTA as likely grounds for invalidation of the act.⁹⁸ A state law is preempted under the HMTA if (1) it is impossible to comply with the requirements of state law and federal regulations enacted under the HMTA or by DHS, or (2) the state law requirement becomes an obstacle to carry out federal regulations enacted under the HMTA or by DHS.⁹⁹ According to Judge Henderson, the D.C. Act created an obstacle to carrying out Federal Regulation HM-232.¹⁰⁰

Under HM-232,¹⁰¹ each railcarrier may create individual plans for en route security. Judge Henderson maintained, however, that the D.C. Act subsumed a railcarrier's ability to carry out HM-232, because the D.C. Act created a complete moratorium on the transportation of hazardous chemicals within a 2.2 mile radius of the U.S. Capitol.¹⁰² Because new state and local ordinances, like the D.C. Act, will also prohibit the rail transportation of hazardous chemicals through densely populated urban corridors, it is likely that these ordinances will also be incompatible with HM-232, thereby leading to their invalidation under the preemption doctrine.¹⁰³

⁹⁷ See *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 672 (D.C. Cir. 2005) (arguing the need to protect the U.S. Capitol from terrorist attack is of "quintessentially national concern"); 49 U.S.C. § 20106 (2000).

⁹⁸ *CSX Transp., Inc.*, 406 F.3d at 674–75 (Henderson, J., concurring).

⁹⁹ *Id.* at 675 (citing 49 U.S.C. § 5125(a)).

¹⁰⁰ *Id.*

¹⁰¹ Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials, 68 Fed. Reg. 14,510 (Mar. 25, 2003) (codified at 49 C.F.R. pt. 172).

¹⁰² *CSX Transp., Inc.* 406 F.3d at 675.

¹⁰³ The likely preemption of local ordinances rerouting trains carrying hazardous cargo by HMTA is also supported by the dispute over prohibitions regarding the transportation of spent nuclear fuel. See generally, e.g., *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103 (3d Cir. 1985), cert. denied, 475 U.S. 1013 (1985) (finding local ordinance prohibiting the importation of spent nuclear fuel to be preempted by HMTA).

3. *Invalidation under the Dormant Commerce Clause*

In addition to the Commerce Clause's affirmative function of authorizing congressional actions, it also serves a negative function by limiting state and local government regulation.¹⁰⁴ This "negative" function is commonly known as the "dormant" Commerce Clause—a principle holding that state and local laws are unconstitutional if the law places an undue burden on interstate commerce.¹⁰⁵ If Congress legislates in a particular area, a state or local law that conflicts with it is struck down under federal preemption.¹⁰⁶ Under the dormant Commerce Clause, however, even if Congress has not regulated a particular area and allowed its commerce power to lay "dormant", state and local laws can still be struck down as unconstitutionally burdening interstate commerce.¹⁰⁷ Accordingly, even in the absence of congressional action to reroute hazardous railcargoes, state and local rerouting ordinances can still be struck down as unconstitutional under the dormant Commerce Clause.

It is likely that federal courts will find state and local ordinances similar to the D.C. Act to be burdensome to interstate commerce, and therefore unconstitutional.¹⁰⁸ The D.C. Circuit was particularly concerned with the practical and cumulative impact resulting from numerous cities passing legislation similar to the D.C. Act.¹⁰⁹ The court

¹⁰⁴ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW—PRINCIPLES AND POLICIES 401 (2d ed. 2002)

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ The actuality that rerouting would affect less than five percent of chemicals transported by rail, *see infra* Part IV. C.3, presents an interesting question of whether a burden to interstate commerce actually exists at all, and whether such local ordinances governing rerouting would ultimately be struck down. *See Moore, supra* note 62, at 773 (arguing the D.C. Act did not unreasonably burden interstate commerce). A state law addressing a "legitimate local public interest" that allegedly burdens interstate commerce will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the punitive local benefits." *Id.* (quoting *Pike v. Bruce Church, Inc.*, 391 U.S. 137, 142 (1970)). A local law rerouting a chemical railcar to avert the catastrophic consequences of terrorist attack, that only affects such a small percentage of chemical railcargo, may not be unreasonable at all to some courts. *Id.* at 773 (arguing the D.C. Act's incidental burden on interstate commerce is not unreasonable).

¹⁰⁹ *CSX Transp., Inc., v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005). *See S. Pac. v. Ariz.*, 325 U.S. 761, 774–75 (1945) (The court struck down a state law limiting train lengths as unconstitutional. The court appeared to take the position that the state regulation put in place did very little to enhance safety, while creating a substantial burden on interstate commerce.).

maintained that various ordinances and state regulations restricting the transportation of hazardous chemicals through the nation's rail infrastructure would "wreak havoc."¹¹⁰ When the D.C. Circuit handed down its opinion, it cited only one regulation, similar to the D.C. Act, which was currently in the works.¹¹¹ With over a dozen additional jurisdictions considering similar bans only two years after the D.C. Council first enacted the D.C. Act, a federal court would be remiss if it did not see the plausible burden on interstate commerce in the wake of their enactments.¹¹²

IV. Federal Inaction Paired with Invalidation of State and Local Action Creates a Conundrum Leaving Chemical Railcargoes Throughout the Country Unprotected—Creating a Solution with a System of Petitionary Exceptions

This section sets forth a proposed system of petitionary exceptions designed to better combat the terrorist threat posed to hazardous railcargoes. This section begins with a discussion of the unique characteristics of the rail infrastructure in terms of security and then proceeds to examine the framework of the system of petitionary exceptions.

A. The Unique Characteristics of the Nation's Rail Infrastructure Call for an Equally Unique Plan

The Nation's rail infrastructure is expansive; each day, more than 550 freight carriers transport cargo over nearly 142,000 miles of track, while nearly 11.3 million passengers in thirty-five metropolitan areas use

¹¹⁰ *CSX Transp., Inc.*, 406 F.3d at 673. Peggy Wilhite of the Association of American Railroads further explains the interstate commerce issue that would possibly result from allowing state and local regulations to restrict the transportation of hazardous chemicals: "D.C. will do it, then Philadelphia will do it, then Miami will do it . . . and you will virtually shut down the transportation of hazardous materials in this country." *PBS: Toxic Transport*, *supra* note 9.

¹¹¹ *CSX Transp., Inc.*, 406 F.3d at 673 (citing S. Res. 419 Amended, 2005–2006 Leg. (Ca. 2005)).

¹¹² See Tony Quesada, *CSX Fights D.C.-Area Rail Buffer*, JACKSONVILLE BUS. J., Feb. 25, 2005, <http://www.bizjournals.com/jacksonville/stories/2005/02/28/story3.html?page=2> (Peter Fitzgerald, a business law professor at Stetson University College of Law opines on difficulty in D.C. being able to maintain the ordinance, given the strong nature of the Commerce Clause).

some form of rail transit.¹¹³ The rail infrastructure has multiple entry points, few barriers to access, and numerous transfer points; unlike the aviation infrastructure, which can be closely monitored through controlled checkpoints and points of entry, the rail infrastructure clearly creates greater difficulties from a security standpoint.¹¹⁴ The most practical manner to protect the Nation's rail infrastructure is by establishing "an overlapping, flexible, [and] multi-layered security regime."¹¹⁵ While the newly proposed DHS regulations¹¹⁶ provide a base for protecting the vulnerability of railcars transporting hazardous chemicals, the Federal Government must adopt a comprehensive rail strategy.¹¹⁷ Moreover, given the unique challenges presented by the vast interconnectivity of the infrastructure, the Federal Government should welcome and incorporate state and local efforts to fill gaps in the policy, particularly when it comes to rerouting.¹¹⁸

B. The System of Petitionary Exceptions

The Federal Government should enact a system of petitionary exceptions, whereby DHS would have the authority to allow state and local governments to reroute trains carrying hazardous materials in the face of apparent preemption and Commerce Clause conflicts. A state or local government would begin the process by petitioning DHS for rerouting authority. The petition would identify the hazardous cargoes currently transported through the locality; the unique threats and vulnerabilities posed to the locality by these cargoes; and alternate and viable rerouting options. Utilizing the existing anti-terrorism security

¹¹³ U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-557T, PASSENGER RAIL SECURITY: EVALUATING FOREIGN SECURITY PRACTICES AND RISK CAN HELP GUIDE SECURITY EFFORTS 5 (2006); *The Status of Railroad Economic Regulation: Hearing Before the H. Comm. on Transp. & Infrastructure*, 108th Cong. 1 (2004) (statement of Edward R. Hamberger).

¹¹⁴ See *Statement of Kip Hawley, Transportation Security Administration, Assistant Secretary: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs*, 109th Cong. 2 (2005) (statement of Kip Hawley), available at http://www.tsa.gov/assets/pdf/testimony_london_attacks_hawley_sept_21.pdf ("While commercial passenger aviation is a closed system that can be closely monitored at controlled checkpoints, passenger rail and mass transit are open systems without controlled checkpoints—hence, the security missions for those systems needs to be different.").

¹¹⁵ *Id.*

¹¹⁶ See *supra* notes 50–51 and accompanying text.

¹¹⁷ See Crowley, *supra* note 75 (describing the immense task of securing the nation's rail infrastructure and need for a credible national rail strategy).

¹¹⁸ See *id.*

framework, DHS would then determine whether rerouting is appropriate and accordingly grant or deny rerouting authority to the locality.

In the absence of comprehensive legislation addressing the security of the nation's railways, the dormant Commerce Clause will likely invalidate state and local laws which allegedly place an undue burden on interstate commerce.¹¹⁹ The dormant Commerce Clause is typically used to invalidate state and local laws that attempt to cover a problem that is national, not local, in scope.¹²⁰ The system of petitionary exceptions championed by this article challenges the maxims of the dormant Commerce Clause and the preemption doctrine. Because the vulnerabilities of trains carrying hazardous materials is a national security threat, it would traditionally be reserved as a matter for the Federal Government to handle under the dormant Commerce Clause. However, this note argues that until the Federal Government acts adequately and comprehensively, the threat is actually better combated at the local level.¹²¹

Critics of this system will likely argue that calling for state and local control of rerouting hazardous railcargoes is inconsistent with allowing DHS, a federal agency, to control which jurisdictions will receive rerouting authority. Moreover, if the Federal Government is unwilling to enact comprehensive rail security legislation, what impetus would it have to enact legislation giving DHS rerouting authority?

The subtlety of involving DHS as the final decision-maker, however, is necessary to sidestep a major culprit of federal inaction on this issue—the paralysis of Congress. A major reason for the failed national efforts to secure the nation's railways is that with regards to this particular section of our infrastructure, there appears to be no galvanized public support or vehement public opposition for action, thereby allowing the

¹¹⁹ See CHEMERINSKY, *supra* note 104, at 401 (“[E]ven if Congress has not acted—even if its commerce power lies dormant—state and local laws can still be challenged as unduly impeding interstate commerce.”). For a more detailed discussion of the dormant Commerce Clause and its implications, see Chemerinsky at 401–33.

¹²⁰ See *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1851) (holding the critical question in a dormant Commerce Clause analysis is whether the subject at issue requires uniform regulation on a national level, or diverse local legislation).

¹²¹ Prof. Erwin Chemerinsky describes a new model under which preemption should operate, which he calls “federalism by empowerment.” See Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74 (2005) (arguing for an alternative view of federalism that empowers government at all levels).

railroad lobby to maintain the status quo.¹²² Passing legislation to give DHS rerouting authority does not involve potential infringement on individual constitutional freedoms, and therefore is unlikely to stir up the stiff public opposition triggered by other post-September 11th legislation.¹²³ However, unless there is a large shift in public support behind rerouting legislation, Congress will allow the railroad lobby to maintain the current inadequate level of security to the infrastructure.¹²⁴ The danger in ceding to the railroad lobby until widespread public support amasses, however, is that such momentous shifts in public support for enhancing aspects of transportation security only arise in the wake of a terrorist attack or catastrophe.¹²⁵

The consequences of placing an overhaul of rail security on the congressional backburner, until a terrorist strike galvanizes public support behind the issue, are far too grave after the events of September 11th. By allowing DHS to constitute the final decision-maker in rerouting authority, state and local governments will become the catalyst for added security—rather than congressional action, symbiotically attached to the peaks and troughs of public opinion.

Before this system is set forth in further detail, it is important to note that exceptions from the reach of preemption and the Commerce Clause are common. State and local laws can create a burden on interstate

¹²² See Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 17 OR. L. REV. 339, 361 (2000) (arguing that legislative enactments are strongly correlated with public opinion).

¹²³ In the post-September 11th world, the enactment of comprehensive security legislation is often met with the consolation that Americans must give up certain conveniences and privacy to achieve a higher level of security. The reality of this situation creates a nexus, which ultimately requires heightened public support in order to enact comprehensive security legislation—unless Americans are willing to give up these conveniences and levels of privacy, the legislation will undoubtedly fail. See Josef Braml, *Rule of Law or Dictates of Fear: A German Perspective on American Civil Liberties in the War Against Terrorism*, FLETCHER F. WORLD AFF. Summer/Fall 2003, at 121 (“[T]he higher the fear, the greater the willingness to curtail liberty to protect safety.”). Legislation authorizing DHS as the final arbiter of rerouting requires no such support.

¹²⁴ See McAdams, *supra* note 122, at 361.

¹²⁵ See Pimentel, *supra* note 7, at 57 (criticizing the actions of nations to enhance its transportation security only in the wake of catastrophic attacks). Although public support exponentially expands for security legislation after a terrorist attack, reliance on this form of support creates an added danger because such support tapers off as the emotions of the attack wear off. See, e.g., Braml, *supra* note 123, at 119–21 (describing opinion polling after September 11th, which found citizens’ willingness to give up civil liberties for greater security, dissipated as time wore on).

commerce by violating the dormant Commerce Clause, yet remain constitutional if approved by Congress.¹²⁶ Congress has frequently given the states power to act on an issue of national concern through a combination of no preemption and affirmative Commerce Clause consent.¹²⁷ The primary examples of such congressional action on behalf of Congress are evident in the areas of prohibition and insurance regulation.¹²⁸

It is again worth noting the security environment in which a system of petitionary exceptions fits. The Bush Administration believes the security of the nation's rail infrastructure belongs in the hands of the Federal Government and not the states; however, the Federal Government's current system does not adequately protect the states, largely because the Federal Government will not consider rerouting opportunities.¹²⁹ The system advocated here would work from the existing DHS risk-based and risk management framework, combined with the proposed DHS rail security regulations, to create a systematic method of rerouting trains carrying hazardous materials away from highly populated urban areas.

¹²⁶ See CHEMERINSKY, *supra* note 104, at 429 (quoting *Western & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652–53 (1981)) (“If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.”).

¹²⁷ See *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985) (indicating the McCarran-Ferguson Act exempts the insurance industry from the restrictions of the Commerce Clause); see also *id.* at 884 (O’Connor, J., dissenting) (opining that Congress, through the McCarran-Ferguson Act, “explicitly suspended Commerce Clause restraints on state taxation of insurance and placed insurance regulation firmly within the purview of the several states”).

¹²⁸ See generally *id.* at 880 (majority opinion) (indicating the McCarran-Ferguson Act exempts the insurance industry from the restrictions of the Commerce Clause); *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652–53 (1981) (finding the McCarran-Ferguson Act removes, entirely, any restriction on a state’s power to tax the insurance business created by the Commerce Clause); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 431 (1946) (upholding the congressional approval of state taxes on out-of-state insurance companies, a practice otherwise unconstitutional); *Wilkerson v. Rahrer*, 140 U.S. 545, 562 (1891) (upholding the constitutionality of state laws restricting both the sale and importation of alcohol). Such congressional action has also gone beyond the realm of prohibition and insurance. See *Ne. Bancorp. v. Bd. of Governors*, 472 U.S. 159, 174 (1985) (finding congressional approval of state laws regarding the purchase of in-state banks by out-of-state holding companies acted as an exception to what would otherwise be considered a dormant Commerce Clause violation).

¹²⁹ *PBS: Toxic Transport*, *supra* note 9.

1. *Working from the Existing Risk-Based Framework*

The DHS primarily uses a risk-based framework to determine where to allocate anti-terrorism funds, and is “guided by a straightforward principle: *Resources must be directed to areas of greatest priority to enable effective management of risk.*”¹³⁰ The risk-based approach affords a great deal of flexibility in effectively responding to the actual terrorism threats the United States faces; instead of allocating funding to each locality or anti-terror category equally, DHS can afford more funding to areas that face a higher terrorism risk.¹³¹ Homeland Security Secretary Michael Chertoff explains:

[A risk-based approach means] . . . we look at where consequences . . . would be catastrophic, where the vulnerabilities would be, where the threats are. And that means we look at infrastructure, some of it can be where there’s population, some of it might be where there’s important electrical grids or important transportation hubs. So again, we want to be first, very focused and specific and use really disciplined analytic tools other than the traditional method of distributing packets of money across the country.¹³²

Therefore, under a risk-based approach, DHS allocates more funding to high-risk localities such as New York and Washington, D.C.¹³³ Aside from the risk-based approach to allocating anti-terrorism funding, DHS enhances the protection of the country’s critical infrastructures¹³⁴ through a similar framework called “risk management.”¹³⁵ Although DHS is

¹³⁰ NATIONAL INFRASTRUCTURE PROTECTION PLAN, *supra* note 12.

¹³¹ *Meet the Press*, *supra* note 75.

¹³² *Id.* For a more detailed account of the risk-based approach, see NATIONAL INFRASTRUCTURE PROTECTION PLAN, *supra* note 12.

¹³³ *Meet the Press*, *supra* note 75.

¹³⁴ See 42 U.S.C. § 5195(c)(e) (2000) (“[T]he term ‘critical infrastructure’ means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”).

¹³⁵ See NATIONAL INFRASTRUCTURE PROTECTION PLAN, *supra* note 12, at 4 (Risk management “establishes the processes for combining consequence, vulnerability, and threat information to produce a comprehensive, systematic, and rational assessment of national or sector risk.”). For a more detailed layout of the risk management framework,

criticized, at times, for the manner in which it allocates anti-terrorism funding under the risk-based approach,¹³⁶ it is important to note that the proposed system of petitionary exceptions uses this methodology as a template for a more nationalized and refined federal and state partnership, to better combat the national threat posed by hazardous railcargoes.

2. Utilizing Components from Proposed DHS Rail Security Regulations

The DHS used these risk-based methodologies in its proposed rail security regulations to identify geographic areas warranting heightened attention because of unique vulnerabilities to terrorism.¹³⁷ These forty-six geographic areas, designated as High Threat Urban Areas¹³⁸ (HTUAs), qualify for the enhanced security measures proposed by the new DHS rail security regulations, particularly the heightened reporting and shipping requirements for those railcarriers transporting hazardous materials.¹³⁹ The HTUAs include many major U.S. cities, such as Boston, Dallas, Los Angeles, Miami, New York City, and Washington, D.C.¹⁴⁰ Additionally, the HTUAs include a “buffer-zone”, providing protection for those cities and localities located within a ten-mile radius of the major city.¹⁴¹

As discussed in Part II.B, the newly proposed DHS rail regulations fail to address rerouting and do not adequately protect a railcar with

see U.S. DEP'T OF HOMELAND SEC., NATIONAL INFRASTRUCTURE PROTECTION PLAN—RISK MANAGEMENT FRAMEWORK (2006), available at http://www.dhs.gov/xlibrary/assets/NIPP_RiskMgmt.pdf.

¹³⁶ Kevin Bohn, *Homeland Security Grants Rile D.C., N.Y.C.: Feds Say Cuts Result from New Formula, Smaller Total Budget*, CNN, June 16, 2006, available at <http://www.cnn.com/2006/US/05/31/homeland.grants/index.html>.

¹³⁷ Rail Transportation Security, 71 Fed. Reg. 76,852, 76,861 (Dec. 21, 2006) (to be codified 49 C.F.R. pts. 1520 & 1580). In identifying the HTUAs, DHS considered the following variables: “(1) threat, or the likelihood of a type of attack that might be attempted; (2) vulnerability, or the likelihood that an attacker would succeed; and (3) consequence, or the impact of an attack occurring.” *Id.* In determining the total terrorism risk posed to a HTUA, DHS also considered, collectively, the asset-based risk and geographically based risk. *Id.*

¹³⁸ “Each HTUA consists of a city limit or combined adjacent city limits, plus a 10-mile buffer zone extending from the city border(s).” *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 76,886–76,887.

¹⁴¹ *Id.* at 76,861; 76,886–76,887.

hazardous material from the vulnerabilities of a terrorist attack; however, the regulations utilize the risk-based methodologies and create a strong foundation for a system of petitionary exceptions. Under this system, after state or local governments petition DHS for permission to reroute trains carrying hazardous chemicals, DHS can utilize the designations of HTUAs to aid in determining whether the petitioning locality faces a unique threat and vulnerability that warrants rerouting approval. For example, under this system, DHS would likely give rerouting authority to cities identified as HTUAs such as Phoenix, Boston, or Philadelphia, or other jurisdictions exhibiting unique vulnerability to terrorist attack. The DHS, however, would not cede such authority to smaller localities outside of an HTUA designation, where a terrorist attack on trains transporting hazardous chemicals is far less likely.¹⁴² Fred Millar, a former member of the Washington, D.C. local Emergency Planning Committee, provides additional support: “[With] all due respect to the citizens of Luray, Virginia, . . . you can’t believe too many terrorists spend their nights trying to figure out how to blow up a railcar in Luray, Virginia.”¹⁴³

C. Addressing the Opposition

This subsection addresses the primary arguments opposing a rerouting policy. Specifically, these arguments include risk shifting; the use of alternative transportation vehicles for hazardous cargoes; and the cascading effects of numerous rerouting ordinances.

1. *Does Rerouting Shift the Risk?*

Opponents of such a system will maintain that the rerouting of trains carrying hazardous materials merely shifts the risk to other cities and can actually create more danger because the added travel times increase the risk of accidents.¹⁴⁴ Such a contention is somewhat skewed. First, the rerouting of railcargo is not unheard of and can be accomplished safely. Specifically, before litigation over the D.C. Act, CSX Transportation

¹⁴² See *id.* at 76,886–76,887 (setting forth cities and localities designated as HTUAs).

¹⁴³ PBS: *Toxic Transport*, *supra* note 9.

¹⁴⁴ Sally Quinn, *Hell on Wheels*, WASH. POST, Mar. 12, 2006, at B8; see also PBS: *Toxic Transport*, *supra* note 9 (“If you reroute outside the big cities, you’re just gonna [sic] simply shift the risk to other cities.”—Peggy Wilhide, Association of American Railroads).

willingly rerouted or held hazardous railcargoes away from Washington, D.C. during national security events such as State of the Union addresses and Fourth of July celebrations.¹⁴⁵ While the D.C. Act is being litigated, CSX has begun “a voluntary, anti-terrorism detour of trains carrying hazardous material around Washington, D.C.”¹⁴⁶ Second, the ultimate focus of using a risk-based methodology to reroute hazardous cargoes is to remove the probability of catastrophic destruction that would result from a terrorist attack on a railcar in a densely populated urban area. By removing this risk from a populated area, the risk is naturally transferred elsewhere. Although the reality may be uncomfortable to swallow, the consequences of an attack on a chemical railcar in a small town dwarf the consequences of a similar attack in a major U.S. city.¹⁴⁷

Critics of rerouting proposals have cited an increase in rail accidents on the rail lines used for rerouting as evidence of the transferred risk.¹⁴⁸ Since CSX voluntarily rerouted hazardous railcargoes away from Washington, D.C., “an additional [thirteen] freight trains per day, carrying hazardous cargo,” travel through Syracuse and Central New York, contributing to eleven accidents, compared to no accidents before the voluntary rerouting plan began.¹⁴⁹ What becomes lost in translation is that once hazardous cargoes are rerouted, the population centers these cargoes traverse are no longer considered high-value terrorist targets.¹⁵⁰ The danger of an accident on these alternate lines is largely a product of the increased traffic on the aging rail infrastructure in these areas—a problem that can be solved by providing adequate funding to the nation’s rail infrastructure.¹⁵¹

¹⁴⁵ Memorandum from D.C. Councilmember Kathy Patterson, Chair, Comm. on the Judiciary, to fellow Councilmembers (Nov. 23, 2004) (on file with author).

¹⁴⁶ Goldberg & Weiner, *supra* note 85.

¹⁴⁷ It is important to keep in mind that the obvious goal of terrorist strike is to cause death on a large scale; therefore, although the risk is transferred to a less vulnerable and populated area, is the smaller locality still even an attractive terrorist target? *See also PBS: Toxic Transport, supra* note 9 (Fred Millar indicates the consequences of a chlorine release in a small town is far less than the consequences of a similar release in Washington, D.C.).

¹⁴⁸ Goldberg & Weiner, *supra* note 85.

¹⁴⁹ *Id.*

¹⁵⁰ *PBS: Toxic Transport, supra* note 9.

¹⁵¹ Goldberg & Weiner, *supra* note 85.

2. *Should Other Methods of Transportation Be Utilized to Move Hazardous Chemicals Through the Country?*

Other critics of rerouting maintain that these hazardous chemicals should be transported by other means, such as trucks.¹⁵² Removing hazardous cargo from trains and placing it on trucks merely compounds the problem and greatly increases the risk because of the higher probability of an accident.¹⁵³ Additional opponents of rerouting argue that the real solution is to replace these hazardous chemicals with safer chemicals.¹⁵⁴ Although this is a novel idea, the chemical industry lobby has vehemently opposed congressional attempts to require safer alternatives. Given that safer alternatives are not economically feasible, this possible solution has failed.¹⁵⁵ Even with the possibility of substituting safer chemicals, the heavy industry reliance on certain chemicals, such as chlorine for water purification, will not allow rapid substitution, thereby making chemical substitution an impractical solution to combat the terrorist threat.¹⁵⁶ Accordingly, rerouting is the first step to combat the threat to hazardous railcargoes because it is the simplest and most comprehensive way to combat the threat to hazardous railcargoes.¹⁵⁷

¹⁵² Steve Dunham, *Hazmats Ride Rails Alongside Commuters*, FREE LANCE-STAR, May 15, 2005, http://fredericksburg.com/News/FLS/2005/052005/05152005/171182/index_.html?page=1.

¹⁵³ Each year 3.1 billion tons of hazmat chemicals are transported throughout the country by truck, rail, pipeline, and water. AM. SOC'Y OF SAFETY ENG'RS, HAZARDOUS MATERIALS—SAFETY INFORMATION GUIDE (2006), available at <http://www.asse.org/newroom/docs/ASSEHazamtBrochurelores102506.pdf>. Forty-three percent of this hazmat tonnage is carried by truck. OFF. OF HAZARDOUS MATERIALS SAFETY RESEARCH & SPECIAL PROGRAMS ADMIN., HAZARDOUS MATERIALS SHIPMENTS (1998), available at <http://hazmat.dot.gov/pubs/hms/hmship.pdf>. Of an estimated 5000 hazardous spills during the past thirty years in Maryland, roughly 3500 took place on the highways, while only 217 occurred on the railways. *Id.*

¹⁵⁴ PBS: *Toxic Transport*, *supra* note 9.

¹⁵⁵ *Id.*

¹⁵⁶ Carl Prine, *No Consensus on Rail Shipment Regulations*, PITTSBURGH TRI.-REV., Jan. 15, 2007, http://www.pittsburghlive.com/x/pittsburghtrib/news/specialreports/s_48790.html.

¹⁵⁷ Quinn, *supra* note 144; see also PBS: *Toxic Transport*, *supra* note 9.

3. *Will Allowing State and Local Governments to Reroute Hazardous Railcargoes Create an Inefficient Cascading Effect?*

Perhaps the strongest argument of rerouting opponents is that allowing state and local governments to reroute hazardous railcargoes sets a dangerous precedent, resulting in copy-cat legislation that will ultimately bring a halt to the transportation of critical chemicals through the nation's rail system.¹⁵⁸ Although the argument seems plausible on its face, it amounts to nothing more than a misrepresentation. Allowing both DHS and individual localities to combat the vulnerabilities posed to hazardous railcargoes creates a federal-state partnership,¹⁵⁹ guarding against evils that exist in an exclusively federal or state approach.

The petitionary rerouting system advocated by this article employs DHS in a substantive role. Under the proposed petitionary rerouting system, localities can only receive rerouting authority after petitioning DHS. By giving DHS this ultimate rerouting authority, the system avoids inefficiencies and confusion that would result if each locality enacted its own rerouting legislation, thereby requiring rail shippers to remain cognizant of a multitude of varying rerouting legislations for different jurisdictions within the continental United States. Additionally, DHS's substantive role protects the Nation from the danger of local governments engaging in economic protectionism,¹⁶⁰ disguised in the

¹⁵⁸ *Judge Backs Ban on Hazardous Cargo*, Apr. 19, 2005, CNN.COM (on file with author). The opposition of certain politicians to rerouting should also be viewed with some degree of skepticism. Representative Steven C. LaTourette, R-Ohio and Representative Corrine Brown, D-Fla, both staunch advocates of the D.C. Act, received thousands of dollars in campaign contributions from CSX Transportation. Sean Madigan, *Hill Bill Aims to End District of Columbia's Interference with Toxic Rail Freight*, CONG. Q.—HOMELAND SEC. (May 4, 2005) (on file with author). Mr. LaTourette received nearly \$24,000 from the railroad industry during the 2005 campaign cycle. *Id.* Moreover, since 1998, CSX Transportation has given Mr. LaTourette \$6,500 and Ms. Brown \$15,000. *Id.*

¹⁵⁹ "Coordinated federal policy is necessary for protection of America's rail systems, including freight, passenger and commuter services." Pimentel, *supra* note 7, at 72.

¹⁶⁰ See Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, SAN DIEGO L. REV., May-June 1997, at 588 ("[A] per se invalid protectionist state statute will be defined as one that uses, manipulates, or substantially affects the channels of interstate commerce purposefully to isolate the state from the national economy or protect resident economic interests from the national market. It is a statute that purposefully makes use of the State's own borders or the network of the interstate market to improve the position of local residents and actors simply because they are local.").

cloak of terrorism prevention.¹⁶¹ The use of DHS oversight will prevent a confusing maze of rerouting restrictions and prevent state and local governments from looking after their own security interests at the expense of other jurisdictions.

Additionally, under the proposed system, DHS would only allow rerouting for chemicals that pose an actual health risk or would cause large-scale injuries in the event of a terrorist attack.¹⁶² These chemicals “that are toxic by inhalation, highly explosive, or highly flammable” ultimately account for “less than 5% of all hazardous materials shipped.”¹⁶³ CSX, in particular, estimates that it would only have to reroute 2.3% of its hazardous cargo each year.¹⁶⁴ Therefore, because rerouting affects such a small number of shipments, it is unrealistic to paint a picture of log-jammed rail lines backing up the transportation of essential chemicals throughout the railway infrastructure.

The arguments against this proposed system of petitionary exceptions simply are not persuasive enough to defeat the benefits and protection the system provides. The unique vulnerabilities of the rail infrastructure require an equally unique and outside-the-box method of thinking. The utilization of existing framework, the strength of a federal-state partnership, and the considerable reduction in the opportunity to use hazardous railcargoes as weapons of mass destruction, make the system worthy of support.

¹⁶¹ The danger of localities engaging in economic protectionism by rerouting or prohibiting the transportation of hazardous railcargoes through its densely populated areas is analogous to past disputes over the transportation of commercial hazardous wastes and spent nuclear fuel. See Edward A. Fitzgerald, *The Waste War: Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources and Chemical Waste Management, Inc. v. Hunt*, 13 STAN. ENVTL. L.J. 78, 104–06 (1994) (discussing the invalidation of an Alabama law charging different hazardous waste fees to out-of-state waste because of economic protectionism).

¹⁶² The position is similar to that in Senator Biden’s rail security legislation that unfortunately never left the Senate. See Press Release, Office of Senator Joseph Biden, Biden Bill Safeguards Cities from Chemical Attacks (June 16, 2005), available at <http://biden.senate.gov/newsroom/details.cfm?id=238999>.

¹⁶³ *Id.*; Fiorill, *supra* note 74; see also S. 1256 § 2(A)(i)–(iii), 109th Cong. (2005) (defining “extremely hazardous material” as those materials that are “(i) toxic by inhalation; (ii) extremely flammable; or (iii) highly explosive.”).

¹⁶⁴ Moore, *supra* note 62, at 781 (citing Defendants’ Memorandum of Points and Authorities in Opposition to Plaintiff’s Application for a Preliminary Injunction and Plaintiff’s Motion for Summary Judgment at 3, *CSX Transp., Inc. v. Williams*, No. Civ.A. 05–338EGS, 2005 WL 902130 (D.D.C. Apr. 18, 2005)).

V. A System of Petitionary Exceptions Should Be Merely One Layer of a Multi-tiered and Comprehensive Policy to Secure the Nation's Rail Infrastructure from Terrorist Attack

A system of petitionary exceptions will largely eliminate the probability of a catastrophic terrorist attack on a chemical railcar near a densely populated U.S. city.¹⁶⁵ However, there will be instances where rerouting is not feasible. The rerouting alternatives of two vulnerable jurisdictions could conflict, and rerouting the hazardous cargo away from certain jurisdictions may be implausible. In such situations, this system, although originally designed as a “quick fix” until the Federal Government adequately addresses the vulnerabilities to this aspect of the nation's railway infrastructure, can ultimately constitute one layer of a multi-tiered, comprehensive plan to address this distinct terrorism risk.¹⁶⁶

In our post-September 11th world, our Nation is engaged in a complex struggle with fanatical extremists. Our nation's security rests not only on our ability to protect ourselves, but also on our ability to uncover our enemy's next move. Given the stakes, hubris on behalf of any sector of our government which mistakenly believes that it alone can provide for our protection, is extremely dangerous and irresponsible.

The proposed DHS rail security regulations alone will not protect this Nation from terrorists trying to use a chemical railcar as a WMD. The system of petitionary exceptions advocated by this note, alone, will also not categorically eliminate this method of attack. Together, however, these measures begin to form a comprehensive and multifaceted approach, creating a blanket of protection that eliminates the vulnerabilities of this segment of the infrastructure. Recent history demonstrates how the lack of a multi-tiered scheme of protection between federal and state government exacerbated the disaster and devastation resulting from Hurricane Katrina—despite the storms ferocity, a multi-tiered disaster response system would have likely saved thousands of lives and billions of dollars.¹⁶⁷ Given the open nature and

¹⁶⁵ *Supra* Part IV.

¹⁶⁶ The DHS Secretary Michael Chertoff explains the approach needed to protect the nation's mass transit systems: “We've got to tailor the approach we take to the particular type of transportation we're talking about and that's the kind of discipline analysis we need to bring to the problem.” *Meet the Press*, *supra* note 75.

¹⁶⁷ See Michael Greenberger, *The Alfonse and Gaston of Governmental Response to National Public Health Emergencies: Lessons Learned from Hurricane Katrina for the Federal Government and the States*, 58 ADMIN. L. REV. 611, 612 (2006) (arguing that the

unique vulnerabilities of the nation's rail system, multiple security layers afford greater protection compared to a single-minded approach that leaves the Nation susceptible to a terrorist attack.¹⁶⁸

Since September 11th, the American people have been barraged with hypothetical, and at times, implausible terrorist plots. The impracticality of some of these schemes, along with the absence of a terrorist attack on American soil since September 11th, should not lull this nation into a false sense of security. The threat of a terrorist organization converting a train transporting hazardous chemicals into a potential WMD is a very real and well-documented scenario. Unfortunately, the Federal Government's inability to adequately address the security of chemical railcargoes traveling through our major cities has made this scenario not only a real, but a plausible manner of attack.

Rerouting these chemical shipments away from vulnerable localities is the only effective method to remove the danger. Although these localities have attempted to compensate for the Federal Government's ineffectiveness in this area, their valiant efforts in enacting rerouting ordinances will likely be defeated on legal grounds by federal preemption and the Commerce Clause. The refusal of the Federal Government to address this particular category of rail security and the likely legal defeat of localities' attempts to fill the gaps creates a dangerous nexus that ultimately leaves the American people dangling in the cross-hairs.

The solution is fairly simple: implement a system whereby jurisdictions facing unique vulnerabilities can petition DHS for rerouting authority, and protect this system from invalidation by federal preemption and the dormant Commerce Clause. The system utilizes the risk-based methodologies already employed by DHS, and works from the existing framework of HTUAs established by proposed federal rail security regulations. Given the distinct challenges created by the wide-

devastation and destruction following Hurricane Katrina illustrates the need for better federal and state government coordination during natural disasters).

¹⁶⁸ For example, when rerouting hazardous railcargoes becomes impossible, another layer of safeguards should afford protection. One plausible alternative is to transport these chemical cargoes using "next generation" rail tank cars being developed by Dow Chemical Company, "designed to resist puncture in accidents or terrorist attacks." Emery & Wald, *supra* note 16. Moreover, a serious effort could also be made to find safer and alternative chemicals to replace those chemicals that pose the most danger during transportation. *PBS: Toxic Transport*, *supra* note 9.

open characteristics of the Nation's rail infrastructure, a layered and flexible strategy is required to provide adequate security. A system of petitionary exceptions should ultimately form one layer of a multi-faceted approach that will deny terrorist organizations the ability to inflict physical and psychological carnage, by using our own rail infrastructure against us.