

**FREIGHT RAIL TRANSPORTATION IN THE POST-9/11 ERA:
BALANCING SAFETY AND FREEDOM IN A CORPORATE SETTING**

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I. INTRODUCTION**

The United States, in the early morning of September 11, 2001, witnessed what were arguably the most important events that have shaped this stage of American history.¹ Stated in terms of the most sweeping changes, the terrorist attacks on the World Trade Center, the Pentagon, and the failed third attack precipitated two wars and drastic changes in the U.S. national security arena.² These large-scale changes, while representing the most salient alterations to the American landscape, might nevertheless be of secondary importance compared to the effect the attacks had on our national psyche.³ September 11 was more than an attack on our infrastructure; it was an attack on our ideals and the very *idea* of America.⁴

The combination left us reeling, but the shock and fear that followed in the wake of the attack could not conceal the groundswell of

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¹ See *A Look Back at the Morning of Sept. 11*, CBS NEWS, Sept. 10, 2011, <http://www.cbsnews.com/stories/2011/09/10/earlyshow/saturday/main20103908.shtml>.

² AMY BELASCO, CONG. RESEARCH SERV., RL 33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 1 (2011), available at <http://www.fas.org/sgp/crs/natsec/RL33110.pdf> (indicating that the cost of the wars, exclusive of any other secondary economic burdens, is over 1.2 trillion dollars).

³ See Lance Cole, *Special National Investigative Commissions: Essential Powers and Procedures (Some Lessons from the Pearl Harbor, Warren Commission, and 9/11 Commission Investigations)*, 41 McGEORGE L. REV. 1, 2 (2009) (noting the impact of the 9/11 attacks on the national psyche in comparison to other historical events).

⁴ See Donna Miles, *Pearl Harbor Parallels 9-11*, MILITARY.COM (Dec. 7, 2006), <http://www.military.com/NewsContent/0,13319,120133,00.html> (describing the World Trade Center as a symbol of the U.S. free-market economy).

our anger and resolve.⁵ These turbulent times led to a mobilization of national energy and resources that America had not seen since the attack on Pearl Harbor sixty years before.⁶ Many controversial decisions were made during the days and years immediately following the 9/11 attacks.⁷ These decisions were arguably necessary and justifiable in light of the surrounding events and compelling need for the government to fulfill its primary mandate to protect the people.⁸ It is nevertheless important to reflect, in comparatively less tumultuous times, on decisions hastily made to ensure that the decisions still address the problems they sought to ameliorate without unduly interfering in other areas.⁹ In some instances, decision makers may have gone too far, in other instances, not far enough.¹⁰ Substantial legal and political commentary exists addressing this issue with regard to individual freedoms and privacy.¹¹

⁵ David Morris, *Poll: Resolve, But Lower Ratings for Bush*, ABC NEWS, Sept. 8, 2003, <http://abcnews.go.com/US/story?id=90273&page=1>.

⁶ *Cf.* Miles, *supra* note 4 (drawing comparisons between the attacks of 9/11 and those of Pearl Harbor).

⁷ Passage of the PATRIOT Act, for example, has created significant controversy. *See, e.g.*, Nathan H. Seltzer, *Still Sneaking and Peeking*, 42 CRIM. L. BULL. 289, 289 (2006) (arguing that “the Patriot Act[] is antithetical to the values underlying . . . the Fourth Amendment”).

⁸ *See* U.S. CONST. pmb. (providing for a common defense).

⁹ Garth Molander, Comment, *Machiavellian Jurisprudence: The United States Supreme Court’s Doctrinal Approach to Political Speech Under the First Amendment*, 10 TOURO L. REV. 593, 613 (1994) (noting Machiavelli argued that in less tumultuous times it may be necessary to relax or do away with some repressive means that were previously used to protect society because those means are “‘out of sync’ with present conditions”).

¹⁰ *See, e.g.*, John M. Allen, Note, *Expanding Law Enforcement Discretion: How the Supreme Court’s Post-September 11th Decisions Reflect Necessary Prudence*, 41 SUFFOLK U. L. REV. 587, 591 (2008) (“[M]any Americans believe the federal government has gone too far in the fight against terrorism”); Stephanie Cooper Blum, *What Really is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269, 308-314 (2009) (arguing that the FISA Amendments Act does not go far enough in protecting Americans).

¹¹ *See, e.g.*, Seltzer, *supra* note 7, at 290 (noting that John Ashcroft said those opposing the PATRIOT Act only give ammunition to the nation’s enemies).

This Article considers this issue in the context of national security changes to the freight rail¹² and maritime port systems and in the context of the extent to which the government may or should be allowed to pass mandates to private corporations.¹³ Part II recounts the needs that the 9/11 Commission addressed with regard to domestic freight railroads.¹⁴ Part III provides an account of some of the major legal and administrative changes to the freight rail industry organized by topic.¹⁵ Part IV proposes a paradigm for measuring the need for and effectiveness of present and future security measures.¹⁶ Part V applies the paradigm proposed in Part III to the legal and administrative changes implemented in the wake of the September 11 attacks.¹⁷ Finally, Part VI considers how well the changes since 9/11 address the security concerns expressed by the 9/11 Commission.¹⁸

II. THE RECOMMENDATIONS OF THE 9/11 COMMISSION

On November 22, 2002, Congress and the President created the National Commission on Terrorist Attacks Upon the United States (9/11 Commission or Commission).¹⁹ The 9/11 Commission was assigned the task of investigating the facts and circumstances leading up to the September 11 attacks and providing recommendations to address the failures that allowed the attacks to take place.²⁰ The final report of the

¹² Passenger rail systems are subject to significantly different security concerns and are discussed only in comparison to the freight rail industry. *See infra* note 234 and accompanying text (noting the long history of terrorist attacks on commuter trains).

¹³ Detailed discussion of other industries, with presumptively different security needs, is left for further scholarship.

¹⁴ *See infra* Part II. The freight rail industry is intricately linked to several other industries, including chemical manufacture and port operations. *See* Helen Eichmann & William McElroy, *Growing Rail Freight Transportation Industry Meets Growing Risks*, *INS. J.*, June 4, 2007, <http://www.insurancejournal.com/magazines/southcentral/features/2007/06/04/81339.htm>. This Article largely ignores changes to the chemical manufacture industry, and discusses port security only to the extent that it directly affects freight railroads.

¹⁵ *See infra* Part III.

¹⁶ *See infra* Part IV.

¹⁷ *See infra* Part V.

¹⁸ *See infra* Part VI.

¹⁹ Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 601, 116 Stat. 2383, 2408 (2002).

²⁰ *Id.* § 602, 2383 Stat. at 2408.

9/11 Commission provides detailed information about the events leading up to the 9/11 attacks and the emergency response on that day, as well as providing a strategy for disrupting terror networks elsewhere in the world.²¹ The report also contains numerous recommendations to avoid future attacks on the home front.²²

The first recommendation directly related to the transportation industry involves biometric screening systems.²³ In that regard, the 9/11 Commission recommended that “[t]he U.S. border security system should be integrated into a larger network of screening points that includes our transportation system and access to vital facilities, such as nuclear reactors.”²⁴ This recommendation is based on the understanding that people move through distinct channels during international and domestic travel.²⁵ Once inside the country, potential terrorists may seek an alternative form of identification to gain access to sensitive facilities.²⁶ Every use of these well-defined channels presents an opportunity to ensure that people are who they claim to be and are here for legitimate purposes.²⁷

The second recommendation of the 9/11 Commission was that the private sector, in cooperation with the American National Standards Institute (ANSI), should develop strategies to increase security and create plans to respond to any future attacks.²⁸ Both the fact that private industry accounts for over eighty-five percent of the nation’s critical infrastructure and the realization that, despite the events of 9/11, the private sector remained largely unprepared for future attacks inspired this recommendation.²⁹ The Commission further suggested that the standards ANSI developed should define the standard of care a private

²¹ See generally NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2002), <http://www.9-11commission.gov/report/911Report.pdf> [hereinafter 9/11 COMMISSION].

²² *Id.* at 361-428.

²³ *Id.* at 387-89.

²⁴ *Id.* at 387.

²⁵ *Id.* at 385.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 398.

²⁹ *Id.*

corporation owed to its employees and the society at large.³⁰ “Private-sector preparedness is not a luxury; it is a cost of doing business in the post-9/11 world. It is ignored at a tremendous potential cost in lives, money, and national security.”³¹

Finally, the Commission recommended that allocation of limited assets should be need based by identifying key security weaknesses and determining which transportation assets need protection.³² Such allocation decisions should be reviewed regularly to assess future threats and to determine the adequacy of the nation’s defenses against those threats and preparedness in the event of an attack.³³ The Commission noted that, at the time of the report, efforts had yet to embrace the forward-looking approach suggested by the Commission.³⁴ Furthermore, the Commission noted that maritime and surface transportation present significant opportunities to cause harm.³⁵ “Surface transportation systems such as railroads and mass transit [systems] remain hard to protect because they are so accessible and extensive.”³⁶

These broad recommendations pointed the way for the many refinements in the law and security procedures instituted in the rail transportation industry.³⁷ In certain areas, the recommendations have been adequately met and possibly exceeded, while in others the progress remains either unaccomplished or ineffective.³⁸

III. IMPLEMENTING THE RECOMMENDATIONS OF THE 9/11 COMMISSION

The 9/11 Commission’s recommendations were necessarily broad and light on details because the Commission was developed to provide recommendations to Congress for future action and not to pro-

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 391.

³³ *See id.* at 428.

³⁴ *Id.* at 391.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See infra* Part III.

³⁸ *See infra* Parts IV, VI.

vide detailed solutions to every security problem in the country.³⁹ The Commission was initiated to determine what systemic failures permitted the 9/11 attacks to occur and what weaknesses remained after the attacks, allowing Congress and the President to address those security needs in the most efficient way possible.⁴⁰

The first action the U.S. House of Representatives in the 110th Congress took was passing the Implementing Recommendations of the 9/11 Commission Act of 2007.⁴¹ The Act, commonly referred to as HR 1, was Congress's attempt to address the security issues the 9/11 Commission identified.⁴² The Act made several major changes to a number of the agencies in charge of U.S. defense.⁴³ HR 1 also made considerable changes that affected the freight rail industry⁴⁴ and that provided the basis for many of the regulations addressed in the following sections.⁴⁵

A. *Creation of the Transportation Security Administration*

Even before Congress passed HR 1, the Aviation and Transportation Security Act created the Transportation Security Administration (TSA), one of the most obvious new components of national security.⁴⁶ TSA has the broad task of overseeing the security of the transportation industry.⁴⁷ Not surprisingly, a very large portion of what TSA does relates to security for the airline industry.⁴⁸ Given the nature of the 9/11

³⁹ See Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, §§ 601-602, 116 Stat. 2383, 2408 (2002).

⁴⁰ See *id.*

⁴¹ Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266.

⁴² See *id.*

⁴³ *Id.* § 531, 121 Stat. at 332 (codified as amended in 6 U.S.C. § 121 (Supp. III 2009)) (reorganizing the Homeland Security Intelligence Office).

⁴⁴ *Id.* §§ 1501-1558, 121 Stat. at 422-77 (codified as amended in scattered sections of the U.S.C.).

⁴⁵ See, e.g., *id.* § 1551, 121 Stat. at 469 (codified as amended at 6 U.S.C. § 1201 (Supp. III 2009)) (requiring hazardous materials routing rules to be published within one year).

⁴⁶ Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101, 115 Stat. 597, 597-98 (2001) (codified as amended at 49 U.S.C. § 114 (Supp. III 2009)).

⁴⁷ 49 U.S.C. § 114(d).

⁴⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-492, TRANSPORTATION SECURITY: COMPREHENSIVE RISK ASSESSMENTS AND STRONGER INTERNAL CONTROLS

attacks and the historical attractiveness of passenger airplanes to terrorists, the airline industry was an obvious area of primary concern for the newly minted agency.⁴⁹

Despite a significant focus on the airline industry, TSA did not completely abandon other modes of surface transportation.⁵⁰ Apart from the airports, where TSA doubtlessly has its most visible impact, TSA also oversees the security at ports, in the rail industry, and on the highways.⁵¹ Given such a massive scope, TSA has introduced many regulations to enhance the security of these various modes of surface transportation.⁵² In cooperation with TSA in this monumental undertaking, private industry has adopted many voluntary measures.⁵³

B. Voluntarily Adopted Industry Changes

Recognizing that this newly created agency lacked expertise in the details of every mode of transportation in the country, private com-

NEEDED TO HELP INFORM TSA RESOURCE ALLOCATION 28 (2009), available at <http://www.gao.gov/new.items/d09492.pdf> (detailing monetary apportionments among various modes of security for which TSA is responsible).

⁴⁹ See *id.*; see also *History of Terrorist Attacks*, HISTORY CENTRAL, <http://www.historycentral.com/Terrorhistory.html> (last visited Jan. 18, 2012) (listing a number of terrorist attacks in which a plane was used).

⁵⁰ Of TSA's approximately 7 billion dollar budget in 2009, 5.8 billion dollars went directly to the airline industry, leaving merely 1.2 billion dollars to be split among freight rail, passenger rail and mass transit, ports, and credentialing. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-492, TRANSPORTATION SECURITY: COMPREHENSIVE RISK ASSESSMENTS AND STRONGER INTERNAL CONTROLS NEEDED TO HELP INFORM TSA RESOURCE ALLOCATION 28 (2009), available at <http://www.gao.gov/new.items/d09492.pdf>.

⁵¹ See *Our History*, TRANSP. SECURITY ADMIN., <http://www.tsa.gov/research/tribute/history.shtm> (last visited Jan. 18, 2012).

⁵² *What We Do*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/what_we_do/index.shtm (last visited Jan. 18, 2012) (providing links to numerous programs initiated by TSA).

⁵³ *Securing the Nation's Rail and Other Surface Transportation Networks: Hearing Before the U.S. S. Comm. on Commerce, Sci. & Transp.*, 111th Cong. 49-51 (2010) [hereinafter *Hearing on Surface Transp.*], available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66169/pdf/CHRG-111shrg66169.pdf> (statement of Howard R. "Skip" Elliott, Vice President – Public Safety and Environment, CSX Transportation, Inc.) (detailing voluntary actions adopted by CSX Transportation, Inc. prior to regulatory requirements).

panies have compiled security-related information and identified various vulnerabilities in their operations.⁵⁴ This approach makes sense when one realizes that the private companies are the most familiar with their own operations and have an obvious interest in avoiding major security lapses.⁵⁵ Measured in terms of damage to infrastructure and lost productivity, the costs of an attack on an information center or major artery connecting two large cities could be immense.⁵⁶

Some corporate entities have demonstrated a long history of proactively adopting safety measures.⁵⁷ Such proactive measures include forming partnerships with local emergency responders to expedite information sharing, developing tools to enable state and federal agencies to have nearly real-time information about the location of any car on the network, and providing training on actual rail cars to local law enforcement, enabling law enforcement officials to have practice dealing with a takeover of a passenger train.⁵⁸ CSX Transportation is working to create detailed maps of its entire system of rails and facilities to share with emergency responders.⁵⁹ This is an incomplete list from one company in the industry, and other industry participants likely have voluntarily adopted security measures without the need for formal interaction from the government as well.⁶⁰

C. TWIC Cards

Recognizing the importance of controlling who gains access to U.S. ports and fulfilling the recommendation of the 9/11 Commission for increased security and biometric screening at U.S. borders, Congress passed the Maritime Transportation Security Act (MTSA), which established a program to create a Transportation Worker Identification Cre-

⁵⁴ *See id.* at 49-50.

⁵⁵ *See id.* (alluding to the benefits of voluntary and mandatory safety measures).

⁵⁶ It is difficult to obtain data on an example of where such vulnerability exists, presumably because easy access to such information might make an attack easier. However, one can imagine scenarios in which there are few routing choices between major cities and an attack occurs on the major thoroughfare.

⁵⁷ Hearing on Surface Transp., *supra* note 53, at 49-51 (statement of Howard R. “Skip” Elliott).

⁵⁸ *Id.*

⁵⁹ *Id.* at 50.

⁶⁰ *Cf. id.* at 49-51.

dential (TWIC card).⁶¹ TWIC cards are biometric identification credentials used by workers who need unescorted access to ports and other marine facilities.⁶² Applications for a TWIC card require the participant to submit fingerprints and pass a background check.⁶³ From the standpoint of a freight rail company, the MTSA requires any person, whether they are a conductor, supervisor, maintenance crew, or other employee, to apply for and receive a TWIC card if they pick up materials from a qualifying port and need unescorted access.⁶⁴ The cards cost \$132.50, which must be paid every five years as the cards expire.⁶⁵ According to TSA, they have only installed the actual readers for these cards in a handful of locations, as part of a testing phase.⁶⁶

D. Toxic Inhalation Hazard Regulations

One of the most dangerous freight rail transportation activities is moving materials that are dangerous if inhaled.⁶⁷ Every day, the freight rail industry moves chlorine gas and many other compounds that can pose serious health problems if inhaled.⁶⁸ As 9/11 demonstrated, terrorists are more than happy to use preexisting hazards to commit an

⁶¹ Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 102, 116 Stat. 2064, 2080-81 (codified as amended in scattered sections of 46 U.S.C.).

⁶² *Program Information*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/what_we_do/layers/twic/program_info.shtm (last visited Jan. 18, 2012) (requiring TWIC cards for access to, inter alia, ports, offshore wells, and vessels).

⁶³ *Id.*

⁶⁴ *Frequently Asked Questions: Transportation Worker Identification Credential (TWIC)*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/what_we_do/layers/twic/twic_faqs.shtm (last visited Jan. 18, 2012).

⁶⁵ *Id.*

⁶⁶ *TWIC Pilot Test*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/what_we_do/layers/twic/pilot_test.shtm (last visited Jan. 18, 2012) (noting that four ports and four individual sites are conducting the test phase).

⁶⁷ *See Freight Rail Division Eyes Security on 140,000 Miles of Track*, TRANSP. SECURITY ADMIN. (Aug. 22, 2007), http://www.tsa.gov/press/happenings/freight_rail.shtm.

⁶⁸ *See A. E. Dunning & Jennifer L. Oswalt, Train Wreck and Chlorine Spill in Graniteville, South Carolina: Transportation Effects and Lessons in Small-Town Capacity for No-Notice Evacuation*, TRANSP. RES. REC.: J. OF THE TRANSP. RES. BOARD, 2007, at 130.

attack that they might not otherwise have the resources to carry out.⁶⁹ A release of several tankers of poisonous gas is one strategy a terrorist organization might employ.⁷⁰ Recognizing this threat, both TSA and the Department of Transportation (DOT) have released regulations for the proper handling of rail cars carrying such toxic inhalation hazards (TIH).⁷¹

As a preliminary matter, the law requires rail companies to transport TIH materials upon the reasonable request of chemical manufacturers,⁷² and many rail companies have indicated that, given the option, they would prefer not to handle these products.⁷³ While TIH materials make up a very small percentage of the total volume of goods shipped by freight rail companies, regulations have made it especially burdensome to transport this material.⁷⁴

TSA's interactions with the freight rail industry began as a "collaborative effort."⁷⁵ Gradually, TSA began interacting with rail companies in a more formal manner, working with the industry to develop voluntary guidelines for the transportation of TIH materials.⁷⁶ This led to the creation of twenty-four voluntary security action items, designed to provide guidance on what factors the railroads should consider in

⁶⁹ See Rail Transportation Security, 71 Fed. Reg. 76852, 76861 (proposed Dec. 21, 2006) (to be codified at 49 C.F.R. pts. 1520, 1580) (noting that several agencies are worried that terrorists may use hazardous materials already in transportation in a future attack).

⁷⁰ *Id.*

⁷¹ See 49 C.F.R. § 174.1 (2010) (noting that the DOT provides additional requirements to railroads transferring hazardous materials beyond what Congress has provide); 49 C.F.R. § 1580.103 (2010) (providing additional procedures for railroads when transferring hazardous materials from TSA).

⁷² 49 U.S.C. § 11101(a) (2006); *Classification Ratings on Chemicals, Conrail*, 3 I.C.C.2d 331, 338 (1986).

⁷³ *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials: Hearing Before the Surface Transp. Bd.*, 110th Cong. 5 (2008) [hereinafter Comments of CSX], available at <http://docs.stb.dot.gov/?sGet&D15ZTH1WXw1zAA0LXBdTV0x6Sw1xfAUIXAEHCW4DF3gBencMWQgECWwCHAcEexNbAlxHcUsOS1FELBNIO1RFS0ZcQQ0AfQENS1deVEpdT11VcAcKXwYPCQoBamBOC20xNzgvMy8wME01OAw%3D> (comments of CSX Transportation, Inc.).

⁷⁴ See *id.* at 9, 14.

⁷⁵ *Id.* at 9.

⁷⁶ *Id.* at 10.

developing plans for TIH transport.⁷⁷ In 2006 and 2007, TSA released two supplemental security action items, recommending for railroads to develop site-specific security plans for high threat urban areas⁷⁸ that identify secure areas to hold TIH materials in the event of an emergency,⁷⁹ avoid shipments near National Special Security Events,⁸⁰ and establish more thorough background checks.⁸¹ TSA has adopted federal regulations requiring numerous changes aimed at rail safety.⁸² The legislation includes measures requiring private entities to appoint a rail security coordinator,⁸³ to track and be able to report the location of any given rail car,⁸⁴ to notify TSA immediately of all suspicious activity,⁸⁵ and to maintain positive and secure handoffs of cars carrying TIH materials.⁸⁶

The Pipeline and Hazardous Materials Safety Agency (PHMSA) and the Federal Railroad Administration (FRA) have continued the trend toward formalization of interactions with freight rail companies by adopting final rules for routing and inspecting TIH material.⁸⁷ Under

⁷⁷ See *Toxic Inhalation Hazard Materials*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/what_we_do/tsnm/freight_rail/tih_materials.shtm (last visited Jan. 18, 2012).

⁷⁸ DEP'T OF HOMELAND SEC., RECOMMENDED SECURITY ACTION ITEMS FOR THE RAIL TRANSPORTATION OF TOXIC INHALATION HAZARD MATERIALS 3 (2006), http://www.tsa.gov/assets/pdf/Supplement_No_1_TIH-SAI.pdf; see also DEP'T OF HOMELAND SEC., RECOMMENDED SECURITY ACTION ITEMS FOR THE RAIL TRANSPORTATION OF TOXIC INHALATION HAZARD MATERIALS (2007), http://www.tsa.gov/assets/pdf/sai_for_tih_supplement2.pdf (noting additional voluntary measures that TSA recommends).

⁷⁹ DEP'T OF HOMELAND SEC., RECOMMENDED SECURITY ACTION ITEMS FOR THE RAIL TRANSPORTATION OF TOXIC INHALATION HAZARD MATERIALS 4 (2006), http://www.tsa.gov/assets/pdf/Supplement_No_1_TIH-SAI.pdf.

⁸⁰ *Id.*

⁸¹ See DEP'T OF HOMELAND SEC., RECOMMENDED SECURITY ACTION ITEMS FOR THE RAIL TRANSPORTATION OF TOXIC INHALATION HAZARD MATERIALS (2007), http://www.tsa.gov/assets/pdf/sai_for_tih_supplement2.pdf.

⁸² See 49 C.F.R. §§ 1580.101-.107 (2010).

⁸³ 49 C.F.R. § 1580.101 (2010).

⁸⁴ 49 C.F.R. § 1580.103 (2010).

⁸⁵ 49 C.F.R. § 1580.105 (2010).

⁸⁶ 49 C.F.R. § 1580.107 (2010) (requiring a person to be present at all times when a car carrying TIH material is awaiting pickup or transfer to another train).

⁸⁷ See 49 C.F.R. § 172.1 (2010) (noting that the PHMSA is responsible for determining how TIH material will be transported); 49 C.F.R. § 209.1 (2010) (noting that the FRA is responsible for enforcement of laws and regulations pertaining to railroads).

these rules, railroads must conduct a route analysis, considering twenty-seven inexhaustive factors, and use the analysis to select routes trains carrying TIH should take.⁸⁸ Some of these factors pose significant quantification challenges, such as the requirement to consider emergency response capabilities along the proposed route.⁸⁹

E. TIH Tank Car Regulations

Recently, DOT, acting through PHMSA and the FRA, adopted regulations setting standards for tank cars used to transport TIH.⁹⁰ The new standards require that tank cars meet certain structural standards designed to prevent a release of poisonous gasses in the event of a terrorist attack or derailment.⁹¹ The same regulation also imposes a speed restriction of fifty miles per hour on any train carrying TIH materials.⁹² This regulation is significantly more onerous to the free flow of commerce.⁹³ Given that TIH materials account for only half of one percent of the total volume of traffic, this particular provision effectively slows down an entire corridor of traffic for the benefit of one car.⁹⁴ The fact that the law does not specifically address trains other than those carrying TIH materials is immaterial given that railroad traffic is limited to the existing tracks.⁹⁵ If the front train is going fifty miles per hour, every train behind it cannot go faster than fifty miles per hour. There are also significantly fewer routing options in the rail industry when compared to other modes of transportation.⁹⁶ If a car is going fifty

⁸⁸ 49 C.F.R. § 172 app. D (2010).

⁸⁹ *Id.* One Class 1 railroad reports that it has over 20,000 miles of track that spans 17,000 communities. Comments of CSX, *supra* note 73 at 4, 13. To meet the requirement of this section, the railroad would presumably have to grade the emergency response capabilities in each of these communities. *See id.* at 13.

⁹⁰ *See* Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, 74 Fed. Reg. 1770, 1770 (Jan. 13, 2009) (to be codified at 49 C.F.R. pts. 171-74, 179).

⁹¹ *See id.* at 1771.

⁹² *Id.* at 1772.

⁹³ *See* Comments of CSX, *supra* note 73, at 18.

⁹⁴ *Id.*; *see also* Hearing on Surface Transp., *supra* note 53, at 49 (statement of Howard R. “Skip” Elliott).

⁹⁵ *See infra* note 96 and accompanying text.

⁹⁶ *Compare* Honorable Norman Y. Mineta, Sec’y of Transp., Remarks at the Rail Safety Action Plan Announcement in Columbia, SC (May 16, 2005), *available at* <http://www.fra.dot.gov/Pages/1669.shtml> (noting that there is 233,000 miles of

miles per hour on the highway, there is always the option to just go around it.

IV. PROPOSED GUIDELINES FOR TSA DIRECTIVES TO PRIVATE INDUSTRY

It is important when beginning an analysis to indicate the criteria upon which it is based. With this in mind, the following factors and policy considerations provide the basis for the proposed analysis.⁹⁷ Our nation was founded on the principle of limited government, and the government only has the power to act within the limits of the Constitution.⁹⁸ Despite this general rule that government's power is limited, there are spheres in which it is unquestionably appropriate for the government to act.⁹⁹ Arguably, the single most important function of government is to provide for the safety of its citizens.¹⁰⁰ However, even in this sphere, the power of the government to act must be limited.¹⁰¹ The reason for this limitation is that increased regulation usually comes at the price of decreased freedom and privacy.¹⁰² The struggle between the guarantees of safety on the one hand and freedom and the right to privacy on the other provides the backdrop to any action the government takes in this area.¹⁰³ A further limiting factor is that improperly

railroad track in the United States) *with Scope of the American Transportation System*, NATIONALATLAS.GOV, www.nationalatlas.gov/transportation.html (noting there are more than “[four] million miles of roads and streets”) (last modified Jan. 27, 2011).

⁹⁷ See *infra* notes 98-104 and accompanying text. It is readily apparent that there will be others who share a different understanding of the competing interests that guide this proposal.

⁹⁸ See U.S. CONST. amend. X; *United States v. Comstock*, 130 S. Ct. 1949, 1962 (2010) (noting powers delegated to the federal government include those powers expressly enumerated under “Article I along with the implementation authority granted by the Necessary and Proper Clause”).

⁹⁹ See, e.g., U.S. CONST. art. I, § 8, cl. 1 (authorizing Congress to provide for defense).

¹⁰⁰ See U.S. CONST. pmbl. (noting the government must provide for the common defense).

¹⁰¹ See, e.g., *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313-14 (1972) (requiring judicial approval for domestic security surveillance).

¹⁰² See *id.* at 314-15 (discussing that the government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy and free expression).

¹⁰³ See *id.*

designed or indiscriminate regulations can provide a powerful disincentive to businesses and have a stifling effect on the free flow of commerce.¹⁰⁴

Presumably, the government can make society most safe by abridging freedom and privacy just one hairsbreadth less than the amount that would lead to revolution. Obviously, this is not an appropriate strategy.¹⁰⁵ While acting in its native realm of authority to secure safety, there is little the government *cannot* do.¹⁰⁶ But just because an action may be tolerable does not make it acceptable. Rather than continually pushing the limits of its admittedly sweeping power, TSA should adopt an approach that accounts for the competing interests at stake.

The first interest to consider is the extent to which the activity to be regulated is one that may be considered private.¹⁰⁷ Regulation of matters that are generally public in nature does not pose as significant of a burden as regulation of typically private matters.¹⁰⁸ Next, the likely impact any proposed regulation would have on the ultimate goal of safety needs to be addressed.¹⁰⁹ If a particular action is especially effective in ensuring the safety of the rail industry, greater burdens may be justifiable.¹¹⁰ Taken together, these considerations provide a cap on the action that regulators should consider taking. There are some areas where freedom is so important that safety must be sacrificed to protect

¹⁰⁴ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (holding that regulation will not be upheld where the burden imposed on such commerce is clearly excessive).

¹⁰⁵ See RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 31 (Geoffrey R. Stone ed., 2006) (noting that a balance must be found between security and liberty, rather than one being more important than the other).

¹⁰⁶ See *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944) (allowing the U.S. government “to exclude those of Japanese ancestry from the West Coast war area at the time they did”).

¹⁰⁷ See *New York v. Burger*, 482 U.S. 691, 702 (1987) (noting decreased expectations of privacy for businesses).

¹⁰⁸ See *id.*

¹⁰⁹ Cf. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (discussing the serious health risks of tobacco in deciding whether the Food and Drug Administration should regulate tobacco).

¹¹⁰ See POSNER, *supra* note 105, at 31 (noting that “as threats to liberty and safety wax and wane” the point of balancing between liberty and safety also shifts).

it.¹¹¹ Likewise, there are other areas where the effectiveness of a safety procedure is too minimal to justify an imposition on freedom, no matter how trivial.

On the other side of the equation, certain factors exist that increase the appropriateness of regulatory action.¹¹² One such factor would be the presence of a specific and identifiable security threat.¹¹³ If TSA or any other government agency receives a credible threat about a particular aspect of the transportation industry, it must be granted the power to react to that threat.¹¹⁴ Greater specificity of a threat would give greater presumed authority to react.¹¹⁵ Agencies should also consider the magnitude of the threat.¹¹⁶ Magnitude is not to be measured only by the number of casualties or loss of property, which would be classified by size.¹¹⁷ The proper measure of the magnitude of threat is the probability of any attack occurring multiplied by the size of the attack.¹¹⁸ The mere fact that 9/11 occurred makes it significantly less likely that another attack like that could happen again.¹¹⁹ Given the logistical difficulties of perpetrating such a large-scale attack, TSA

¹¹¹ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (noting that it is only in rare circumstances that the constitutional protection of a writ of habeas corpus can be suspended or denied).

¹¹² See *infra* notes 113-18 and accompanying text.

¹¹³ Cf. Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 *YALE L. & POL'Y REV.* 399, 402 (2009) (noting that the classification of documents is not controversial when there is an identifiable threat).

¹¹⁴ See *National Terrorism Advisory System Public Guide*, HOMELAND SECURITY, <http://www.dhs.gov/files/publications/ntas-public-guide.shtm> (last modified July 13, 2011) (outlining the various Homeland Security terror threat levels).

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.* (stating that the increase in threat level is determined by the possibility of a threat).

¹¹⁸ See WASH. STATE DEP'T OF HEALTH, *THREATS AND MAGNITUDE OF TERRORIST ATTACKS* (2002), <http://www.doh.wa.gov/ehp/rp/factsheets/factsheets-pdf/fs35magterr.pdf> (describing the second highest FBI threat level as one in which there is a weapon of mass destruction involved and in which there is some particularity of a threat).

¹¹⁹ See generally 9/11 COMMISSION, *supra* note 21 (discussing the short comings of our intelligence community prior to 9/11 and laying out recommendations for changes to help prevent attacks in the future). Even on the day of the 9/11 attacks, passengers on Flight 93, once they became aware of what was happening, foiled a fourth attack. *Id.* at 14.

might more appropriately focus its efforts on smaller threats, which have a higher probability of success.¹²⁰

The results of this balancing should determine whether a program is implemented.¹²¹ If the burdens on autonomy are excessive compared to the safety value achieved, the program should not be implemented.¹²² The security agencies must also recognize that the private sector is not a blank checkbook from which they can purchase safety and security.¹²³ The fact is corporations, even large companies, have limited resources.¹²⁴ While security is important in our society, it cannot be the only concern at the expense of job growth and innovation.¹²⁵ Security agencies have borrowed a significant amount from the private sector's determinations about safety procedures to develop national security measures.¹²⁶ The focus needs to shift back to fostering cooperation between the public and private sectors, as recommended by the 9/11 Commission, and away from the current trend of command-and-control regulations.¹²⁷

¹²⁰ An attack on the freight rail industry would tend to be of the larger variety. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-492, TRANSPORTATION SECURITY: COMPREHENSIVE RISK ASSESSMENTS AND STRONGER INTERNAL CONTROLS NEEDED TO HELP INFORM TSA RESOURCE ALLOCATION 23 (2009) (noting that TSA has identified release of TIH materials in major cities as a high threat). There is very little value to terrorists in derailing a carload of coal in the countryside. A terrorist attack aimed at the freight rail industry seeking the release of hazardous materials in a densely populated area or a major attack on infrastructure such as a depot, is much more probable. *See id.*

¹²¹ *See infra* note 122 and accompanying text.

¹²² While this may seem intuitive, a valid argument exists that the government has not always employed this basic framework. *See infra* Part V.

¹²³ *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-492, TRANSPORTATION SECURITY: COMPREHENSIVE RISK ASSESSMENTS AND STRONGER INTERNAL CONTROLS NEEDED TO HELP INFORM TSA RESOURCE ALLOCATION 30 (2009) (recognizing TSA's concerns about high costs of implementing solutions).

¹²⁴ *See, e.g.*, Hearing on Surface Transp., *supra* note 53, at 49 (statement of Howard R. "Skip" Elliott) (noting that the routing rule consumes "a disproportionate share of management resources").

¹²⁵ *See id.* at 52.

¹²⁶ *See id.* at 47-48 (indicating that experience with the railroad's voluntary plans led to adoption of PHMSA routing regulations and implementation was eased by the fact that a similar plan had been voluntarily created several years earlier).

¹²⁷ *See id.* at 47-49 (chronicling a progressively stricter and less cooperative regulatory scheme).

Finally, the government must institute an ongoing process for measuring the continued effectiveness of a program.¹²⁸ This process cannot merely consist of the government adding additional layers of security; the process must be a true evaluative endeavor that includes the possibility of eliminating programs that are underperforming.¹²⁹ Despite adherence to the proposed process to ensure that only effective programs are implemented, changing circumstances or new tactics may render a previously effective program obsolete.¹³⁰

V. APPLICATION TO LEGISLATIVE ACTIONS SINCE 9/11

As a preliminary matter, one of the factors the proposed analysis must consider is the burden on privacy and freedom.¹³¹ When it comes to a corporation or other business entity, there is no doubt that the expectation of privacy and noninterference from the government is significantly lower.¹³² Choosing to open a business necessarily involves submitting to increased regulations, even if only in the form of obtaining a business license.¹³³ However, it is important to note that even a business's limited right to freedom from regulation must be recog-

¹²⁸ See 9/11 COMMISSION, *supra* note 21, at 391 (“Lacking such a plan, we are not convinced that our transportation security resources are being allocated to the greatest risks in a cost-effective way.”).

¹²⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-492, TRANSPORTATION SECURITY: COMPREHENSIVE RISK ASSESSMENTS AND STRONGER INTERNAL CONTROLS NEEDED TO HELP INFORM TSA RESOURCE ALLOCATION 39 (2009) (“Without establishing controls to monitor the effectiveness of its risk management efforts, TSA misses an opportunity to measure, evaluate, and improve its risk management activities.”).

¹³⁰ The decision to remove a particular program is not an easy one to make. The difficulty of making the decision is one of the reasons why the decision to remove a program is so important. Without the will to make tough decisions, legislative inertia leads to ever-increasing burdens in the face of marginally increasing effectiveness.

¹³¹ See *New York v. Burger*, 482 U.S. 691, 702-03 (1987) (indicating even where businesses' right to privacy is reduced, certain protections must be provided that meet minimal constitutional requirements).

¹³² *Id.* at 702.

¹³³ *Id.*; see Dustin Hurst, *Idaho Makes National News Shutting Down Roadside Pumpkin Stand*, IDAHOREPORTER.COM, Oct. 23, 2010, <http://www.idahoreporter.com/2010/idaho-makes-national-news-shutting-down-roadside-pumpkin-stand> (reporting that Idaho tax collectors levied fines against two children for not getting a business license to operate a pumpkin stand).

nized at some point.¹³⁴ For example, most people would agree that the government should not be able to take 100% of a business's profits. At some point, regulations could become so burdensome and infiltrate decision-making processes to the point that regulation becomes indistinguishable from a government takeover of the business.¹³⁵ As a matter of policy, burdens on authorization to begin operating a business would receive more lenient treatment under the proposed analysis than burdens on operational decision making.¹³⁶ With the floor and ceiling of acceptable regulation established, the proposed guidelines can measure the regulations falling within the *living space*.¹³⁷

A. Creation of TSA

By itself, the creation of TSA poses little to no additional burden on the freight rail industry.¹³⁸ Indeed, the FRA and DOT heavily regulated the industry well before TSA existed.¹³⁹ Using the proposed analysis, it is clear that the rail industry cannot claim that making a report to the federal government about its actions to ensure the security of the

¹³⁴ *Burger*, 482 U.S. at 702-03.

¹³⁵ For example, if regulations required all publicly traded corporations to appoint a government official to authorize any expenditure over \$1000 or to appoint an official to the board of directors with veto power over any board decision, the regulations might rise to the level of a takeover.

¹³⁶ As an analogy, consider cases finding that the right to privacy is diminished at the national borders. *See* *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004) (holding that the government's authority to conduct "suspicionless" searches at the border includes the ability to disassemble a gas tank); *United States v. Montoya de Hernandez*, 473 U.S. 531, 539-40 (1985) (holding that individuals have a decreased expectation of privacy at the border while the government has an increased interest in security). In such a manner, those entering into the business community should expect some administrative hurdles, therefore, more administrative hurdles are acceptable. *Cf. Montoya de Hernandez*, 473 U.S. at 539-40. Once an entity has been admitted into the business community, different standards and expectations apply. *Cf. id.* at 538 ("[T]he Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior.").

¹³⁷ *See supra* notes 131-36 and accompanying text.

¹³⁸ *See* Hearing on Surface Transp., *supra* note 53, at 47 (statement of Howard R. "Skip" Elliott) (discussing pre-TSA and post-TSA creation).

¹³⁹ *See* Joel Webber, *Moving Freight After 9/11: Compliance Dashboards to Keep Clients Current*, THE FED. LAW., June 2008, at 48, 49 ("[A] chemical company that uses rail tank cars . . . long had to comply with regulations issued by [DOT] agencies like the [FRA] . . .").

nation's critical infrastructure is an unexpected or onerous burden; in fact, the rail industry has not made such a claim.¹⁴⁰ In fact, having one agency that is primarily in charge of oversight makes it significantly easier for the rail industry to keep up with proposed changes.¹⁴¹ Moreover, a single regulatory agency provides the rail industry with a specific point of contact in the event an attack on the rail systems occurs.¹⁴² One of the major problems with the response to 9/11 was a lack of clear guidelines about which agencies should be informed or which agencies had the power to make decisions.¹⁴³ Creation of TSA, coupled with regulations designed to foster cooperation between government agencies, should effectively solve this problem.¹⁴⁴ As indicated previously, creation of TSA solves the problem without imposing a significant burden, in and of itself, on either the railroad industry in particular or the free flow of commerce as a whole.¹⁴⁵

TSA also gives the industry a point of contact for the industry to propose changes based on its own findings regarding security weaknesses.¹⁴⁶ As long as TSA remains willing to listen to the recommendations and concerns of the participants in the freight rail industry and treats the participants as partners in a collaborative effort, such easy and consistent access has the tendency to promote a true and effective private-public partnership.¹⁴⁷ Finally, appointing the responsibility of oversight and development of regulations to a federal agency is well within the general power of the government and is even more appropri-

¹⁴⁰ See Comments of CSX, *supra* note 73, at 13 (indicating full support for the goals of TIH regulations).

¹⁴¹ Hearing on Surface Transp., *supra* note 53, at 52 (statement of Howard R. "Skip" Elliott) ("[A] formal process like this would . . . provide Industry stakeholders with a better understanding of the agency's expectations and its views on the scope of new rules.").

¹⁴² Cf. 9/11 COMMISSION, *supra* note 21, at 35 (noting that after the attack on 9/11, there was confusion about who to contact within the Federal Aviation Administration).

¹⁴³ See *id.* at 20.

¹⁴⁴ See 49 C.F.R. § 1580.101 (2010) (requiring designation of a Rail Security Coordinator who must be available at all times and who must report incidents to TSA).

¹⁴⁵ See *supra* notes 138-40 and accompanying text.

¹⁴⁶ See 49 C.F.R. § 1580.101.

¹⁴⁷ See Hearing on Surface Transp., *supra* note 53, at 52 (statement of Howard R. "Skip" Elliott).

ate as a matter that increases safety.¹⁴⁸ While the mere creation of TSA did not create a new burden on the freight rail industry, some of the actions taken by TSA have been burdensome.¹⁴⁹

B. TWIC Requirements

The requirement for TWIC cards creates an interesting problem for analysis.¹⁵⁰ As a preliminary matter, TWIC requirements do not directly address the rail industry but rather sweep the industry due to their wide applicability and the nature of the distribution systems within the United States.¹⁵¹ There are numerous advantages to the use of the freight rail system for the transportation of goods from the nation's ports.¹⁵² To reap the benefits of rail transportation, train crews need access to the ports to load and unload freight.

As with the prior analysis, the rail industry should expect certain restrictions on who can access critical infrastructure, and the government is acting within its power to ensure public safety.¹⁵³ This places TWIC regulations within the permissible zone of regulation. However, numerous aspects of the TWIC program render parts of the program either unnecessary, ineffective, or both.¹⁵⁴

In addition to any preemployment checks railroad companies may require, the law already requires train crews to pass certain back-

¹⁴⁸ See, e.g., Kevin M. Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2391 (2011) (noting that the Supreme Court has never questioned the ability of a federal agency to have powers to create and enforce regulations).

¹⁴⁹ See Comments of CSX, *supra* note 73, at 10-11 (noting some requirements are impossible to achieve in some situations).

¹⁵⁰ See *infra* notes 160-64 and accompanying text.

¹⁵¹ See Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, §102, 116 Stat. 2064, 2080-81.

¹⁵² Advantages of freight rail transportation include lower costs, less environmental impact, decreased highway traffic, and increased safety. ASS'N OF AM. R.Rs., OVERVIEW OF AMERICA'S FREIGHT RAILROADS 7 (2008), <http://www.aar.org/PubCommon/Documents/AboutTheIndustry/Overview.pdf>.

¹⁵³ See *supra* notes 132-40 and accompanying text.

¹⁵⁴ For example, the limited use of card readers makes any security benefits questionable. See Thomas Frank, *\$250M Effort to Secure Port Lags*, USA TODAY, Apr. 15, 2009, available at http://www.usatoday.com/tech/news/surveillance/2009-04-15-port-security_N.htm.

ground checks.¹⁵⁵ Moreover, since freight rail companies do not conduct a train-by-train analysis about the cargo on any given trip, train crew members need to be certified to transfer hazardous materials, unless there is no chance that a train may carry hazardous materials.¹⁵⁶ Since freight rail crews have already obtained background clearances and identification verifications, another identification card seems to provide little additional benefit.¹⁵⁷ If this were the only problem with the program, it might be reasonable to continue the program in its present state.¹⁵⁸ However, there are numerous issues regarding the implementation of the program and the effectiveness of the actual TWIC cards and readers that further erode the justifications for the program.¹⁵⁹

The most glaring problem with the TWIC requirement is that it is unlikely to address the primary dangers ports pose.¹⁶⁰ Ports are more valuable in defense against terrorist attacks as points of inspection to prevent previously loaded dangerous materials from getting into the country.¹⁶¹ While possibly representing a valuable economic target, terrorists seem more interested in choosing targets primarily based on human casualties, with, at best, a secondary concern for economic disruption.¹⁶² A terrorist does not need to wander into a port to attack port workers. In fact, doing so would increase the likelihood of detection. As currently implemented, TWIC cards are not actually necessary to

¹⁵⁵ Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1520, 121 Stat. 266, 444 (requiring background checks for all railroad frontline employees, which are defined in section 1501 to include essentially everyone associated with rail operations).

¹⁵⁶ See 49 U.S.C. § 5103a(a)(1) (Supp. III 2009) (requiring background checks for all individuals who need hazardous materials certification); Comments of CSX, *supra* note 73, at 18 n.10 (indicating rail companies do not conduct analysis on what each train will carry).

¹⁵⁷ See *supra* note 155 and accompanying text.

¹⁵⁸ See *infra* notes 160-71 and accompanying text (describing other problems with the TWIC system).

¹⁵⁹ See Frank, *supra* note 154 (describing the problems with the current card readers).

¹⁶⁰ See *infra* notes 161-66 and accompanying text.

¹⁶¹ See 33 C.F.R. § 401.80 (2010) (noting that all ships carrying dangerous cargo must notify prior to entering the port).

¹⁶² See Hearing on Surface Transp., *supra* note 53, at 1 (statement of Sen. Frank R. Lautenberg, Chairman, S. Comm. On Sci., Commerce, and Transp.) (describing a number of attacks overseas on commuter rails).

access the ports.¹⁶³ As such, only in the event that an inspector asks a person for their TWIC card is there any chance of finding an unauthorized person.¹⁶⁴

An attack involving trains could include sneaking a person or explosive into a port or sneaking a person or item out of the port. TWIC cards cannot do anything about movement of materials, and they have limited usefulness in preventing the movement of persons into the United States.¹⁶⁵ An outgoing target, such as a tank car, is substantially easier to sabotage either on the open railroads, at unguarded or lightly guarded stations, or, in the case of a highway tank, at any rest stop, gas station, or restaurant in the country where there are no access restrictions.¹⁶⁶ Sneaking a person into a port is of questionable significance due to the fact that ports do not make a particularly attractive target, and sneaking a person into the country through a port would be one of the least effective ways imaginable to smuggle a person, given our porous national borders.¹⁶⁷

Finally, the implementation of the TWIC program has been incomplete and so fraught with problems that it remains unclear whether complete implementation would have a serious impact on reduction of the threat posed to ports by unfettered admission of railroad employ-

¹⁶³ *TWIC Pilot Test*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/what_we_do/layers/twic/pilot_test.shtm (last visited Jan. 18, 2012) (noting that only four ports and four individual sites are conducting the test phase and using the actual card readers).

¹⁶⁴ *See id.*

¹⁶⁵ Sneaking a person into the country can be done much more easily at the nation's porous northern or southern borders or with any number of readily-available falsified travel documents. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-770, *ILLEGAL IMMIGRATION: BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995; BORDER PATROL'S EFFORTS TO PREVENT DEATHS HAVE NOT BEEN FULLY EVALUATED* 23 (2006), available at <http://www.gao.gov/new.items/d06770.pdf>. (showing the number of people who have been caught trying to enter the country through our borders).

¹⁶⁶ *See* Hearing on Surface Transp., *supra* note 53, at 2 (statement of Sen. Frank R. Lautenberg) (noting the vast amount of railways and pipelines in the country).

¹⁶⁷ While an exact number of people who cross the border is difficult to obtain, in 2005, nearly 750,000 people were *caught* trying to enter the country. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-770, *ILLEGAL IMMIGRATION: BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995; BORDER PATROL'S EFFORTS TO PREVENT DEATHS HAVE NOT BEEN FULLY EVALUATED* 23 (2006), available at <http://www.gao.gov/new.items/d06770.pdf>.

ees.¹⁶⁸ According to TSA, full implementation of the TWIC program has only begun in a handful of locations as part of a testing phase.¹⁶⁹ Unfortunately, even this testing phase has been unsuccessful, as there have been problems with the availability of working card readers.¹⁷⁰ Furthermore, TSA has taken the position that TWIC cards are required for people that have very little to do with the safety of the nation's ports.¹⁷¹ Given these problems, it is far from certain that the TWIC program is effectively addressing the security at the nation's ports.¹⁷²

Despite these shortcomings, TWIC card requirements represent an area of regulation where the federal government is surely acting within its authority to regulate.¹⁷³ The problem is not the permissibility of the regulations but the implementation.¹⁷⁴ Insofar as the regulations relate to establishing a standardized form of identification for access to the nation's ports, they address a security need that, if perhaps not pressing, is at least colorable.¹⁷⁵ But, an identification program in which the card readers do not function can provide little security bene-

¹⁶⁸ See *infra* notes 174-77 and accompanying text.

¹⁶⁹ *TWIC Pilot Test*, TRANSP. SECURITY ADMIN., http://www.tsa.gov/what_we_do/layers/twic/pilot_test.shtm (last visited Jan. 18, 2012).

¹⁷⁰ Frank, *supra* note 154; Matthew Harwood, *TWIC Compliance Starts Today; Critics Angry Card Readers Not Deployed*, SECURITY MGMT. (Apr. 15, 2009), <http://www.securitymanagement.com/news/twic-compliance-starts-today-critics-angry-card-readers-not-deployed-005486>.

¹⁷¹ See Mike M. Ahlers, *TSA: Mule Skinners Need Background Checks, Too*, CNN.COM, Feb. 25, 2009, <http://www.cnn.com/2009/US/02/25/mule.skinner.blues/index.html?iref=allsearch> (noting that national park workers who oversee mule-drawn canal boats were required by TSA to obtain a TWIC card to operate a boat pulled by mules). While this is probably the most ridiculous of all of the TWIC requirements, it operates to demonstrate that blind adherence to the program is resulting in unnecessary burdens.

¹⁷² Rather than engage in conjecture, the question of how port officials should treat a malfunctioning TWIC card or reader is left unanswered. It is not difficult to imagine a scenario in which the reader stops functioning or in which a vital member of train operations (such as the conductor) merely forgets her TWIC card at home. In such a scenario, would the train be denied access to the port, thereby holding up any number of future shipments, or would an alternative form of identification be accepted?

¹⁷³ See U.S. CONST. art. I, § 8, cl. 1 (authorizing Congress to provide for defense).

¹⁷⁴ See *supra* notes 160-77 and accompanying text (describing the problems in the TWIC program).

¹⁷⁵ See *supra* note 153 and accompanying text (noting that it is within the government's power to restrict who can access critical infrastructure).

fit.¹⁷⁶ Furthermore, relative to the rail industry, the duplicative nature of the process makes any additional benefit very insignificant.¹⁷⁷

There are several ways to address the shortcomings of the TWIC program.¹⁷⁸ The first would be to completely exempt transportation workers from the requirements of this essentially marine regulation.¹⁷⁹ Train crews that briefly access port property and whose backgrounds have already been checked should not be required to obtain a TWIC card.¹⁸⁰ This situation could be an exception without a change to the current legislation by providing train crews with an escort or by presuming that train crews have an escort while on the property.¹⁸¹ The second way to address problems with the TWIC program would be to design a working reader and require the readers to check *port employees* as they enter the grounds and *ship crews* as they pull into the dock.¹⁸² Finally, once these basic recommendations are in place, the focus should return to the major threat that ports pose—the admittance of dangerous cargo into the country.¹⁸³ By their very nature, ports are avenues of getting goods into the country. To ignore the nature of ports and focus on the secondary aspect of people at ports is to ignore the real threat.¹⁸⁴

C. TIH Regulations

Government regulation relating to the transportation of hazardous materials is generally appropriate because of the dangers such

¹⁷⁶ Frank, *supra* note 154.

¹⁷⁷ See *supra* notes 155-57 and accompanying text.

¹⁷⁸ See *infra* notes 179-83 and accompanying text.

¹⁷⁹ Mule handlers would fit nicely into this category. See Ahlers, *supra* note 171.

¹⁸⁰ See *supra* notes 155-57 and accompanying text.

¹⁸¹ See Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 102, 116 Stat. 2064, 2073 (noting that only those needing unescorted access must get a card).

¹⁸² This addresses the problem of requiring people only tangentially related to the maritime transportation of goods to apply for TWIC cards as well as the need to make sure that those who should have the identification card have one that functions properly.

¹⁸³ See 33 C.F.R. § 401.80 (2010) (noting that all ships carrying dangerous cargo must notify the port prior to entering).

¹⁸⁴ See *supra* notes 160-67.

materials pose.¹⁸⁵ However, because freight rail companies must transport hazardous materials upon “reasonable request,”¹⁸⁶ serious questions arise over what additional regulatory requirements are appropriate to place on freight rail companies.¹⁸⁷ Many railroad companies would rather not transport hazardous materials.¹⁸⁸

The TIH guidelines propose complicated and sometimes conflicting standards for the railroads to consider, while imposing significant burdens on railroad management resources.¹⁸⁹ For example, PHMSA’s regulations require an analysis using twenty-seven nonexhaustive factors for railroads to consider when making routing decisions for TIH railcars.¹⁹⁰ Some of these factors, such as the requirement to consider emergency response capabilities of the communities that TIH material will pass through, impose substantial burdens on the railroads.¹⁹¹

It is not only the direct impact the regulations pose on the railroads that must be taken into account.¹⁹² Any regulation that proposes a change to the *operation* of the railroads necessarily creates cascading effects on the flow of commerce.¹⁹³ Particularly troublesome in this regard is the recent regulation requiring that trains carrying TIH materi-

¹⁸⁵ Rail Transportation Security, 71 Fed. Reg. 76852, 76861 (proposed Dec. 21, 2006) (to be codified at 49 C.F.R. pts. 1520, 1580) (noting that cargos carrying hazardous material present an attractive target for terrorist attacks).

¹⁸⁶ 49 U.S.C. § 11101(a) (2006).

¹⁸⁷ See Hearing on Surface Transp., *supra* note 53, at 49 (statement of Howard R. “Skip” Elliot) (arguing that some restrictions are extremely burdensome to rail companies).

¹⁸⁸ Comments of CSX, *supra* note 73, at 5 (noting that one railroad company would prefer not to transport TIH material).

¹⁸⁹ See *id.* at 10-11, 14 (noting that compliance with TIH guidelines takes a disproportionate amount of management time and conflict between regulations requiring attended car transfers and regulations to keep TIH materials out of major population centers).

¹⁹⁰ 49 C.F.R. § 172 app. D (2010).

¹⁹¹ See Comments of CSX, *supra* note 73, at 13 (noting that one railroad company is incapable of determining the emergency response capabilities of the fire departments in the 17,000 communities the company’s trains pass).

¹⁹² See *infra* notes 193-98 and accompanying text.

¹⁹³ See Comments of CSX, *supra* note 73, at 18 (noting that one railroad company’s efforts to meet future transportation demands will be delayed).

als go no faster than fifty miles per hour.¹⁹⁴ Since railroad companies, when planning regular operations and routing determinations, do not conduct a train-by-train analysis,¹⁹⁵ these restrictions effectively impose a standing speed limit on the nation's railroads.¹⁹⁶ This puts freight rail companies in an untenable position where it might become necessary to consider fundamental changes to routing determinations or to wait to transport TIH materials until there is a full or nearly full train.¹⁹⁷ The former option would be costly to implement, and the latter option would create ultrahazardous TIH trains that would be ideal targets for terrorist attacks.¹⁹⁸

Balanced against these strong reasons to limit regulation in this area is the fact that TIH materials represent a particularly dangerous aspect of freight rail transportation and present an attractive target for terrorist attacks.¹⁹⁹ Given the inherent risks of transporting TIH materials, some government regulation is appropriate.²⁰⁰ In this regard, the requirement that rail carriers identify the safest routes to transport hazardous material is appropriate.²⁰¹ With much better access to intelligence information than any private corporation, the federal government is in a better position to provide guidance on what factors should receive the greatest weight in making TIH routing determinations.²⁰² Unfortunately, the various regulatory agencies have been less than consistent in their message to participants in the freight rail industry.²⁰³

¹⁹⁴ Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, 74 Fed. Reg. 1770, 1772 (Jan. 13, 2009) (to be codified at 49 C.F.R. pts. 171-74, 179).

¹⁹⁵ Comments of CSX, *supra* note 73, at 18 n.10.

¹⁹⁶ *See id.* at 18 (noting one railroad company's acknowledgment that speed reductions will adversely affect railroad networks).

¹⁹⁷ *See id.* at 14 (noting that one railroad company anticipates changes in routing due to additional regulations).

¹⁹⁸ *See* Rail Transportation Security, 71 Fed. Reg. 76852, 76861 (proposed Dec. 21, 2006) (to be codified at 49 C.F.R. pts. 1520, 1580).

¹⁹⁹ *Id.*

²⁰⁰ *See supra* notes 70-71 and accompanying text.

²⁰¹ 49 C.F.R. § 172.820(e) (2010).

²⁰² *See* Comments of CSX, *supra* note 73, at 13 (noting that one railroad company supports the goals the government attempts to achieve in its routing regulations).

²⁰³ *Id.* at 11.

There are several possible solutions to the problems with TIH regulations.²⁰⁴ The most important solution would be consistency among the various regulatory bodies that directly or indirectly regulate the freight rail industry.²⁰⁵ One of the 9/11 Commission's recommendations was to encourage communication between government agencies in charge of security.²⁰⁶ The federal agencies should follow the recommendation and sort out inconsistencies to provide the industry with clear, consistent guidelines. At all times, regulatory agencies need to remember that every regulation they pass imposes restrictions on the other ninety-nine percent of goods that do not pose any particular security risks to the country.²⁰⁷ With this in mind, agencies need to return to the cooperative interaction between industry and government that was the hallmark of early regulatory and nonregulatory action.²⁰⁸

Finally, if the government is going to mandate that freight rail companies transport TIH materials, it needs to provide the industry with substantial legal protection for taking on the extraordinary risks associated with transporting these materials.²⁰⁹ The current state of regulations has created an environment where many railroads would prefer not to transport TIH materials at all due to the risk of ruinous liabilities.²¹⁰ The original cost and safety considerations that led to the preference for moving these commodities by freight rail over highway transportation are still legitimate.²¹¹ The 9/11 Commission recommended that regulatory agencies set new safety standards and that corporations consider those standards the duty of care they owe to the public for legal pur-

²⁰⁴ See *infra* notes 205-16 and accompanying text.

²⁰⁵ See Comments of CSX, *supra* note 73, at 11.

²⁰⁶ 9/11 COMMISSION, *supra* note 21, at 416-18.

²⁰⁷ Comments of CSX, *supra* note 73, at 8-9.

²⁰⁸ See *id.* at 9-10 (noting a change in the relationship between the railroad industry and government from cooperative to formal).

²⁰⁹ See *id.* at 6 (noting that juries have held railroad companies liable merely because they have a deep pocket).

²¹⁰ *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials: Hearing Before Surface Transp. Bd.*, 110th Cong. 31, 14 (2008) (statement of Association of American Railroads) (noting an untenable situation where railroads face potentially ruinous liability).

²¹¹ ASS'N OF AM. R.Rs., OVERVIEW OF AMERICA'S FREIGHT RAILROADS, 7 (2008), <http://www.aar.org/PubCommon/Documents/AboutTheIndustry/Overview.pdf>.

poses.²¹² However, contradictory regulations have created a scenario in which railroads cannot simultaneously meet the conflicting standards.²¹³ This leads to a situation where the railroads are nearly certain, in the event of a terrorist attack on a train carrying TIH material, to face potentially ruinous liability.²¹⁴ This is an industry characterized by exemplary corporate participants with a clearly demonstrated concern for safety and security.²¹⁵ That such responsible corporate partners would prefer not to pursue this line of business should give the regulatory agencies pause.²¹⁶

D. Tank Car Guidelines

Minimal safety guidelines on tank cars pose no serious concerns with regard to legislative appropriateness.²¹⁷ Even in a world devoid of the threat of terror attacks, mundane harms could lead to a derailment or other train accident.²¹⁸ As such, the federal government acts within a native sphere of power to protect the public, and the threat of terrorist activity merely expands the permissible range of regulation.²¹⁹ Businesses have no particular freedom to use tank cars to transport goods if the cars are unsafe.²²⁰ As long as the regulations take into consideration the reality that businesses cannot install or create new technology overnight, the increased standards for rail cars should have a minimal impact on commerce. Cooperation between industry and government has been more apparent in this area than in the other regulations discussed.²²¹ At

²¹² 9/11 COMMISSION, *supra* note 21, at 398.

²¹³ Comments of CSX, *supra* note 73, at 10-11.

²¹⁴ *See id.* at 5-8 (describing the liability issues and their implications in a post 9/11 world).

²¹⁵ *See id.* at 11-17 (detailing many proactive measures taken to ensure rail safety).

²¹⁶ *See id.* at 5 (reasoning that many companies are avoiding shipping TIH due to the extra risks and reputation damage).

²¹⁷ *See infra* notes 226-30 and accompanying text.

²¹⁸ FED. R.R. ASSOC., HEADQUARTERS-LEVEL RAILROAD ACCIDENT INVESTIGATIONS (2010), http://www.fra.dot.gov/downloads/safety/Accident_Investigation/2010/2010_summary.pdf (listing a number of derailments for reasons unrelated to terrorism).

²¹⁹ *See supra* notes 105-06 and accompanying text; Hearing on Surface Transp., *supra* note 53 (statement of Howard R. “Skip” Elliot) (noting that the railroad industry changed due to the attacks on 9/11).

²²⁰ *See supra* notes 112-20 and accompanying text (describing the balancing that must take place between freedom and government regulation).

²²¹ *See* Comments of CSX, *supra* note 73, at 17-18.

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the very least, DOT has been open to receiving comments on the issue, and the industry has proposed a standard of implementation over the next twenty-five years.²²²

VI. CONCLUSION

The point of these regulatory changes is to address the concerns of the 9/11 Commission and the threats that have arisen since the Commission published its results.²²³ TWIC cards properly addressed the 9/11 Commission's recommendation to implement biometric scans at our nation's borders, but the indiscriminate extension of the requirements to previously verified workers who are only temporarily at the ports has created unnecessary burdens on commerce and individuals.²²⁴

The recommendation to create private security plans to prevent and respond to potential attacks has succeeded admirably well.²²⁵ The corporations involved in freight transportation have been very responsive to the government's requests and have even taken significant voluntary measures to enhance safety and security without need for regulation.²²⁶ The cooperation of the freight rail industry has created an environment where plans are in place to help avoid the occurrence of an attack as well as plans for quick reaction if an attack were to occur.²²⁷ Improved communication directives allow concerned actors to quickly convey such information by identifying contact points within the government and industry.²²⁸ Taken together, these improvements address the recommendations of the 9/11 Commission.²²⁹ There are, however, significant areas that need improvements that will maintain or improve the present level of protection while placing significantly less burden on the industry and commerce in general.²³⁰

²²² *See id.*

²²³ *See supra* Parts II-III.

²²⁴ *See supra* Parts III.C, V.B.

²²⁵ *See supra* Part III.B.

²²⁶ Hearing on Surface Transp., *supra* note 53, at 47-49 (statement of Howard R. "Skip" Elliot).

²²⁷ 49 C.F.R. § 1580.101 (2010).

²²⁸ *Id.*

²²⁹ *See supra* Part III.B.

²³⁰ *See supra* Part V.

Perhaps the area of transportation regulations with the greatest room for improvement is fiscal allocation, which should be need based.²³¹ According to TSA's analysis, "the transportation mode that may be at highest risk is mass transit, followed by aviation, highway, freight rail, and pipeline."²³² Aviation receives the lion's share of TSA money, but mass transit protections remain woefully inadequate.²³³ The history of attacks on the rail industry indicates that terrorists are most interested in passenger and commuter rail.²³⁴ Now that regulations are in place to address the present security threats to the freight rail system, concentrating on passenger and commuter rails may best serve the safety of the nation.²³⁵

As the government proceeds to address commuter rail issues, it will be very important to remember the lessons learned from freight rail regulations.²³⁶ Freight rail companies have demonstrated an excellent record of compliance with the government's security policies.²³⁷ Even more importantly, the industry has been remarkably proactive in addressing the security concerns in the post-9/11 era.²³⁸ Efforts should be made to include the industry in any risk evaluation.²³⁹ Communication between the industry and intelligence-gathering agencies must be encouraged, and security efforts need to be directed at areas where the threats are greatest.²⁴⁰ More can be accomplished with a cooperative effort than can be accomplished if one partner feels a constant need to protect himself or herself from the other.²⁴¹ If extensive burdens are forced on the industry, the government must make an effort to mitigate

²³¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-492, TRANSPORTATION SECURITY: COMPREHENSIVE RISK ASSESSMENTS AND STRONGER INTERNAL CONTROLS NEEDED TO HELP INFORM TSA RESOURCE ALLOCATION 27-29 (2009), available at <http://www.gao.gov/new.items/d09492.pdf>.

²³² *Id.* at 29.

²³³ *See id.* at 28 (showing the difference in funding between aviation security and all other forms).

²³⁴ *See* Hearing on Surface Transp., *supra* note 53, at 1 (statement of Sen. Frank R. Lautenberg) (describing a number of attacks overseas on commuter rails).

²³⁵ *See supra* Part III.

²³⁶ *See infra* notes 237-44 and accompanying text.

²³⁷ Hearing on Surface Transp., *supra* note 53, at 47-49.

²³⁸ *Id.*

²³⁹ *See supra* notes 213-16 and accompanying text.

²⁴⁰ *See supra* notes 206-08, 231-35 and accompanying text.

²⁴¹ *See supra* Part III.B.

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those burdens with reasonable legislative shields.²⁴² Finally, in considering what plans to implement and how to best implement them, government agencies must remember that passenger rail systems do not operate in a vacuum. In some places, freight and passenger rail systems exist side by side.²⁴³ Agencies need to ensure that regulations necessary for protection of the passenger rail systems do not unnecessarily burden the nation's freight rail industry or impede the free flow of commerce.²⁴⁴

²⁴² See *supra* notes 209-10 and accompanying text (describing the risk of lawsuits because of government regulations).

²⁴³ ASS'N OF AM. R.R.S., OVERVIEW OF AMERICA'S FREIGHT RAILROADS 8 (2008), <http://www.aar.org/PubCommon/Documents/AboutTheIndustry/overview.pdf>.

²⁴⁴ See *supra* notes 131-38 and accompanying text (describing the balancing that must take place between freedom and government regulation).

