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**B. Post-9/11 Domestic Security Initiatives Regarding Cargo Containers**

1. Key legislation

In the wake of 9/11, the United States realized the vulnerability of its seaports and vessels to a new brand of twenty-first century terror.<sup>76</sup> With that realization came vigorous efforts to quickly adopt innovative security measures in the United States and a call for the recognition that it was time to embrace an international approach, particularly regarding vessel, port, and cargo security.<sup>77</sup>

There are two pieces of key legislation relating to container security.<sup>78</sup> The basis for any discussion of U.S. homeland security must begin with the extensive restructuring of the U.S. government in November of 2002, resulting in the enactment of the Homeland Security Act.<sup>79</sup> This Act gave birth to a new U.S. executive department, the

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Cox, *The Advent and Future of International Port Security Law*, 1 NATIONAL SECURITY L. J. 77, 77 (2013).

<sup>75</sup> See Firestone and Corbett, *supra* note 6, at 426.

<sup>76</sup> See FLYNN, *supra* note 4, at 87.

<sup>77</sup> *Id.* at 91 (“We have to recognize that the networks we rely on today are integrated into much larger continental and global systems.”).

<sup>78</sup> While the focus of this Article is on certain protocols for tracking and screening cargo, there are a number of excellent pieces of scholarship with detailed discussions covering additional pieces of legislation and executive orders concerning homeland security stemming from the attacks on September 11, 2001. See, e.g., Rachael B. Bralliar, *Protecting U.S. Ports with Layered Security Measures for Container Ships*, 185 MIL. L. REV. 1 (2005); Robert G. Clyne, *Terrorism and Port/Cargo Security: Developments and Implications for Marine Cargo Recoveries*, 77 TUL. L. REV. 1183 (2003); Katie S. Matison, *What’s in the Box?*, 76 J. OF TRANSP. L., LOGISTICS & POL’Y 329 (2009); K. Lamar Walters, III, *Industry on Alert: Legal and Economic Ramifications of the Homeland Security Act on Maritime Commerce*, 30 TUL. MAR. L.J. 311 (2006).

<sup>79</sup> Homeland Security Act of 2002, 6 U.S.C. §§ 101-195c (2012).

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Department of Homeland Security (the “DHS”).<sup>80</sup> In March of 2003, Congress reorganized the U.S. Customs Service and renamed it as United States Customs and Border Protection (the “CBP”).<sup>81</sup> This Agency now falls within the DHS and is responsible for managing, controlling, and securing the borders of the United States.<sup>82</sup> Congress also relocated the U.S. Coast Guard (the “USCG”) from the Department of Transportation to the DHS.<sup>83</sup>

*a. The MTSA*

The first piece of legislation that Congress enacted following 9/11 in an effort to secure U.S. ports was the 2002 MTSA.<sup>84</sup> The Act requires, or empowers, the DHS to conduct comprehensive threat and vulnerability assessments at critical ports including local threat profiles and evaluations of all aspects of security in the surrounding area.<sup>85</sup> The general approach of the MTSA to port security is multitiered.<sup>86</sup> Experts have concluded that the most effective defense is one that is layered and

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<sup>80</sup> *Id.* § 111; Owen Bishop, *A “Secure” Package? Maritime Cargo Container Security After 9/11*, 29 *TRANSP. L.J.*, 313, 314 (2002).

<sup>81</sup> See JOHN F. FRITELLI, CONG. RESEARCH SERV., RL31733, *PORT AND MARITIME SECURITY: BACKGROUND AND ISSUES FOR CONGRESS 10* (2005), available at <http://www.maritimeterrorism.com/2005/05/27/port-and-maritime-security-background-and-issues-for-congress/>.

<sup>82</sup> *Id.* (discussing the role of the CBP). Notably, “[p]rior to the establishment of the CBP, customs and immigration functions at U.S. borders were conducted separately by the Department of Treasury’s U.S. Customs Service and the Department of Justice’s Immigration and Naturalization Service.” *Id.*

<sup>83</sup> Bralliar, *supra* note 78, at 39.

<sup>84</sup> Joann Peterson & Alan Treat, *The Post 9/11 Global Framework for Cargo Security*, 2 *J. INT’L COM. & ECON.* 1, 11 (2009); Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064 (codified at 46 U.S.C. §§ 70101-70125 (2006)).

<sup>85</sup> *Id.* §§ 70102-03. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law, Establishment of U.S. Antiterrorism Maritime Transportation System*, 98 *AM. J. INT’L L.* 579, 588-89 (2004) (explaining what the MTSA requires of the DHS).

<sup>86</sup> See Bralliar, *supra* note 78, at 4, 38-63; Wendy J. Keefer, *Container Port Security: A Layered Defense Strategy to Protect the Homeland and the International Supply Chain*, 30 *CAMPBELL L. REV.* 139, 139 (2007) (discussing the multilayered security measures used to secure containers entering the United States).

includes both national and international security measures.<sup>87</sup> This approach is essential when it comes to cargo security measures due to the variety of goods transported in containers aboard a cargo ship<sup>88</sup> and the number of individuals and countries that may be involved in shipping a container from a foreign port to the United States.<sup>89</sup>

*b. The SAFE Port Act*

In 2006, Congress enacted the SAFE Port Act to supplement and strengthen perceived weaknesses of the MTSA.<sup>90</sup> Like the MTSA, the SAFE Port Act advocates the layered approach to port security.<sup>91</sup> It also prescribes the steps that must be taken to create a strategic plan to secure “the international supply chain.”<sup>92</sup> The linchpin of this global

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<sup>87</sup> See FLYNN, *supra* note 4, at 69 (endorsing a multitiered approach and admonishing that “[a]nyone who claims they have developed *the* solution to a security challenge should be met with automatic skepticism. Effective security always requires constructing layers of measures. Each of these layers may be imperfect, but collectively they increase the odds of tripping up the bad guys.”); FRITELLI, *supra* note 81, at 18 (stating that experts recommend relying “on a layered approach with multiple lines of defense”).

<sup>88</sup> See Bralliar, *supra* note 78, at 10-11 (“The volume and multiple sources providing cargo in maritime containers transported overseas, as well as the potential anonymity of such contents, make containers and container ships easy targets for terrorist. These vulnerabilities make containers and container ships unique security threats.”).

<sup>89</sup> See FRITELLI, *supra* note 81, at 8 (Individuals connected to a container shipment “usually include the exporter, the importer, a freight forwarder, a customs broker, a customs inspector, inland transportation provider(s) (which may include more than one trucker or railroad), the port operators, possibly a feeder ship [a smaller cargo container vessel that travels between a megaship and the port of destination], and the ocean carrier.”).

<sup>90</sup> The SAFE Port Act, Pub. L. No. 109-347, 120 Stat. 1884 (2006); see GAO MARITIME SECURITY, *supra* note 19, at 1, 3 (explaining what the SAFE Port Act required of the DHS).

<sup>91</sup> 6 U.S.C. § 941(a) (2012) (“The Secretary, in consultation with appropriate Federal, State, local, and tribal government agencies and private sector stakeholders responsible for security matters that affect or relate to the movement of containers through the international supply chain, shall develop, implement, and update, as appropriate, a strategic plan to enhance the security of the international supply chain.”).

<sup>92</sup> § 941(b)-(f).



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supply chain is the container.<sup>93</sup>

An interesting wrinkle has also arisen as to whether it is safe for port security to be “SMART.” The House of Representatives passed a bill on June 28, 2012, that it introduced as H.R. 4251 in March of 2012, but the Senate never passed the bill.<sup>94</sup> The legislation, entitled the Securing Maritime Activities through Risk-Based Targeting for Port Security Act (the “SMART Port Security Act”), authorized “the Homeland Security Department to acknowledge as acceptable foreign nations’ Trusted Shipper Programs.”<sup>95</sup> The SMART Port Security Act was supposed to build on the 2006 SAFE Port Act with the goal of the legislation to assist the United States in “streamlining and improving . . . efforts to prevent dangerous materials that could be used in a terrorist attack from entering the country through its port system.”<sup>96</sup> Arguably, the SMART Port Security Act would also have “neutralize[d] many provisions of the SAFE Port Act by allowing the executive branch to recognize another country’s [Trusted Shipper] port security measures as sufficient.”<sup>97</sup> The ramifications of such authority could result in the United States “rely[ing] on the security measures at a [United Arab Emirates] managed port . . . if the United States Coast Guard recognizes their port security threat assessments as sufficient.”<sup>98</sup> In essence, it is as if the United Arab Emirates could manage a U.S. port

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<sup>93</sup> See § 941(a)-(f).

<sup>94</sup> See Ryan Hatley, *Could “SMART Port Security” Reverse “SAFE Port Security”?*, NAT’L SECURITY L. BRIEF (Nov. 21, 2012), <http://nationalsecuritylawbrief.com/could-smart-port-security-reverse-safe-port-security/>; *H.R. 4251 (112th): Securing Maritime Activities through Risk-based Targeting for Port Security Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr4251> (last visited Sept. 15, 2013) (providing information as to the status and history of the bill).

<sup>95</sup> *House Approves New Ship Cargo Screening Bill*, NUCLEAR THREAT INITIATIVE (June 29, 2012), <http://www.nti.org/gsn/article/house-approves-new-ship-cargo-screening-bill/>.

<sup>96</sup> *Id.*; Jeff Berman, *NFR Voices Support for the SMART Port Security Act*, LOGISTICS MGMT. (June 6, 2012), [http://www.logisticsmgmt.com/article/nrf\\_voices\\_support\\_for\\_the\\_smart\\_port\\_security\\_act/](http://www.logisticsmgmt.com/article/nrf_voices_support_for_the_smart_port_security_act/) (stating that the Act “encourage[s] DHS to really identify where the current supply chain security gaps are and determine what is needed to fill those gaps in”).

<sup>97</sup> Hatley, *supra* note 94.

<sup>98</sup> *Id.*

in terms of the enforceable security measures.<sup>99</sup> This permits an end run around the provision of the SAFE Port Act that “changed the Exon-Florio Amendment . . . to require the executive branch to perform a 45-day investigation of each foreign investment deal” absent an agreement by “the Secretary of Transportation and the head of the lead agency on the transaction . . . that there is no threat to national security.”<sup>100</sup>

## 2. The agencies

The principal players in fulfilling the success of the layered approach to container security are the DHS;<sup>101</sup> the USCG, which is responsible for providing security on the water and regulating and inspecting vessels that enter U.S. ports;<sup>102</sup> and the CBP, which has the primary duty of examining and inspecting cargo and cargo containers shipped to the United States aboard foreign vessels.<sup>103</sup> Each of these enforcement authorities has instituted various security measures that specifically relate to securing shipping containers.<sup>104</sup> There is a fourth agency that plays a role in the security of domestic maritime transportation, the Transportation and Security Administration (the “TSA”).<sup>105</sup> Originally seen as an agency focused on security in the aviation area, the TSA now plays a significant role in cargo container security by its oversight of the TWIC initiative.<sup>106</sup>

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<sup>99</sup> *See id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See supra* note 85 and accompanying text.

<sup>102</sup> *See* Bralliar, *supra* note 78, at 43-44 (discussing the role of the Coast Guard in fulfilling the tenets of the MTSA).

<sup>103</sup> *Id.* at 39-40 (stating that the CBP also is responsible for “examining and inspecting the crew members and passengers on ships arriving in U.S. ports from foreign ports.”); *see* FRITELLI, *supra* note 81, at 3 (discussing the physical inspection by the CBP of maritime containers).

<sup>104</sup> *See supra* notes 101-03 and accompanying text (explaining each agency’s security measures).

<sup>105</sup> FRITELLI, *supra* note 81, at 9-10 (citing the Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (2001)) (“TSA is an agency created by the Aviation and Transportation Security Act of 2001.”).

<sup>106</sup> *See id.* at 20; Ben Brandt, *Terrorist Threats to Commercial Aviation: A Contemporary Assessment*, COMBATING TERRORISM CENTER AT WEST POINT (Nov. 30, 2011), <http://www.ctc.usma.edu/posts/terrorist-threats-to-commercial-aviation-a-contemporary-assessment>.

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### 3. The programs

There are four key programs set forth in the MTSA and the Safe Port Act that are critical to the creation of the multilayered approach to container security.<sup>107</sup> First, to increase security, the MTSA requires the development of the TWIC.<sup>108</sup> Second, the SAFE Port Act codified the CSI and the C-TPAT.<sup>109</sup> It also required that all containers entering high-volume U.S. ports be scanned for radiation sources by December 31, 2007.<sup>110</sup>

#### *a. The SAFE Port Act*

##### *i. The CSI*

In January 2002, the CBP launched the CSI.<sup>111</sup> There are four core elements to the CSI: “(1) using intelligence and automated information to identify and target high-risk containers; (2) pre-screening those containers identified as high-risk, at the port of departure, before they arrive at U.S. ports; (3) using detection technology to quickly pre-screen high-risk containers; and (4) using smarter, tamper proof containers.”<sup>112</sup> The overarching intent of the CSI is to “extend our zone of security outward so that American borders are the last line of defense, not the first.”<sup>113</sup>

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<sup>107</sup> See *Deputy Commissioner Testifies on Cargo and Border Security Issues*, U.S. CUSTOMS & BORDER PROTECTION (Apr. 2, 2008), [http://www.cbp.gov/xp/cgov/newsroom/con\\_res/ref\\_rec/congressional\\_test/con\\_test\\_110/border\\_securiry\\_testify.xml](http://www.cbp.gov/xp/cgov/newsroom/con_res/ref_rec/congressional_test/con_test_110/border_securiry_testify.xml) (setting out and discussing in detail the components of the multilayered approach).

<sup>108</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-86T, MARITIME SECURITY: THE SAFE PORT ACT AND EFFORTS TO SECURE OUR NATION'S SEAPORTS 1, (2007) (statement of Steven L. Caldwell, Director of Homeland Security and Justice Issues), available at <http://www.gao.gov/new.items/d0886t.pdf>.

<sup>109</sup> *Id.* at 2.

<sup>110</sup> *Id.*

<sup>111</sup> *Container Security Initiative Expands Beyond The Megaports, Strengthening Anti-Terror Coalition*, U.S. CUSTOMS & BORDER PROTECTION (Jan. 28, 2003), [http://www.cbp.gov/archived/xp/cgov/newsroom/news\\_releases/archives/cbp\\_press\\_releases/012003/01282003.xml.html](http://www.cbp.gov/archived/xp/cgov/newsroom/news_releases/archives/cbp_press_releases/012003/01282003.xml.html).

<sup>112</sup> *Id.*

<sup>113</sup> *Container Security Initiative (CSI)*, GLOBALSECURITY.ORG,

According to the CSI 2006–2011 Strategic Plan,<sup>114</sup> the purpose of the CSI is “to pre-screen[] containers posing a potential security risk before they leave foreign ports for U.S. seaports.”<sup>115</sup> To implement the strategic plan, the “CBP deploys multi-disciplined teams to selected foreign seaports of countries that have bilaterally agreed to implement the CSI program.”<sup>116</sup> The CSI officials then “partner with foreign governments to identify cargo containers that pose a potential risk for terrorism and inspect those containers at the foreign ports before they are shipped to the United States.”<sup>117</sup> Originally, the CSI was operational “at the [top twenty] ports that sen[t] large volumes of cargo containers to the United States, in a way that will facilitate detection of potential security concerns at ports of origin or transshipment.”<sup>118</sup> Today, the CBP has expanded the CSI to include fifty-eight ports, which make up approximately eighty-five percent of the containers headed to the United States.<sup>119</sup>

Primarily, the CSI relies upon the CBP “24-hour manifest rule.”<sup>120</sup> Effective December 2, 2002, this rule requires carriers and non-vessel-operating common carriers to submit a cargo declaration to the CBP twenty-four hours before cargo is laden aboard the vessel at a foreign port.<sup>121</sup>

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<http://www.globalsecurity.org/security/ops/csi.htm> (last visited Sept. 17, 2013).

<sup>114</sup> *Container Security Initiative: 2006–2011 Strategic Plan*, U.S. CUSTOMS & BORDER PROTECTION (Aug. 2006), available at <http://epic.org/privacy/surveillance/spotlight/1006/csiplan.pdf>.

<sup>115</sup> *Id.* (Introduction by Commissioner W. Ralph Basham).

<sup>116</sup> *Id.* at 6.

<sup>117</sup> *Id.*

<sup>118</sup> *U.S. Expands Container Security Initiative to Sweden*, IIP DIGITAL, <http://iipdigital.usembassy.gov/st/english/texttrans/2003/01/20030129132511azwaniecki@pd.state.gov0.1734735.html#axzz2epMg8m4b> (last visited Sept. 17, 2013).

<sup>119</sup> *Container Security Initiative Ports*, DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/container-security-initiative-ports> (last visited Sept. 17, 2013).

<sup>120</sup> See Jim Giermanski, *Closing Gaps in the Container Security Initiative: Why the CSI Program Doesn’t Go Far Enough and What Can Be Done to Fix It*, SECURITY INFOWATCH.COM (Aug. 29, 2011), <http://www.securityinfowatch.com/article/10483219/closing-gaps-in-the-container-security-initiative?page=2>; Keefer, *supra* note 86, at 157.

<sup>121</sup> Joann Peterson and Alan Treat, *The Post-9/11 Global Framework for Cargo Security*, U.S. INT’L TRADE COMM’N J. OF INT’L COM. & ECON., Mar. 2008, at 1, 11-

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Consequently, the main weakness of the CSI, like the other tiers in the layered approach to cargo security, is its grounding in “data flow. Its validity is only as good as the accuracy of the data submitted.”<sup>122</sup> To identify containers to screen, the CBP employs “automated targeting tools” to determine which containers are high risk “based upon advance information and strategic intelligence.”<sup>123</sup> Further, the “CBP officers are only allowed to physically inspect containers in the participating foreign country ports when authorized to do so by that nation’s customs authorities.”<sup>124</sup> Absent the permission to actually examine the cargo, the CBP officers use nonintrusive inspection methods, i.e., mobile gamma-ray imaging technology and radiation technology, to screen high-risk containers.<sup>125</sup> This raises the additional criticism that the CSI is weak because it results in the inspectors generally “not really knowing the contents of the container.”<sup>126</sup> There is also a problem that the “nonintrusive inspection equipment used at CSI ports varies in detection capability . . . . As a result, the CBP has limited assurance that inspections conducted under CSI are effective at detecting and identifying terrorist [weapons of mass destruction] in containers.”<sup>127</sup>

ii. The C-TPAT

In contrast to the CSI, which is at least founded on the logical premise of “extend[ing] our zone of security outward so that American borders are the last line of defense, not the first,” arguably, the C-TPAT

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12, available at [http://www.usitc.gov/publications/332/journals/cargo\\_security.pdf](http://www.usitc.gov/publications/332/journals/cargo_security.pdf).

<sup>122</sup> James Giermanski, *Container Security: Is the Layered Approach Working?*, CSO (June 25, 2008), <http://www.csoonline.com/article/411113/container-security-is-the-layered-approach-working-> (discussing the statement of Deputy Commissioner of the CBP, Jayson P. Ahern, made before the Committee on Appropriations on April 2, 2008).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-466T, HOMELAND SECURITY: KEY CARGO SECURITY PROGRAMS CAN BE IMPROVED (2005) (testimony of Richard M. Stana, Director of Homeland Security and Justice Issues), available at <http://www.gao.gov/new.items/d05466t.pdf>; see also Bralliar, *supra* note 78, at 62-63 (discussing the inadequate implementation and enforcement mechanisms of the CSI).

does not have a sound foundation.<sup>128</sup> The DHS and the CBP developed the C-TPAT as a voluntary government-business initiative premised on the concept of quid pro quo.<sup>129</sup> If shippers agree “to adopt and integrate the program’s security guidelines into their supply chains,” they receive certification as “trusted” or “known” shippers.<sup>130</sup> This changes the risk factor of their goods.<sup>131</sup> The primary problem with the C-TPAT is that it basically gives shippers who provide information about their operations to the CBP “an ‘E-Z Pass’ from [the U.S.] government, sort of like drivers who speed right through toll booths without having to stop.”<sup>132</sup> In other words, their goods are less likely to be subject to extensive inspection.<sup>133</sup>

Further, it appears that “[the CBP] grants these special benefits without verifying that the security information provided by the shippers [] is reliable, accurate and effective.”<sup>134</sup> According to a Government Accounting Office (the “GAO”) report in 2005, the CBP’s validation process was not “rigorous” and did not have “written guidelines to indicate what scope of effort is adequate for the validation.”<sup>135</sup> In addition, the CBP had not developed a comprehensive set of performance measures for the program; furthermore, key program decisions “[were] not always documented and programmatic information [was] not updated regularly or accurately.”<sup>136</sup>

The program has been criticized as taking “a complacent posture towards port security by giving companies the benefit of speedy

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<sup>128</sup> *Container Security Initiative (CSI)*, *supra* note 123.

<sup>129</sup> *Securing the Global Supply Chain: Customs-Trade Partnership Against Terrorism (C-TPAT) Strategic Plan*, CUSTOMS & BORDER PATROL 12 (Nov. 2004), [http://www.cbp.gov/linkhandler/cgov/trade/cargo\\_security/ctpat/ctpat\\_program\\_information/ctpat\\_strat\\_plan.pdf](http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/ctpat/ctpat_program_information/ctpat_strat_plan.pdf) (last visited Oct. 23, 2013).

<sup>130</sup> *Supply Chain Security Programs and Issues*, WORLD SHIPPING COUNCIL, available at <http://www.worldshipping.org/industry-issues/security/cargo-and-the-supply-chain/supply-chain-security-programs-and-issues> (last visited Oct. 23, 2013).

<sup>131</sup> See *Securing the Global Supply Chain: Customs-Trade Partnership Against Terrorism (C-TPAT) Strategic Plan*, *supra* note 129, at 19-20.

<sup>132</sup> *Container Security Initiative (CSI)*, *supra* note 113.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> KEY CARGO SECURITY PROGRAMS CAN BE IMPROVED, *supra* note 127.

<sup>136</sup> *Id.*

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approval at the border without checking to make sure that promised security measures actually are in place at their facilities.”<sup>137</sup>

iii. The 100% scanning initiative

The SAFE Port Act, which the Implementing Recommendations of the 9/11 Act of 2007 amended,<sup>138</sup> also mandated 100% screening of all high-risk containers coming to U.S. ports from foreign countries by July 1, 2012.<sup>139</sup> The SAFE Port Act did allow the DHS to extend the deadline for two years under certain circumstances.<sup>140</sup> The DHS extended the deadline further to 2014.<sup>141</sup> The topic has fostered considerable debate, with the requirement drawing much criticism and praise.<sup>142</sup>

The majority of the objections to the scanning requirement are logistical and economic in nature.<sup>143</sup> Not surprisingly, companies

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<sup>137</sup> *Container Security Initiative (CSI)*, *supra* note 113; *see also* Bralliar, *supra* note 78, at 61-62 (discussing the inadequate “enforcement [and] oversight” of the C-TPAT Initiative).

<sup>138</sup> Pub. L. No. 110-53, § 1701, 121 Stat. 266, 489 (2007) (amending 6 U.S.C. § 982(b) (2006)).

<sup>139</sup> 6 U.S.C. § 982(a), (b)(2) (2012).

<sup>140</sup> § 982(b)(4).

<sup>141</sup> *See* Bondareff & O’Neill, *supra* note 32.

<sup>142</sup> *See, e.g.*, James J. Carafano & Jessica Zuckerman, *Maritime Cargo Scanning Folly: Bad for the Economy, Wrong for Security*, THE HERITAGE FOUNDATION (Feb. 2, 2012), <http://report.heritage.org/wm3481>.

<sup>143</sup> *See id.* (arguing that cost and infrastructure mandate against the 100% scanning requirement); Susan E. Martonosi, David S. Ortiz, & Henry H. Willis, *Evaluating the Viability of 100 Percent Container Inspection at America’s Ports*, in THE ECONOMIC IMPACTS OF TERRORIST ATTACKS 218, 237-38 (Harry W. Richardson, Peter Gordon, & James E. Moore II eds., 2005) (arguing for the use of a quantitative analysis to evaluate security initiatives and that, unless attack damages or the likelihood of an attack are quite high, 100% scanning is not cost-effective and noting that the adoption of the requirement could be infeasible due to labor costs and lack of adequate technologies), *available at* <http://www.rand.org/pubs/reprints/RP1220.html> (last visited Mar. 15, 2013); FREDERIC CARLUER, GLOBAL LOGISTICS CHAIN SECURITY: ECONOMIC IMPACT OF THE US 100 % CONTAINER SCANNING LAW, (University of Le Havre study commissioned by the World Customs Organization, June 2008) *available at* <http://www.tradeinnovations.com/Documents/News/WCO%20Scanning%20Study.pdf>

working on developing new cargo scanning technology are “lobbying on the Hill, trying to prevent Congress from overturning existing legislation to expand cargo container scanning requirements.”<sup>144</sup> Scholars have made the point that the 100% requirement “is not only wasteful, but it violates an age-old axiom in the security field that if ‘you have to look at everything, you will see nothing.’”<sup>145</sup>

The DHS and the CBP established the Secure Freight Initiative (the “SFI”) “to test the feasibility of scanning [100%] of U.S.-bound cargo containers.”<sup>146</sup> Unfortunately, the SFI is apparently an unmitigated failure.<sup>147</sup> None of the ports selected to participate in the SFI program, which include “Hong Kong, Oman, Pakistan, South Korea, and the UK, . . . were able to meet the 100% scanning requirement and still keep [] cargo moving in an expeditious manner.”<sup>148</sup> In light of these results, the DHS has extended the July 2012 deadline to 2014.<sup>149</sup> In making this determination, then DHS Secretary Janet Napolitano “noted that the extension was necessary because implementing the requirement at [that] time would ‘have [had] a significant and negative impact on trade capacity and the flow of cargo.’”<sup>150</sup> She further observed that “foreign ports lack[ed] the physical space and configuration for efficiently routing cargo through inspection stations.”<sup>151</sup> At this point in time, the feasibility of 100% scanning remains basically unproven.

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(analyzing the economic and logistical effects of the 100% scanning policy).

<sup>144</sup> Marjorie Censer, *Sloane, Former SRA Chief, Unveils First Decision Sciences-Equipped Port*, WASH. POST (Aug. 26, 2012), [http://articles.washingtonpost.com/2012-08-26/business/35491655\\_1\\_cosmic-rays-gao-scan](http://articles.washingtonpost.com/2012-08-26/business/35491655_1_cosmic-rays-gao-scan).

<sup>145</sup> Flynn & Kirkpatrick, *supra* note 41.

<sup>146</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-940T, MARITIME SECURITY: DHS PROGRESS AND CHALLENGES IN KEY AREAS OF PORT SECURITY (2010), *available at* <http://www.gao.gov/new.items/d10940t.pdf>.

<sup>147</sup> See Carafano & Zuckerman, *supra* note 142.

<sup>148</sup> Bondareff and O'Neill, *supra* note 32.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*



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*b. The MTSA's TWIC program**"Biometrics are yesterday's solution for today's problem."*— George Jonas<sup>152</sup>

The TSA and USCG jointly administer the TWIC reader program.<sup>153</sup> TWICs are "tamper-resistant biometric credential[s]" (fingerprint template) that are issued to "workers who require unescorted access to secure areas" of an MTSA-regulated port or vessel.<sup>154</sup> MTSA regulations require TWIC cards for all Coast Guard credentialed merchant mariners, port-facility employees, longshore

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<sup>152</sup> Bralliar, *supra* note 78, at 54 (quoting George Jonas, *Biometrics Won't Catch Disposable Terrorists*, NAT'L POST, Jan. 19, 2004, [http://www.georgejonas.ca/recent\\_writing.aspx?id=165](http://www.georgejonas.ca/recent_writing.aspx?id=165)).

<sup>153</sup> 46 U.S.C. § 70105 (2006). Established as part of the Maritime Transportation Security Act of 2002, the relevant section requires

the Secretary (at the time the Secretary of the Department of Transportation) to issue biometric transportation security cards to prevent unauthorized individuals from entering an area of a vessel or facility designated as a secure area. Currently, TSA is responsible for enrollment . . . and systems operations and maintenance related to TWICs while the USCG is responsible for establishing and enforcing access control standards including requirements for TWIC readers at MTSA-regulated facilities and vessels.

*Written Testimony of TSA Office of Intelligence and Analysis Assistant Administrator Stephen Sadler for a House Committee on Homeland Security, Subcommittee on Border and Maritime Security Hearing Titled "Threat, Risk and Vulnerability: The Future of the TWIC Program"*, DEP'T OF HOMELAND SECURITY (June 18, 2013), <http://www.dhs.gov/news/2013/06/18/written-testimony-tsa-house-homeland-security-subcommittee-border-and-maritime>.

<sup>154</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-198, TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL: CARD READER PILOT RESULTS ARE UNRELIABLE; SECURITY BENEFITS NEED TO BE REASSESSED I (2013) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE, TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL], available at <http://www.gao.gov/assets/660/654431.pdf>; see *Using TWIC With Biometrics Will Be a Challenge*, SECURITYINFOWATCH.COM (Jan. 25, 2008), [http://www.securityinfowatch.com/press\\_release/10561888/using-twic-with-biometrics-will-be-challenge](http://www.securityinfowatch.com/press_release/10561888/using-twic-with-biometrics-will-be-challenge) (discussing how biometric technology is used in the workforce).

workers, truck drivers, and others requiring unescorted access to secure areas of maritime facilities and vessels.<sup>155</sup> There are currently 2,685,280 workers enrolled.<sup>156</sup>

Sadly, TWIC is another effort at increasing port security that appears to have failed.<sup>157</sup> In May 2013, the GAO issued a highly critical report concerning the TWIC reader pilot program, finding that the results of the program were “incomplete, inaccurate and unreliable.”<sup>158</sup> Between 2008 and 2011, the pilot program tested a number of various readers at ports and aboard vessels.<sup>159</sup> In light of the results, the GAO did not recommend that Congress use the findings from the pilot program to develop a reader regulation.<sup>160</sup> Rather, Congress should require the DHS to reassess whether readers actually increase port security and perform “a comprehensive comparison of alternative credentialing approaches, which might include a more decentralized approach, for achieving TWIC program goals.”<sup>161</sup>

In light of the report’s conclusions, the pilot program’s data does not confirm any prior claims from the DHS to Congress that readers would actually enhance security at ports.<sup>162</sup> Rather, the report found that “11 years after initiation . . . the security benefits of the [TWIC] program have yet to be demonstrated.”<sup>163</sup> The GAO report also contradicts previous conclusions by the TSA that the performance of readers at selected ports and maritime locales across the United States were generally positive and that readers operated effectively and

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<sup>155</sup> *The Safe Port Act: A Six-Month Review, Hearing Before the Subcomm. on Border, Mar., and Global Counterterrorism of the Comm. on Homeland Sec. H.R.*, 110th Cong. 10 (2007).

<sup>156</sup> TRANSP. SEC. ADMIN., TWIC DASHBOARD REPORT (Sept. 2013), available at [http://www.tsa.gov/sites/default/files/publications/pdf/twic/monthly\\_dashboard\\_current.pdf](http://www.tsa.gov/sites/default/files/publications/pdf/twic/monthly_dashboard_current.pdf).

<sup>157</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL, *supra* note 154, at 33.

<sup>158</sup> *Id.* at 42-43.

<sup>159</sup> *Id.* at 3-4.

<sup>160</sup> *Id.* at 43.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 43-44.

<sup>163</sup> *Id.* at 42.

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efficiently in verifying the identity of TWIC cardholders.<sup>164</sup> In response to the report, Representative Bennie G. Thompson, a Democrat from Mississippi and ranking member of the House Homeland Security Committee, said,

I am greatly concerned that despite [the] DHS investing \$544 million and 11 years in the TWIC program, the program continues to suffer from fundamental problems that undermine its ability to provide the security benefits Congress intended. Meanwhile, port workers and industry stakeholders have invested their time, effort, and money into this troubled program, holding up their end of the bargain. Indeed, [the] DHS has failed to implement [the] GAO's prior recommendations that would have strengthened the TWIC program and ultimately enhanced maritime security. After years of oversight of the TWIC program, I concur with [the] GAO's recommendation that an effectiveness assessment of the security benefits of TWICs and the use of biometric readers must occur before the American people are expected to invest additional money in this program. We cannot continue to throw good money after bad with this program.<sup>165</sup>

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<sup>164</sup> *Id.* at 39.

<sup>165</sup> Press Release, Committee on Homeland Security Democrats, Report: TWIC Reader Pilot Results Unreliable (May 8, 2013), <http://chsdemocrats.house.gov/press/index.asp?ID=804>. The TWIC program is not the only wasted investment by the government in its attempts to harden container security. In July of 2011, the DHS "terminated the program to develop the next generation of radiation detection monitors . . . . The [A]gency spent roughly \$230 million over five years attempting to develop and field the monitor system." Martin Matishak, *Homeland Security Cancels Troubled Radiation Detector Effort*, NUCLEAR THREAT INITIATIVE (July 26, 2011), <http://www.nti.org/gsn/article/homeland-security-cancels-troubled-radiation-detector-effort/>.

Operation Safe Commerce ("OSC") is another program that demonstrated the spendthrift nature of certain government agencies. Initiated in 2002, OSC is "a federally funded program that will conduct vulnerability assessments of sample supply chains and serve as a test-bed for new business processes and security technologies to increase the security of container shipments." *Operation Safe Commerce*, FIRST PORT OF N.Y. & N.J., <http://www.firstnyj.com/pdf/operation-safe-commerce.pdf> (last

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visited Sept. 16, 2013). After funding a number of “port and cargo security pilot projects . . . over . . . three years,” the DHS was reticent to share the results of the projects. See Christian Beckner, *AP Unmasks Operation Safe Commerce Findings*, *HOMELAND SECURITY WATCH* (Mar. 12, 2006), <http://www.hlswatch.com/category/port-and-maritime-security/page/6/>. According to the article,

The [*Associated Press*] got hold of a series of previously-unpublished Operation Safe Commerce documents, which serve as the basis for the story. Some findings from the documents:

-Safety problems were not limited to overseas ports. A warehouse in Maine was graded less secure than any in Pakistan, Turkey or Brazil. “There is a perception that U.S. facilities benefit from superior security protection measures,” the study said. “This mind set may contribute to a misplaced sense of confidence in American business practices.”

-No records were kept of “cursory” inspections in Guatemala for containers filled with Starbucks Corp. coffee beans shipped to the West Coast. “Coffee beans were accessible to anyone entering the facility,” the study said. It found significant mistakes on manifests and other paperwork. In a statement to the AP, Starbucks said it was reviewing its security procedures.

-Truck drivers in Brazil were permitted to take cargo containers home overnight and park along public streets. Trains in the U.S. stopped in rail yards that did not have fences and were in high-crime areas. A shipping industry adage reflects unease over such practices: “A container at rest is a container at risk.” . . .

-Containers could be opened aboard some ships during weeklong voyages to America. “Due to the time involved in transit (and) the fact that most vessel crew members are foreigners with limited credentialing and vetting, the containers are vulnerable to intrusion during the ocean voyage,” the study said.

*Id.* There were three phases of Operation Safe Commerce. See *Operation Safe Commerce Phase III*, FED. GRANTS, <http://www.federalgrants.com/Operation-Safe-Commerce-Phase-III-2777.html> (last visited Sept. 16, 2013). Each phase had a large price tag. See *id.* For example, the grant funds available for just Phase III of container security projects totaled \$17.1 million. See *id.* For the three-year period between 2002 and 2005, the DHS “spent \$75 million to track several companies’ cargo containers coming into the seaports of Seattle/Tacoma, Los Angeles/Long Beach, and New York/New Jersey.” Ben Worthen, *Security Compliance - Customs Rattles the Supply Chain*, *CIO MAG.*, Mar. 1, 2006, [http://www.cio.com/article/17906/Security\\_Compliance\\_Customs\\_Rattles\\_the\\_Supply\\_Chain](http://www.cio.com/article/17906/Security_Compliance_Customs_Rattles_the_Supply_Chain). The project “used GPS technology and radio frequency identification to monitor cargo from a handful of importers (including Sara Lee and Motorola) as it made its way from overseas factories to its final destination in the United States.” *Id.* The purported goal of OSC “was to identify weak links in the global supply chain. A

### III. THE RISE OF CONTAINERIZATION

#### A. *Malcolm McLean, Father of Containerization and Global Trade*

In the early 1950s, cargo ships carried a great variety of goods ranging from sugar, bananas, and coffee to bars of copper and coils of steel wire.<sup>166</sup> “Most cargoes came in sacks, boxes, cartons, bales, or barrels . . . .”<sup>167</sup> Known as “breakbulk,”<sup>168</sup> each item of these mixed cargoes had to be loaded individually or hoisted onto the vessel using a sling board and crane.<sup>169</sup> Like a scene out of *On the Waterfront*,<sup>170</sup> gangs of longshoremen “clambered up gangplanks with loads on their backs or toiled deep in the holds of ships, stowing boxes and barrels in every available corner.”<sup>171</sup> The unloading process could be equally grueling and time consuming.<sup>172</sup>

Then along came Malcolm Purcell McLean.<sup>173</sup> In 1937, McLean found himself sitting in his truck waiting to unload bales of cotton he had brought from Fayetteville, North Carolina, to a vessel

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report summarizing its findings was due more than a year ago, in February 2005. To date . . . no report has been released. But sources close to the project have told *CIO* that Operation Safe Commerce revealed that companies actually know very little about what goes on in their supply chains.” *Id.*

<sup>166</sup> LEVINSON, *supra* note 6, at 17-18.

<sup>167</sup> STAN WEIR, SINGLEJACK SOLIDARITY 92 (George Lipsitz ed., Univ. of Minn. Press 2004), available at <http://libcom.org/files/Weir%20-%20Singlejack%20Solidarity.pdf>.

<sup>168</sup> The term “bulk” cargo is generally used to describe “commodities such as coal or grain, which can be loaded on a ship in a continuous process without packaging or sorting.” LEVINSON, *supra* note 6, at 19 n.\*. In contrast, “breakbulk” cargo “consists of discrete items that must be handled individually.” *Id.*

<sup>169</sup> *Id.* at 17.

<sup>170</sup> Winner of eight Academy Awards, including best picture, best director, and best actor, *On the Waterfront* was directed by Elia Kazan and starred Marlon Brando as Terry Malloy. *Filmsite Movie Review: On the Waterfront*, FILMSITE.ORG, <http://www.filmsite.org/onth.html> (last visited Sept. 18, 2013).

<sup>171</sup> LEVINSON, *supra* note 6, at 16.

<sup>172</sup> *Id.* at 17-18.

<sup>173</sup> Anthony J. Mayo & Nitin Nohria, *The Truck Driver Who Reinvented Shipping*, WORKING KNOWLEDGE (Oct. 3, 2005), <http://hbswk.hbs.edu/cgi-bin/print/5026.html>.

docked in Hoboken, New Jersey.<sup>174</sup> While watching the stevedores load other cargo, McLean “came across the idea that not only changed his destiny but also the entire shipping world: the notion of ‘containerization.’”<sup>175</sup>

He recalled, ‘I had to wait most of the day to deliver the bales, sitting there in my truck, watching stevedores load other cargo. It struck me that I was looking at a lot of wasted time and money. I watched them take each crate off the truck and slip it into a sling, which would then lift the crate into the hold of the ship.’<sup>176</sup>

Then “[t]he thought occurred to me, as I waited around that day, that it would be easier to lift my trailer up and, without any of its contents being touched, put it on the ship.”<sup>177</sup>

McLean did not immediately pursue his idea.<sup>178</sup> Instead, he first “set out to become rich. By 1940 he had 30 lorries. In 1955, when he had decided that containerization was the future, he sold his trucking business for \$6 [million], equivalent to \$40 [million] today.”<sup>179</sup> He invented and patented the first shipping container in 1956.<sup>180</sup> Ultimately, he later founded Sea-Land Service, Inc.<sup>181</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> *Malcolm McLean—The Man Who Changed the World*, CONTAINER TRANS., <http://www.container-transportation.com/malcolm-mclean.html> (last visited Sept. 18, 2013).

<sup>176</sup> *Id.*

<sup>177</sup> *Malcolm McLean: Malcolm Purcell Mclean, Pioneer of Container Ships, Died on May 25th, Aged 87*, THE ECONOMIST (May 31, 2001), available at <http://www.economist.com/node/638561/print>.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Malcolm McLean—The Inventor of ISO Shipping Containers*, INT’L MARINE CONSULTANCY (Jan. 19, 2009), <http://www.imcbrokers.com/blog/overview/detail/malcolm-mclean-the-inventor-of-iso-shipping-containers>.

<sup>181</sup> *Id.* Sea-Land Service, Inc. (“Sea-Land”) was a pioneering shipping and containerization company founded by American entrepreneur Malcolm McLean in 1960, out of the operations of the Pan-Atlantic Steamship Company, which McLean acquired in 1955. *Malcolm McLean—The Man Changed the World*, CONTAINER

As a result of McLean's epiphany, by 1975, in excess of "two-thirds of all dry cargoes moving across the docks of major American ports" were shipped in containers.<sup>182</sup> "Ships of traditional design[—] whose double bottoms and sweat battens once felt the burdens of sacked coffee, spices, sugar, and various cartoned goods and absorbed their smells—became unusual sights at long-used piers."<sup>183</sup> Instead, ports now boast "new or remodeled ships whose holds are slotted exactly to receive and nest . . . rectangular, locked, sealed, clean, and odorless containers."<sup>184</sup>

### **B. The Mechanics of Transport by Container**

One can think of containerships as floating malls in terms of possible cargo types and amounts. Just as stores in a mall vary in size, so do cargo containers.<sup>185</sup> In 1961, the International Organization for Standardization set standard sizes for all cargo containers as twenty-foot containers, referred to as a twenty-foot equivalent unit ("TEU").<sup>186</sup> Currently, the most frequently used container is the forty-foot container, which would be two TEUs.<sup>187</sup> Standardization was necessary to allow

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TRANSP., <http://www.container-transportation.com/malcolm-mclean.html> (last visited Sept. 16, 2013). Sea-Land existed under various changes of ownership, passing from R. J. Reynolds to CSX Corporation ("CSX"), until CSX split it into two liner companies and a terminal operator. *History*, HORIZON LINES, <http://horizonlines.com/About-Horizon/History.aspx> (last visited Sept. 16, 2013). The international liner company and the Sea-Land name was acquired by, and formally incorporated into, the operations of the A. P. Moller-Maersk Group in December 1999. *Id.* The domestic liner company was sold by CSX in 2003. *Id.* In 2005 it went public and now operates as Horizon Lines, Inc. using a modified Sea-Land logo. *Id.*

<sup>182</sup> WEIR, *supra* note 167, at 91.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See *Containers*, WORLD SHIPPING COUNCIL, <http://www.worldshipping.org/about-the-industry/containers> (last visited Sept. 16, 2013).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* In addition to standard dry cargo containers, there are special equipment containers with unique designs, including "open end, open side, open top, half-height, flat rack, refrigerated (known as 'reefer'), liquid bulk (tank), and modular [which are] all built to [the] same exterior lengths and widths as the standard dry cargo containers." *Id.*; see also Holly Schubert, *Container Shipping*, ABOUT.COM, <http://freight.about.com/od/Containers/a/Container-Shipping.htm> (last visited Sept. 13, 2013).

intermodal transportation.<sup>188</sup> On board the vessel, containers are efficiently stacked one upon another.<sup>189</sup> At the port, containers must be unloaded by cranes and capable of transfer to truck or train to reach their final destination.<sup>190</sup> Standardization has created rail and truck companies for containers that are “interchangeable between shipping companies.”<sup>191</sup> This interchangeability results in more efficient loading and unloading, which ultimately lowers the price of goods and allows consumers to purchase goods from around the world.<sup>192</sup>

It is important to recognize that a threat to U.S. ports is also a threat to the interior of the country.<sup>193</sup> Maritime container security is not just about transporting boxes on ocean-going vessels.<sup>194</sup> It is the embodiment of intermodal transportation at its highest level.<sup>195</sup> The container is part of an international chain of supply.<sup>196</sup> In the usual cargo container transportation process, an importer must rely on a number of “second-hand parties to move cargo in containers and prepare various transportation documents.”<sup>197</sup> In a normal container shipment process, these parties may include exporters, freight forwarders, customs brokers, customs inspectors, port operators, and ocean carriers, which may include feeder vessels.<sup>198</sup> The chain of

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<sup>188</sup> See *Containers*, *supra* note 185.

<sup>189</sup> *Id.*

<sup>190</sup> See Holly Schubert, *supra* note 187.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* Modern containers carry a variety of goods. See *id.*

<sup>193</sup> See Stephen S. Cohen, *Boom Boxes: Containers and Terrorists*, in PROTECTING THE NATION’S SEAPORTS: BALANCING SECURITY AND COST 91, 99 (Jon D. Haveman & Howard J. Shatz eds., 2006), available at [http://www.ppic.org/content/pubs/report/r\\_606jhr.pdf](http://www.ppic.org/content/pubs/report/r_606jhr.pdf).

<sup>194</sup> *Id.* at 104.

<sup>195</sup> *Id.*

<sup>196</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-557, CONTAINER SECURITY: A FLEXIBLE STAFFING MODEL AND MINIMUM EQUIPMENT REQUIREMENTS WOULD IMPROVE OVERSEAS TARGETING AND INSPECTION EFFORTS 1, 5-6 (2005), available at <http://www.gao.gov/assets/250/246125.pdf>.

<sup>197</sup> *Id.* (“Relatively few importers own and operate all key aspects of the cargo container transportation process, which includes overseas manufacturing and warehouse facilities, carrier ships to transport goods, and the transportation operation to receive the goods upon arrival.”).

<sup>198</sup> *Id.*; Bralliar, *supra* note 78, at 12-13 (quoting JOHN F. FRITTELLI, CONG. RESEARCH



supply also includes entities that usually perform the final leg of the shipment—inland transportation providers, such as trucks or railroads.<sup>199</sup> It is the inland cogs of the system that have the potential to extend the threat of terrorist attacks at ports to America’s heartland.<sup>200</sup> Each time control over the container changes hands, there is a security-breach risk.<sup>201</sup>

While all containers may pose a risk for the transportation of terrorist devices, the most problematical are those stuffed with what are known as “mixed loads.”<sup>202</sup> These loads consist of differing items and materials that are added to the container at varying places.<sup>203</sup> According to one estimate, almost forty percent of the containers arriving in U.S. seaports contain mixed loads.<sup>204</sup> Such containers increase the likelihood that “[t]he documentation . . . provided to the ocean carrier by the shipping company” is inaccurate.<sup>205</sup> This is the information that the ocean carrier ultimately forwards to U.S. customs.<sup>206</sup> A key example of the fact that shipping companies successfully report inaccurate information is the huge amount of counterfeit goods that enter the

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SERV., RL31733, PORT AND MARITIME SECURITY: BACKGROUND AND ISSUES FOR CONGRESS 8 (2005)). Feeder vessels or ships are “watercrafts employed in short sea routes to fetch or carry goods and containers to and from ocean going vessels.” *Feeder Vessel Law & Legal Definition*, USLEGAL.COM, <http://definitions.uslegal.com/f/feeder-vessel/> (last visited Sept. 13, 2013). They are part of “a cargo network in which the larger, faster vessels only call at the major ports at both ends of the area being covered, and the smaller ports are served by the smaller feeder vessels which transfer the cargo to and from the major port terminals and thus keep the larger vessels filled closer to capacity.” *Id.* This portion of the multi-modal network saves the larger container vessel “the expense and loss of time in loading and unloading in the subsidiary ports.” *Id.* Ultimately, “the smaller vessels feed the big liners, which carry thousands of containers.” *Id.*

<sup>199</sup> See sources cited *supra* note 198.

<sup>200</sup> See Cohen, *supra* note 193, at 99.

<sup>201</sup> CONTAINER SECURITY: A FLEXIBLE STAFFING MODEL AND MINIMUM EQUIPMENT REQUIREMENTS WOULD IMPROVE OVERSEAS TARGETING AND INSPECTION EFFORTS, *supra* note 196, at 6.

<sup>202</sup> See Cohen, *supra* note 193, at 103.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 104.

<sup>206</sup> *Id.*

United States each year.<sup>207</sup> Clearly, shipping companies do not report the true contents of the containers that contain such goods.<sup>208</sup> *Business Week* estimates that counterfeit goods may compose five to seven percent of imported, international goods.<sup>209</sup>

#### IV. UNEXPECTED CARGO: THE “TERRORIST” STOWAWAY

*“A box that is not moving is a box at risk, and the average container makes 17 shifts.”*

— Stephen S. Cohen<sup>210</sup>

Containers are utilized to ship over ninety percent of the world’s nonbulk cargo.<sup>211</sup> Consequently, each day “thousands of cargo containers from around the world pass through our nation’s sea ports carrying items we need, and possibly some that are not so welcome: drugs, explosives, chemical [weapons], biological . . . weapons—even human cargo.”<sup>212</sup>

Two frequently discussed scenarios of container usage by terrorists that pose the greatest threat to port security are (1) the loaded container with the terrorist weapon of choice to target specific ports<sup>213</sup> and (2) the port as a conduit for stockpiling weapons within the borders

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<sup>207</sup> *See id.*

<sup>208</sup> *See id.*

<sup>209</sup> *Id.*; *Fakes!*, BLOOMBERG BUSINESSWEEK MAG. (Feb. 6, 2005), [http://www.businessweek.com/printer/articles/191504-fakes?type=old\\_article](http://www.businessweek.com/printer/articles/191504-fakes?type=old_article).

<sup>210</sup> Cohen, *supra* note 193, at 103-04; *see also* FLYNN, *supra* note 4, at 89 (“On average, overseas containers will pass through seventeen intermediate points before they arrive at their final U.S. destination.”).

<sup>211</sup> Martin Murray, *Containerization*, ABOUT.COM, <http://logistics.about.com/od/tacticalsupplychain/a/Containerization.htm> (last visited Sept. 17, 2013).

<sup>212</sup> *Ship Cargo Containers-Finding Out What’s In Them Before There’s Trouble*, DEPT. OF HOMELAND SECURITY, <http://www.dhs.gov/ship-cargo-containers-%E2%80%93-finding-out-what%E2%80%99s-them-there%E2%80%99s-trouble> (last visited Sept. 17, 2013). *See generally* U.S. Public Port Facts, AM. ASSOC. OF PORT AUTHS., <http://www.aapa-ports.org/Industry/content.cfm?ItemNumber=1032> (last visited Sept. 17, 2013) (providing additional information about U.S. public ports).

<sup>213</sup> *See* Cohen, *supra* note 193, at 92, 94-99 (describing the ease with which a terrorist could load deadly weapons in a container and send it to a U.S. port).

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of the United States.<sup>214</sup> What some may label as “the terrorist in the box” is another equally viable threat to the integrity of the port system.<sup>215</sup> Prior to being loaded aboard a ship, empty containers are frequently stored in a warehouse or the quayside for an extended period.<sup>216</sup> This creates a perfect opportunity for the inventive stowaway “to install a false wall at the rear end of the container, stretching from side to side and from top to bottom.”<sup>217</sup> Once the stowaway constructs the false wall, he or she will paint it to match the color of the container’s rear wall.<sup>218</sup>

### **A. *The Profile of the Modern-Day Stowaway***

#### 1. The influence of popular culture

The 1965 Convention on Facilitation of International Maritime Traffic, as amended, defines stowaway as

[a] person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities.<sup>219</sup>

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<sup>214</sup> HAVEMAN & SHATZ, *supra* note 19, at 1-2.

<sup>215</sup> See Don Walsh, *A Difficult Journey Ahead for the Cruise Ship Industry*, NAVY LEAGUE OF THE U.S. (Dec. 2002), [http://www.navyleague.org/sea\\_power/dec\\_02\\_51.php](http://www.navyleague.org/sea_power/dec_02_51.php) (discussing one “terrorist in a box” incident involving a suspected al-Qaeda member hiding in a container destined for Toronto).

<sup>216</sup> *Stowaways*, SECURE A SHIP, <http://www.secureaship.com/services-maritime-security/port-security/stowaways> (last visited Sept. 17, 2013).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> International Maritime Organization, Convention on Facilitation of International Maritime Traffic, Apr. 9, 1965, 18 U.S.T. 411, 591 U.N.T.S. 265 (as amended Aug. 1, 2006); see, e.g., Plaintiffs’ Response to Tropical Shipping’s & Harren & Partner Schifffahrts GmbH’s Motions to Dismiss, *Cabrera v. Tropical Shipping & Constr. Co.*, No. 00-9088-Civ-Seitz (S.D. Fla. Jan. 20, 2001) (discussing the liability of a shipowner for the deaths of three stowaways on his vessel); see also *Came Aboard*

Historically, stowaways have often been individuals who were fleeing political or economic upheavals or oppression occurring in their native country and seeking asylum in the United States.<sup>220</sup> In contrast to reality, popular culture has often romanticized the plight of the

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*Ship on Wave, They Said*, N.Y. TIMES (Feb. 24, 1914), <http://query.nytimes.com/mem/archive-free/pdf?res=F10611F83C5412738DDDAD0A94DA405B8DF1D3> (discussing one of the first reported instances of stowaways); Harold Hamill, *The Ocean Ferry Reporter Tells of Stowaways He Has Seen*, GJENVICK, <http://www.gjenvick.com/SteamshipArticles/Stowaways/1928-11-StowawaysOnSteamships.html#axzz2dZAqsXpz> (last visited Sept. 17, 2013) (reporting several instances of stowaways).

<sup>220</sup> See, e.g., Mary Brooks, *Stowaway's Criminal Past Turns Up in Investigation*, THE ORLANDO

SENTINEL, July 10, 1991, at B4, available at 1991 WLNR 4127821 (A Haitian stowaway was being "held in chains aboard a cargo ship docked in Tampa [due to] a history of criminal arrests and illegal attempts to enter the United States." The stowaway was originally granted asylum in 1973 but returned to Haiti in the late 1980s due to criminal activity); Leonard S. Glickman, *Seeking Freedom: A Child Finds Himself Behind Bars*, REFUGE, May 1, 2002, at 65, available at 2002 WLNR 14778776 (examining the case of a seventeen-year-old boy seeking asylum who stowed away aboard an Italian container ship and then was "indefinitely detained by the United States Immigration and Naturalization Service in an adult facility, on the basis of radial and dental exams."); Kari Huus, *Illegal Chinese Immigrants Land in U.S. Limbo*, MSNBC (Apr. 18, 2006, 6:22 PM), [http://www.nbcnews.com/id/12174500/ns/us\\_news-life/t/illegal-chinese-immigrants-land-us-limbo/](http://www.nbcnews.com/id/12174500/ns/us_news-life/t/illegal-chinese-immigrants-land-us-limbo/) (reporting on twenty-two Chinese stowaways who traveled from Shanghai to the port of Seattle in a forty-foot-long container); *Miami Cubans Protest Deporting of Stowaway*, CHRISTIAN SCI. MONITOR (Jan. 18, 1982), <http://www.csmonitor.com/1982/0118/011820.html> (reporting on demonstrations in Miami in response to a Cuban stowaway who was denied asylum and deported back to Cuba); *Stowaways Seeking Asylum Held in Shackles*, CHI. TRIB., May 12, 1994, available at 1994 WLNR 4367289 (reporting on twenty-five Romanian stowaways, including twenty found in containers aboard a ship in Boston, who were held in leg shackles while their request for political asylum was pending); Joseph F. Sullivan, *In Shift, Immigration Service Won't Hold Stowaways*, N.Y. TIMES, Aug. 05, 1994, at B5, available at 1994 WLNR 3850317 (reporting that the Immigration and Naturalization Service, as opposed to the owner of the plane or ship, will take custody of stowaways and parole them while their requests for asylum are being reviewed); Luisa Yanez, *2 Fleeing Cubans Arrive in Style, As Stowaways on Luxury Liner*, SUN SENTINEL, Mar. 10, 1993, at 2B, available at 1993 WLNR 4296721 (reporting on two Cuban refugees seeking asylum in the United States who managed to stow away on a cruise ship while it was docked in Cayman Islands).

stowaway or employed the subject matter as the basis for a tale of heroism.<sup>221</sup> Examples include the light-hearted 1936 Shirley Temple film, *Stowaway*,<sup>222</sup> the 1931 hit, *Monkey Business*, which features the zany antics of the Marx Brothers;<sup>223</sup> *The Quest*, a 1996 martial-arts film starring Jean-Claude Van Damme as a stowaway aboard a tramp steamer;<sup>224</sup> and the classic, *Torn Curtain*, an Alfred Hitchcock suspense thriller starring Paul Newman and Julie Andrews who ultimately escape from East Berlin by stowing away on an East German vessel to reach a port in the free world.<sup>225</sup>

In light of more recent media reports of actual stowaways “being pulled from cargo containers emaciated and traumatized, or even dead,” popular culture’s skewed portrayal of the stowaway has been revised.<sup>226</sup> A prime example would be HBO’s 1996 film, *Deadly Voyage*, based upon the true story of eight African stowaways, only one of whom survived after discovery by the crew,<sup>227</sup> or the 1997 French film, *Clandestins*, a gut-wrenching tale of six ill-fated refugees.<sup>228</sup>

Popular culture’s altered perception of the stowaway not only

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<sup>221</sup> W.M. von Zharen, *Human Contraband: Stowaways in Popular Culture*, 31 J. MAR. L. & COM. 601, 601 (2000).

<sup>222</sup> *STOWAWAY* (Twentieth Century Fox Film Corp. 1936). In the film, the famous child star, Temple, portrays an appealing and winsome orphan named Ching-Chong who accidentally stows away after falling asleep with her little dog, Mr. Woo, in the trunk of a car being shipped on a steamer bound for San Francisco. *Id.*

<sup>223</sup> *MONKEY BUSINESS* (Paramount Pictures 1931) (starring the Marx Brothers who stow away on a vessel making its transatlantic crossing and, up to their signature antics, they manage to insult and annoy just about everyone on board).

<sup>224</sup> *THE QUEST* (MDP Worldwide 1996).

<sup>225</sup> *TORN CURTAIN* (Universal Pictures 1966).

<sup>226</sup> Zharen *supra* note 221, at 601.

<sup>227</sup> *DEADLY VOYAGE* (HBO 1996). Taking place over twelve days, the film recounts how the crew discovered the stowaways after they were forced to come out of hiding due to loss of their water supply. *Id.* Ultimately, the crew caught seven of them, summarily executed each of them by a shot to the head, and threw them overboard. *Id.*

<sup>228</sup> *CLANDESTINS* (Dschoint Ventschr Filmproduktion AG 1997). As the six stowaways, which include two men, two women, and two children, attempt to reach Canada from a French port, they are confined in a cargo container 269.10 square feet in size. *Id.*

includes the victimized stowaway<sup>229</sup> but also the modern reality of the stowaway as a terrorist.<sup>230</sup> A 2011 episode of *NCIS*,<sup>231</sup> entitled “Safe Harbor,”<sup>232</sup> highlights the stowaway terrorist theme. In the broadcast, the NCIS team investigates the murder of a coast guard officer aboard an abandoned cargo vessel.<sup>233</sup> The team discovers a Lebanese family of four locked behind service panels on the ship who all profess to be seeking asylum in the United States.<sup>234</sup> As the plot develops, the NCIS team discovers that the father, under an alias, is a former anti-U.S. bomber who is wanted in connection with a 1984 bombing in Lebanon.<sup>235</sup> One of the two sons planned to carry out his father’s dream by bombing the Norfolk port in a suicide-bombing mission.<sup>236</sup>

Charlie Sheldon, a former executive director of the Port of Seattle, wrote the 2003 novel, *The Boomerang Heist*, which presents another disquieting illustration of the terrorist stowaway.<sup>237</sup>

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<sup>229</sup> The tragic story told in *DEADLY VOYAGE*, *supra* note 227, is not an isolated event. Unfortunately, the risk explored in the films that dramatize the stowaway as a victim often mirrors true events. *See, e.g., Captain Defends Stowaway*, *SUN SENTINEL*, Sept. 7, 1985, at 14A, *available at* 1985 WLNR 1042110 (reporting on eleven African stowaways who were thrown overboard); Robert D. McFadden, *3 Stowaways on Freighter Saved at Sea*, *N.Y. TIMES*, Aug. 8, 1994, at B1, *available at* 1994 WLNR 3524563 (reporting the rescue of six stowaways from the Dominican Republic who, after being discovered aboard an Estonian freighter, were beaten and subjected to forced labor); *see generally* Elissa Steglich, *Hiding in the Hulls: Attacking the Practice of High Seas Murder of Stowaways Through Expanded Criminal Jurisdiction*, 78 *TEX. L. REV.* 1323 (2000) (explaining that the vastness of the sea itself gives rise to the mistreatment and killing of stowaways).

<sup>230</sup> *See* Marjorie Florestal, *Terror on the High Seas*, 72 *BROOK. L. REV.* 385, 386 (2006) (explaining that terrorists hiding themselves in shipping containers has become an important issue in the War on Terror).

<sup>231</sup> *See NCIS*, CBS, <http://www.cbs.com/shows/ncis/about/> (last visited Sept. 17, 2013) (explaining that “NCIS” is the acronym for the Naval Criminal Investigation Service).

<sup>232</sup> *NCIS: Safe Harbor* (CBS television broadcast Oct. 8, 2011).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> In addition to serving as executive director for the Port of Seattle, Mr. Sheldon also spent twenty years in the commercial fishing industry on the East Coast and worked for the Port Authority of New York and New Jersey. CHARLIE SHELDON, *THE*

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Sheldon's novel describes a so-called Boomerang Box, a container that has been decorated by Seattle high school students as part of a school project.<sup>238</sup> The students tracked the container aboard the vessel, *Kiyo Maru*, as it made its way along its trade route from Seattle to Japan.<sup>239</sup> Upon the return of the promotional container to the Port of Seattle, world leaders attending an economic conference, including the President of the United States and seventeen other heads of state, are to meet the vessel.<sup>240</sup>

In the prologue quoted below, readers discover the protagonist of the novel, an investigative reporter, aboard a container ship traveling from Kobe, Japan, to the Port of Seattle.<sup>241</sup> When the ship is barely out to sea, "terrorist" stowaways, who have been hiding in the Boomerang Box container, hijack *Kiyo Maru*.<sup>242</sup>

*September 20, the near future*

Royal stared through the lens, imagining all the hours, and days, he'd be stuck on this ship, filming . . . what? Distant views from his cabin here five stories above the deck? All the containers stacked fore and aft? The crew as they went about their totally boring duties? What?

That is, if Captain Harris allowed him to leave his cabin. This was shocking. House arrest at sea and the pilot not off the ship an hour? They had sixteen days to go. Nobody could do this to Royal Breem, investigative reporter par excellence, could they? Well, former par excellence. He drank more gin.

Suddenly light flashed from the dark container on top of the stack directly opposite his aft window. Something shifted and the sealed end of the container

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BOOMERANG HEIST (2003).

<sup>238</sup> *Id.* at 8-9.

<sup>239</sup> *Id.* at 8-9, 49; *see also* von Zharen, *supra* note 221, at 604.

<sup>240</sup> SHELDON, *supra* note 237, at 12-15.

<sup>241</sup> *Id.* at 1-2.

<sup>242</sup> *See id.*

opened, levering back like a garage door except over the top instead of inside. Red light glowed. He saw men dressed in dark coveralls and masks pushing one extension ladder, then another, from within the container across the void between the end of the container and the deckhouse. Royal understood the ladders were being placed on the landing of the outside emergency stairway one deck below his, bridging the ten-foot gap between the end of the container and the stair landing.

The moment both ladders were in place, men began crossing, one after another. He counted nine, ten, eleven, twelve. The last man lowered the container door.

Now the container looked just as it had before, dark, silent, but for the two ladders extending to the stairs. For the moments it had been open Royal had seen, beyond the dark form emerging, carpet, bunks, supplies.

The ship had departed Kobe, what, five hours earlier? The pilot let off two hours later?

What was going on?

It was obvious what was going on. A Trojan Horse had been delivered to the ship.

He had to warn the captain.<sup>243</sup>

Outbound, the Boomerang Box was simply a container loaded with innocuous “[c]ardboard flats for use as milk cartons in Japan.”<sup>244</sup> According to the designer of the school project, after docking and unloading in Japan, the container would “be loaded with something else and shipped on.”<sup>245</sup> It is this “something else” that makes *The Boomerang Heist* a chilling commentary on the possible use of stowaways by terrorists.<sup>246</sup>

This alternate scenario, where stowaways are essentially human WMDs, occurs when stowaways do not emerge from a container until

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 9.

<sup>245</sup> *Id.*

<sup>246</sup> *See id.* at 1-2.



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after the vessel has docked at a U.S. port.<sup>247</sup> The unexpected, human cargo becomes a weapon with the potential to fulfill Osama bin Laden's dream of destroying the American economy.<sup>248</sup>

## 2. True tales of stowaways in the twenty-first century

In light of the current vulnerability of U.S. ports to unwittingly serve as gateways for terrorist attacks, we can no longer assume that a stowaway is simply a "would-be illegal entrant" seeking a better life.<sup>249</sup> Rather, the potential for a *Boomerang Heist* scenario is not simply fiction.<sup>250</sup> There are a number of incidents that have occurred since 9/11 that illustrate the porosity in the current approach to cargo security.<sup>251</sup>

Approximately one month after the attacks of 9/11, an event arguably confirmed the fear that some might use containers to transport

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<sup>247</sup> *See id.*

<sup>248</sup> *See id.*; Joel Arak, *Bin Laden's Target: U.S. Wallet*, CBS (Oct. 29, 2004), <http://www.cbsnews.com/news/bin-ladens-target-us-wallet/>.

<sup>249</sup> Rosalie Balkin, *The International Maritime Organization and Maritime Security*, 30 TUL. MAR. L.J. 1, 13 (2006).

<sup>250</sup> *See* Phillipe Crist, *Security in Maritime Transport: Risk Factors and Economic Impact*, ORG. FOR ECON. CO-OPERATION AND DEV.: MAR. TRANSP. COMM. 8-9 (2003), <http://www.oecd.org/sti/transport/maritimetransport/18521672.pdf> (detailing how a potential terrorist was inadvertently found in a shipping container in 2001).

<sup>251</sup> Secure A Ship, a Panamanian company specializing in maritime security, authored a 2011 report that reveals that the cargo security system is also compromised when stowaways receive "extensive shore backup and assistance from individuals who are part of various organisations related to port operations when boarding vessels." *Stowaways*, *supra* note 216. The stowaway "will have inside knowledge of the ship's destination, departure date, at which pier it is going to berth etc." *Id.* This problem is of particular concern in North Africa where

stowaways bribe their way into port facilities and other restricted areas. Once inside the port area they look for an opportunity to board the ship. . . . Recent stowaway interviews have revealed that crew on board have also been involved in the safe passage of stowaways. On some ships stowaways have had to pay a ticket to one of the crew on board as well, i.e. bribing both port officials and crew on board.

*Id.*

terrorists to the United States.<sup>252</sup> In October of 2001, port authorities discovered a stowaway in Gioia Tauro, a port in southern Italy.<sup>253</sup> The shipping container was “well-appointed . . . complete with bed, heater, toilet facilities and water.”<sup>254</sup> The stowaway had with him “a cell phone, a satellite phone, a lap-top computer and, ominously, given recent events, airport security passes and an airline mechanic’s certificate valid for New York’s JFK, Newark, L.A. International and O’Hare airports.”<sup>255</sup> An Egyptian office had chartered the container slot and it was loaded in Port Said.<sup>256</sup> In Italy, the container was to have been transhipped and carried to Rotterdam and then transhipped one final time to Canada, its final destination.<sup>257</sup> If the stowaway had not attempted to “widen the container’s ventilation holes when port workers were nearby, the container would have likely passed through unhindered to its final destination.”<sup>258</sup> Except for its unexpected cargo, the container was “nearly indistinguishable from any of the other 2.5 million handled at Gioia Tauro in 2001.”<sup>259</sup> This incident illustrates the apparent ease with which a person can subvert the container transport system.<sup>260</sup>

In the summer of 2002, “a news crew successfully smuggled 15 pounds of uranium into New York Harbor.”<sup>261</sup> Then “the news team successfully repeated their uranium importation [in 2003] in Los Angeles, shipping 15 pounds of uranium from Indonesia past Customs

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<sup>252</sup> Crist, *supra* note 250, at 8.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 8-9.

<sup>257</sup> *Id.* at 9.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 8.

<sup>261</sup> Brian Ross, Rhonda Schwartz, & David Scott, *Customs Fails to Detect Depleted Uranium*, ABC NEWS (Sept. 11, 2002), <http://abcnews.go.com/WNT/story?id=129321&page=1&singlePage=true>; see Brian Kates, *Harbor Fears High, Terror Funding Low*, N.Y. DAILY NEWS (Dec. 21, 2003), <http://www.nydailynews.com/archives/news/harbor-fears-high-terror-funding-article-1.522970>; Charles. E. Schumer, *Two Years Later: Is the Federal Government Doing Enough to Protect New York? Grading the Federal Homeland Security Efforts in New York and the Nation* (2003), <http://www.hsdl.org/?view&did=449561>.

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officials by simply not declaring it.”<sup>262</sup>

In January 2005, “[t]hirty-two Chinese men were found inside two cargo containers on a ship arriving at the Port of Los Angeles” when a crane operator unloading the containers noticed three men climbing out of one.<sup>263</sup> According to the police, they seemed to be in excellent shape, noting that the containers had “food, water, sleeping bags, backpacks and battery-powered fans” mounted on the top.<sup>264</sup>

In 2006, twenty-two Chinese Nationals apparently let themselves out of a forty-foot cargo container at the Port of Seattle.<sup>265</sup> Having traveled “[i]nside the dark, musty, 40-foot metal box, the 18 men and four women, all in their 20s and 30s, had spent 15 days crossing the Pacific Ocean to the U.S., with no fresh air or light.”<sup>266</sup> According to authorities, “[t]hey had blankets and clothing, tools—presumably to help them break out of the container—and a supply of water.”<sup>267</sup> In addition, “they had portable fans to disperse the air.”<sup>268</sup> However, the “security guards who discovered them would later describe the stench inside the container as overwhelming. Agents found mounds of discarded food packages and containers filled with human waste.”<sup>269</sup>

More recently, in late June 2013, federal agents took two Columbian men into custody after a security officer discovered them in a ship container traveling from Venezuela to Fort Lauderdale.<sup>270</sup> A security officer discovered the men at Port Everglades “[a]fter the container was offloaded from the ship onto the dock [when] a ship

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<sup>262</sup> Kates, *supra* note 261; Schumer, *supra* note 261.

<sup>263</sup> *Chinese Men Found Inside Containers at LA Port*, USA TODAY, Jan. 16, 2005, [http://usatoday30.usatoday.com/news/nation/2005-01-16-chinese-port\\_x.htm](http://usatoday30.usatoday.com/news/nation/2005-01-16-chinese-port_x.htm).

<sup>264</sup> *Id.*

<sup>265</sup> Lornet Turnbull, Kristi Heim, Sara Jean Green & Sanjay Bhatt, *15 Days in a Metal Box to Be Locked Up*, SEATTLE TIMES, Apr. 6, 2006, [http://seattletimes.com/html/localnews/2002914004\\_smuggling.html](http://seattletimes.com/html/localnews/2002914004_smuggling.html).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> Tonya Alanez, *Two Stowaways from Venezuela Found on Ship*, SUN SENTINEL, June 23, 2013, at 6B, available at 2013 WLNR 15318889.

security officer noticed that the container door was open and he saw two men ‘hiding inside.’ The security officer ‘immediately closed the door to lock the males inside’ and notified authorities.”<sup>271</sup>

Clearly, reports of stowaways arriving in the United States are not rare. If the authorities at a port discover stowaways, the authorities often take the position that the system is working.<sup>272</sup> The problem with this position is that it fails to recognize that a suicide-bomber stowing away in a container will simply detonate upon discovery.<sup>273</sup>

## V. CONCLUSION

*“If you know the enemy and know yourself, you need not fear the result of a hundred battles.”*

— Sun Tzu<sup>274</sup>

American seaports are critical assets to our nation, both from a military and economic perspective.<sup>275</sup> They are the gateway for American prosperity and for future economic growth.<sup>276</sup> They are the

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<sup>271</sup> *Id.*

<sup>272</sup> See, e.g., Dan McDonald, *Two Palestinian Stowaways Found Aboard New Bedford-Bound Freighter*, SOUTHCOASTTODAY (Nov. 14, 2010, 12:00 AM), <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20101114/NEWS/11140351/-1/rss30> (A Coast Guard captain emphasized the fact “that the crew report[ing] the stowaways . . . [is] something that we can take some real confidence in.” The captain further commented that “[e]veryone did what they were expected to do and did it in a timely manner.”).

<sup>273</sup> See Press Release, House Passes Rep. Markey Measures to Screen 100 Percent of Air, Ship Cargo in 9/11 Bill (Jan. 9, 2007), *available at* ProQuest, <http://search.proquest.com/docview/469689977?accountid=34965> (reporting that, upon discovery, two suicide bombers “killed themselves along with 10 Israelis”).

<sup>274</sup> SUN TZU, *THE ART OF WAR* 51 (Lionel Giles trans. 1963) (circa 500 B.C.).

<sup>275</sup> See U.S. COAST GUARD, C.G. PUB. 3-0, OPERATIONS §§ 1, 2.2 (2012), *available at* [http://www.uscg.mil/doctrine/CGPub/CG\\_Pub\\_3\\_0.pdf](http://www.uscg.mil/doctrine/CGPub/CG_Pub_3_0.pdf). “The maritime industry continues to evolve as the world remains fully dependent on global maritime trade in an advancing technology and information age. Varied and overlapping international and sovereign legal and policy regimes governing the maritime domain pose practical operational challenges.” *Id.* § 1.1.

<sup>276</sup> See Press Release, Safeguarding Ports is Key to Homeland Security and Prosperity (July 23, 2010), *available at* ProQuest,

points of embarkation for U.S. military troops.<sup>277</sup> They also constitute an almost irresistible target for international terrorists.<sup>278</sup> Unfortunately, many of the current U.S. initiatives through the DHS to ensure cargo container security are, to put it mildly, not meeting expectations.<sup>279</sup> For example, the future of the TWIC program is dismal,<sup>280</sup> the DHS has postponed the 100% scanning requirement at a time when only 4% of the containers bound for the United States are actually scanned prior to entering the country;<sup>281</sup> no one has yet developed a tamper-proof cargo container;<sup>282</sup> and the fears about nuclear terrorism have not abated.<sup>283</sup> In a 2013 report, an audit by the DHS's Office of Inspector General uncovered the startling fact that "[c]argo containers arriving at the 22 maritime ports through which the greatest volume of containerized cargo enters the United States have not adequately been screened for radiation as required by law . . . ."<sup>284</sup>

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<http://search.proquest.com/docview/759682204?accountid=34965>.

<sup>277</sup> See, e.g., Press Release, 22nd Marine Expeditionary Unit Deploys to Earthquake-Devastated Haiti (Jan. 16, 2010), <http://www.iimef.marines.mil/News/NewsArticle/tabid/472/Article/2802/22nd-marine-expeditionary-unit-deploys-to-earthquake-devastated-haiti.aspx>.

<sup>278</sup> See House Passes Rep. Markey Measures to Screen 100 Percent of Air, Ship Cargo in 9/11 Bill, *supra* note 273.

<sup>279</sup> See Bondareff and O'Neill, *supra* note 32 (concluding that port security is "the stepchild of our transportation security program").

<sup>280</sup> See *id.*

<sup>281</sup> Jeff Bliss, *U.S. Backs Off All-Cargo Scanning Goal With Inspections at 4%*, BLOOMBERG (Aug. 13, 2012, 12:00 AM), <http://www.bloomberg.com/news/2012-08-13/u-s-backs-off-all-cargo-scanning-goal-with-inspections-at-4-.html>.

<sup>282</sup> Mathew Rusling, *After Six Years, Still No Tamper-Proof Shipping Containers*, NAT'L DEF. MAG., Mar. 2009, at 39, available at <http://www.nationaldefensemagazine.org/archive/2009/March/Pages/AfterSixYears,StillNoTamper-ProofShippingContainers.aspx>; see Timothy Page, *DHS Looks to Tamper-Proof Cargo Containers*, OHMYGOV, INC. (Dec. 2, 2009, 10:47 AM), [http://blog.ohmygov.com/blogs/general\\_news/archive/2009/12/02/dhs-looks-to-tamper-proof-cargo-containers.aspx](http://blog.ohmygov.com/blogs/general_news/archive/2009/12/02/dhs-looks-to-tamper-proof-cargo-containers.aspx).

<sup>283</sup> Paige Willan, *The Convention on the Suppression of Acts of Nuclear Terrorism: An Old Solution to a New Problem*, 39 GEO. J. INT'L L. 527, 527 (2007-08).

<sup>284</sup> Anthony Kimery, *DHS IG Finds 22 Ports Not Adequately Screening Cargo Containers for Radiation; Former Port Security Official Provides Insight*, THE KIMERY REP. (Feb. 13, 2013), <http://www.hstoday.us/blogs/the-kimery-report/blog/dhs-ig-finds-22-ports-not-adequately-screening-cargo-containers-for-radiation-former-port-security-official-provides->

On May 28, 2013, the American Security Project located in Washington, D.C., hosted a panel entitled *Nuclear Terrorism: What's at Stake?*<sup>285</sup> Dr. Stephen Flynn<sup>286</sup> reminded listeners that smuggling via shipping containers occurs daily, supporting the possibility that terrorists might use containers to transport nuclear weapons to the United States.<sup>287</sup> Pointing out the weaknesses of the C-TPAT “honor system,” Flynn stated that “[t]he bottom line is the [container] system remains highly vulnerable for folks to move things because it’s essentially an honor system, and it’s an honor system of enormous size.”<sup>288</sup> In terms of the trusted shipper approach on which the C-TPAT is premised, Flynn expressed his conviction “that if and when nuclear materials enter the U.S. through a port, ‘it will come through a trusted shipper’” because terrorists know that those containers receive much less scrutiny.<sup>289</sup> Another member of the panel, Rear Admiral (retired) Jay Cohen,<sup>290</sup> expressed agreement with the panelists that the threat of nuclear material entering the United States through its ports is quite real, when he stated, “It’s only a question of where, when, and to what magnitude.”<sup>291</sup>

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insight/b7c57fc60ca972b37e87d55c26087c81.html (citing OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., OIG-13-26, UNITED STATES CUSTOMS AND BORDER PROTECTION’S RADIATION PORTAL MONITORS AT SEAPORTS 1 (2013), available at [http://www.oig.dhs.gov/assets/Mgmt/2013/OIG\\_13-26\\_Jan13.pdf](http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-26_Jan13.pdf)).

<sup>285</sup> Holly Gilbert, *Risk of Nuclear Materials Being Smuggled Through Ports Should Be Taken Seriously, Say Experts*, SEC. MGMT. (May 29, 2013), <http://www.securitymanagement.com/print/12510>.

<sup>286</sup> Dr. Flynn is a “professor at Northeastern University and former president of the Center for National Policy.” *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> Rear Adm. Cohen previously served as “Under Secretary of Homeland Security for Science and Technology.” *Id.*

<sup>291</sup> *Id.*; see also Graham Allison, *Graham Allison Commentary: Don’t Underestimate Nuclear Terror Threat*, HARVARD KENNEDY SCHOOL OF GOV’T (Oct. 9, 2009), <http://www.hks.harvard.edu/news-events/news/news-archive/don-underestimate-nuclear-terror>; Nitin Bakshi, Stephen Flynn & Noah Gans, *Countering the Threat of Nuclear Terrorism at Domestic and Foreign Ports, Estimating the Operational Impact of Container Inspectors at International Ports*, INFORMED DECISIONS ON CATASTROPHE RISK (Wharton Center for Risk Mgmt. and Decision Processes, Univ.

The concern that the potential for a nuclear attack may become a reality is also supported by one of Osama bin Laden's prime directives to al-Qaeda—to destroy the American economy—something that the chaos and magnitude of a nuclear attack would likely achieve.<sup>292</sup> “Further, Navy SEALs discovered plans evidencing that al-Qaeda has identified the U.S. maritime industry as a prime target among the materials found during the 2011 raid on Osama bin Laden's hideout in Pakistan.<sup>293</sup> In 2004, Aegis Defense Services warned of an imminent maritime terror attack in light of the recent appointment of Saud Hamud al-Utaibi, an expert in maritime terrorism, to head al-Qaeda in Saudi Arabia.<sup>294</sup> Consequently, targeting American ports would assist in fulfilling one of the prime goals of Osama bin Laden, destruction of the U.S. economy.<sup>295</sup> Also, depending on the nature of an attack, disrupting

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of Pa., Phila., Pa.), Winter 2012, available at [http://opim.wharton.upenn.edu/risk/library/WRCib2012a\\_Port-Security.pdf](http://opim.wharton.upenn.edu/risk/library/WRCib2012a_Port-Security.pdf) (indicating that the vast amount of shipping containers entering ports provide terrorists ample opportunity “to hide a nuclear device”).

<sup>292</sup> *A Nation Challenged: Bin Laden's Words: 'America Is in Decline,' the Leader of Al Qaeda Says*, N.Y. TIMES, Dec. 28, 2001, at B2, available at 2001 WLNR 3362823. Speaking in 2001, bin Laden instructed that if America's “economy is finished, they will become too busy to enslave oppressed people. . . . God willing, America's end is near. . . . America is in decline; the economic drain is continuing but more strikes are required and the youths must strike the key sectors of the American economy.” *Id.*; see also *Bin Laden: Goal is to Bankrupt U.S.*, CNN (Nov. 1, 2004, 8:07 PM), <http://www.cnn.com/2004/WORLD/meast/11/01/binladen.tape/>. “We are continuing this policy in bleeding America to the point of bankruptcy. Allah willing, and nothing is too great for Allah.” *Id.*

<sup>293</sup> See Press Release, Am. Ass'n of Port Auths., 10 Years After 9/11, Security Still a Top Priority at U.S. Ports (Aug. 31, 2011), <http://www.aapa-ports.org/Press/PRdetail.cfm?itemnumber=18181>.

<sup>294</sup> *Marine Terror Attack Plan to Spark Global Crises*, MAILONLINE (Dec. 10, 2004, 9:01 AM), <http://www.dailymail.co.uk/news/article-330232/Marine-terror-attack-plan-spark-global-crisis.html#> (“Al-Utaibi, thought to be behind the 2000 attack on the USS *Cole* in the Yemeni port city of Aden, which killed 17 American sailors and injured 37, has the experience to make it happen.”). Al-Utaibi's career was likely short-lived due to his reported death in 2005. See HAVEMAN & SHATZ, *supra* note 19, at 3 n.3 (“The appointment ultimately did not provide significant upside career potential, however, because Al-Utaibi reportedly was killed in a gun battle with Saudi security officials in April 2005 (CNN.com, 2005, and Aljazeera.net, 2005).”).

<sup>295</sup> See Safeguarding Ports is Key to Homeland Sec. and Prosperity, *supra* note 276 (describing the importance of American seaports to “economic growth”); see also *Bin*

American ports could critically impact the nation's ability to deploy military forces abroad in addition to the economy.<sup>296</sup>

Those seeking to infiltrate and attack America would most likely prefer to use containers because doing so allows them to stockpile weapons at key ports within the United States.<sup>297</sup> Containerization has revolutionized the world in a way that Malcom McLain never envisioned.<sup>298</sup> The number of stowaways and the amount of counterfeit goods that people smuggle into the country, all via containers, highlight the weaknesses of the current cargo security system.<sup>299</sup> Another indicator of the flaws of the current system to prevent a container-born attack on the United States is the amount of inadequate, if not false, information that importers report to U.S. customs about the content of containers, leading to a large volume of fraudulent goods that arrive in the United States via containers.<sup>300</sup> There is also strong evidence to support the conclusion that “the documentation that declares just what is in a container, and where it comes from, is often incomplete, misleading, or outright falsified.”<sup>301</sup> Such realities confirm that there is a serious and continuing problem with the current U.S. port security

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*Laden: Goal is to Bankrupt U.S., supra* note 292.

<sup>296</sup> *Crimes and Security Issues Involving U.S. Seaports: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 107th Cong. 3-4 (2001) (statement of Sen. Ernest F. Hollings, Chairman, S. Comm. on Commerce, Sci., and Transp.).

<sup>297</sup> GRAHAM ALLISON, *NUCLEAR TERRORISM THE ULTIMATE PREVENTABLE CATASTROPHE* 106-07 (2004) (stating that a nuclear attack is “far more likely to arrive in a cargo container than on the tip of a missile”); Bureau of Transp. Statistics, *Spotlight 2: Maritime Security*, RES. & INNOVATIVE TECH. ADMIN. (2011), [http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/americas\\_container\\_ports/2011/html/spotlight\\_02.html](http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/americas_container_ports/2011/html/spotlight_02.html) (“While notable progress has been made in increasing port and container security over the past decade, major challenges still remain.”); Nat’l Intelligence Council, *Foreign Missile Developments and the Ballistic Missile Threat Through 2015: Unclassified Summary of a National Intelligence Estimate*, FED’N OF AM. SCIENTISTS (Dec. 2001), <http://www.fas.org/irp/nic/bmthreat-2015.htm> (concluding that the delivery of WMDs to the United States by containers was more likely than by Intercontinental Ballistic Missiles).

<sup>298</sup> *See supra* Part III.

<sup>299</sup> *See* Bureau of Transp. Statistics, *supra* note 297 (finding that there are challenges remaining to prevent transportation by containers of illicit drugs, people, and weapons).

<sup>300</sup> Cohen, *supra* note 193, at 104.

<sup>301</sup> *Id.* at 104.



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system.<sup>302</sup>

While it is certainly true that there has been some advancement in the area of port security since 9/11,<sup>303</sup> there is still much that the United States needs to do.<sup>304</sup> First and foremost, the United States must officially recognize that the current selective container scanning approach premised upon the identification of high-risk goods is not working.<sup>305</sup> Continuing to aim for the goal of 100% scanning by delaying the effective date of the mandatory requirement<sup>306</sup> simply presents an opportunity for terrorist groups, like al-Qaeda, “to compromise . . . legitimate shipments.”<sup>307</sup>

Faced with twenty-first century terrorism, it would be naive to “assume that the bad guys know who a trusted shipper is and will target a trusted box first. It follows that a top priority must be to move from

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<sup>302</sup> See Bureau of Transp. Statistics, *supra* note 297 (“Containerships present unique and particularly complex security challenges.”); HAVEMAN & SHATZ, *supra* note 19, at 1-3 (stating that there is a strong need to secure ports because they remain an attractive target for terrorists).

<sup>303</sup> April Terreri, *The Current State of Port Security*, WORLD TRADE 100 (Oct. 5, 2009), <http://www.worldtradewt100.com/articles/print/the-current-state-of-port-security>; Bureau of Transp. Statistics, *supra* note 297.

<sup>304</sup> See Bethann Rooney, *Ten Years Later, Port Security Needs Remain*, AM. ASS’N OF PORT AUTHS. (Winter, 2012-13), <http://www.aapa-ports.org/Publications/SeaportsDetail.cfm?itemnumber=18875#seaportsarticle16> (suggesting specific measures that the United States needs to take to enhance port security); Council on Foreign Relations Editorial Staff, *Targets for Terrorism: Ports*, COUNCIL ON FOREIGN REL. (Jan. 2006), <http://www.cfr.org/port-security/targets-terrorism-ports/p10215> (“[M]aritime transportation is one of our nation’s most serious vulnerabilities.”); Douglas Frantz, *Port Security: U.S. Fails to Meet Deadline for Scanning Cargo Containers*, WASH. POST (July 15, 2012), [http://articles.washingtonpost.com/2012-07-15/world/35489894\\_1\\_port-security-port-vulnerability-cargo-containers](http://articles.washingtonpost.com/2012-07-15/world/35489894_1_port-security-port-vulnerability-cargo-containers) (stating that the current system is not adequate enough to prevent the shipping of illegal weapons into the United States); Terreri, *supra* note 303 (stating that the layered approach is working, but there is more to be done).

<sup>305</sup> See Bondareff and O’Neill, *supra* note 32 (“Ports are certainly more secure than they were before 9/11. But since 9/11, we have also lost sight of the critical role ports play in our economy and transportation system.”).

<sup>306</sup> See Bliss, *supra* note 281 (continuing to aim for the goal of 100% scanning will cause huge delays).

<sup>307</sup> See FLYNN, *supra* note 4, at 91.

the current ‘trust but don’t verify’ system to one where verifiable measures are in place to protect all shipments.”<sup>308</sup> Shipping containers are “ubiquitous, anonymous, and largely innocuous steel boxes”<sup>309</sup> arriving on vessels from foreign ports that clearly can transport illicit devices or terrorist stowaways, thereby serving as “a Trojan horse for a devastating attack on the United States.”<sup>310</sup>

It is also without question that the goal of having a fool-proof system, which can ensure that a container is tamper proof, presents unique and complex technical and economic challenges.<sup>311</sup> It is time for the United States to rethink the 100% scanning requirement,<sup>312</sup> and not just because of economic arguments.<sup>313</sup> While a lofty ideal, it simply is unworkable from a realistic, logistical, labor-intensive perspective.<sup>314</sup>

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<sup>308</sup> *Id.*

<sup>309</sup> MICHAEL D. GREENBERG ET AL., MARITIME TERRORISM: RISK AND LIABILITY 111 (2006),

[http://www.rand.org/content/dam/rand/pubs/monographs/2006/RAND\\_MG520.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2006/RAND_MG520.pdf).

<sup>310</sup> Jerrold L. Nadler et al., *Cargo the Terrorists’ Trojan Horse*, N.Y. TIMES, June 26, 2012, <http://www.nytimes.com/2012/06/27/opinion/the-dangerous-delay-on-port-security.html?>

<sup>311</sup> See Brian Kates, *Harbor Fears High, Terror Funding Low*, N.Y. DAILY NEWS, Dec. 21, 2003, <http://www.nydailynews.com/archives/news/harbor-fears-high-terror-funding-article-1.522970> (reporting that port security improvements require a huge amount of money); Rusling, *supra* note 282, at 39 (stating that developing a fool-proof system presents numerous technical challenges and requires companies to share proprietary technology).

<sup>312</sup> See *infra* notes 313-24 and accompanying text; see also, Nicholas Allen, *Perspectives in Responsible Sourcing: EU Criticizes US 100% Cargo Scan Requirement*, TYPEPAD (May 22, 2008, 5:37 AM), <http://csc.typepad.com/responsiblesourcing/2008/05/eu-criticizes-u.html> (stating that the EU has been critical of the 100% scanning requirement); Stephen Heifetz, *What to do with Really Dumb Laws: A Look at Security Laws for Maritime and Air Cargo and Why They Can’t Effectively Be Enforced*, SUPPLY & DEMAND CHAIN (Sept. 2, 2011), <http://www.sdexec.com/article/10323420/a-look-at-security-laws-for-maritime-and-air-cargo-and-why-they-cant-effectively-be-enforced> (noting that the 100% scanning requirement is now “widely considered to be pure folly”).

<sup>313</sup> See *supra* note 311 and accompanying text.

<sup>314</sup> See *infra* notes 315-16 and accompanying text; see also Roger Hailey, *US Warned 100% Scanning at Box Ports ‘Unworkable,’* LLOYD’S LIST, July 23, 2010, at 1, available at <http://mastershipping.blog.com/files/2010/07/Lloyds-List-2010.7.23.pdf> (noting that 100% scanning of maritime containers requires a great deal of

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As former Secretary of the Department of Homeland Security, Janet Napolitano,<sup>315</sup> recognized, “There are a lot of ways to protect the ports of the United States . . . from dangerous cargo.”<sup>316</sup> “It makes no sense, she argued, to blindly strive to meet an inspection mandate ‘if it’s not feasible, practical, affordable or causes undue interference with cargo.’”<sup>317</sup> An extension of the deadline for the mandate to 2014<sup>318</sup> does not change the accuracy of her former statement.<sup>319</sup> The sound basis for any scanning requirement must be rooted in a risk-based approach that emphasizes *quality* over the *quantity* of scanning<sup>320</sup> and that capitalizes on current technologies, not those of the future that may never be realized.<sup>321</sup> Clearly, the current scanning methods are ineffective.<sup>322</sup> Perhaps the problem is that the focus seems to be on inspections rather than “on developing more transparent and better designed and controlled global supply chain processes.”<sup>323</sup> Arguably, absent such focus, “100 percent inspection of cargo is a means to many

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technological resources and greater manpower).

<sup>315</sup> After serving for four and a half years, Ms. Napolitano left office on September 6, 2013. Pete Williams, *I Didn’t Have as Many Gray Hairs When I Started: Homeland Security Secretary Napolitano Steps Down After Longest Tenure*, NBC NEWS (Sept. 5, 2013, 6:34 PM), [http://usnews.nbcnews.com/\\_news/2013/09/05/20345853-i-didnt-have-as-many-gray-hairs-when-i-started-homeland-security-secretary-napolitano-steps-down-after-longest-tenure?lite](http://usnews.nbcnews.com/_news/2013/09/05/20345853-i-didnt-have-as-many-gray-hairs-when-i-started-homeland-security-secretary-napolitano-steps-down-after-longest-tenure?lite).

<sup>316</sup> James Carafano, *Napolitano Gets It Right on Cargo Screening*, THE HERITAGE FOUND. (Aug. 12, 2012), <http://www.heritage.org/research/commentary/2012/08/napolitano-gets-it-right-on-cargo-screening>.

<sup>317</sup> *Id.*

<sup>318</sup> *DHS Waives Deadline for 100% Box Scans*, INT’L FED’N OF CUSTOMS BROKERS ASS’N (May 11, 2012, 8:54 AM), <http://www.ifcba.org/content/dhs-waives-deadline-100-box-scans>.

<sup>319</sup> See *supra* text accompanying note 317.

<sup>320</sup> See Heifetz, *supra* note 312 (stating that collecting data about cargo and subjecting high-risk cargo to a special level of scrutiny is the best way to enhance port security).

<sup>321</sup> See *id.* (noting that the U.S. government currently lacks adequate technology to accomplish mass scanning).

<sup>322</sup> See *supra* text accompanying notes 299; HAVEMAN & SHATZ, *supra* note 19, at 3 (noting that “the vulnerability of the maritime transportation system is extremely high.”).

<sup>323</sup> Adrian Gonzalez, *100% Cargo Inspection: A Means to What End?*, LOGISTICS VIEWPOINTS (Dec. 3, 2009), <http://logisticsviewpoints.com/2009/12/03/100-cargo-inspection-a-means-to-what-end/>.

ends, except a more secure supply chain.”<sup>324</sup>

Concentrating on creating a container that will let a handler know that it has been compromised is the better route to take. For example, in 2006, the Space and Naval Warfare System Center awarded the University of Maine in conjunction with Maine Secure Composites, LLC, a technology spinoff from the university’s composite labs, a grant in excess of \$12 million for development and prototyping of Composite Anti-Tamper Containers . . . for maritime cargo transport.”<sup>325</sup>

Another key issue is providing complete funding for the Port Security Grant Program (the “PSGP”) with an emphasis on improving seals for containers.<sup>326</sup> Pursuant to its charges under the MTSA, the DHS established the PSGP, “a risk based grant program to support maritime security risk management.”<sup>327</sup> The Federal Emergency Management Agency (“FEMA”) administers the program.<sup>328</sup> The purpose of grant-awarded funding is to implement the “Area Maritime Security Plans . . . and Facility Security Plans . . . among port authorities, facility operators, and [s]tate and local government agencies that are required to provide port security services.”<sup>329</sup> Those entities are to use the awarded funds, inter alia, to “fund pilot programs . . . [and] to examine or develop” a more effective seal for shipping cargo containers in order to track the contents of a specific container.<sup>330</sup>

During 2008 and 2009, the funding for the PSGP “was at its

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<sup>324</sup> *Id.*

<sup>325</sup> Staff, *Industry News: UMaine Spinoff Wins \$12 Million Secure Cargo Container Contract*, COMPOSITES WORLD (June 1, 2008), <http://www.compositesworld.com/news/umaine-spinoff-wins-12-million-secure-cargo-container-contract>.

<sup>326</sup> See *infra* notes 327-35 and accompanying text; see also Randal Mullet, *Container Seals: What Does PAS ISO 17712 Mean to You? An International Cargo Security Council Perspective*, PORT TECH. INT’L 154, [http://www.porttechnology.org/images/uploads/technical\\_papers/PT27-34.pdf](http://www.porttechnology.org/images/uploads/technical_papers/PT27-34.pdf) (discussing container seal guidelines).

<sup>327</sup> *FY 2013 Port Security Grant Program*, <http://www.fema.gov/fy-2013-port-security-grant-program-psgp-0> (last visited Sept. 2, 2013).

<sup>328</sup> Bondareff & O’Neil, *supra* note 32.

<sup>329</sup> *FY 2013 Port Security Grant Program*, *supra* note 327.

<sup>330</sup> 46 U.S.C. § 70107(m)(1)(D) (2006).

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authorized level . . . at nearly \$400 million each year.”<sup>331</sup> However, beginning with 2010, the funding level has “eroded leaving the program funded at only \$97.5 million in [fiscal year] 2012, the lowest level . . . since its inception in 2002.”<sup>332</sup> The decrease in funding is strong evidence that the security of cargo containers and of U.S. ports is no longer a primary concern. The major decrease in port security funding is not only foolish, but it could be tragic. “Our economy, our safety, and our national defense depend largely on how well we can protect our seaports, and cuts in federal funding present significant challenges” in maintaining port security.<sup>333</sup> The 9/11 Commission Report made it clear that “opportunities to do harm are as great, or greater, in maritime and surface transportation” as they are in any land-based transportation sector.<sup>334</sup> It is of paramount importance that Congress once again prioritizes cargo and port security by increasing the PSGP funding to the authorized level.<sup>335</sup>

While not the subject of this Article, suggestions for increasing cargo security would not be complete without touching upon the need to reconsider the onus placed upon the vessel owner in terms of liability for cargo<sup>336</sup> and the financial burdens placed on carriers who transport a stowaway.<sup>337</sup> Current laws encourage inhumane actions against stowaways<sup>338</sup> and discourage carriers from improving container security

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<sup>331</sup> *Hearing on “Homeland Security Grants: Measuring our Investments” Before the H. Comm. on Homeland Sec., 113th Cong. (2013) (testimony of Kurt J. Nagle, the president and CEO of American Association of Port Authorities).*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *See* Kevin P. Maney, “Said to Contain”: *Fear of Incurring Liability Creates a Disincentive for Cargo Carriers to Improve Shipping Container Security by Examining Cargo*, 35 TUL. MAR. L.J. 317, 330-33 (2010) (discussing the burden of proof in a cargo claim and the current disincentives for a carrier to increase container inspections).

<sup>337</sup> *See* Forrest Booth & Larry Altenbrun, *Maritime and Port Security, Piracy, and Stowaways: Renewed Concerns Over Old Problems*, 15 U.S.F. MAR. L.J. 1, 44-47 (2003) (discussing the financial burdens placed on any carrier who transports a stowaway, ranging from fines for allowing a stowaway to escape to being responsible for detainment and repatriation expenses).

<sup>338</sup> *See id.*

by examining containers.<sup>339</sup> The master of a vessel is there to protect the interests of the carrier, not the shipper.<sup>340</sup> The age-old rules for a master are to (1) never accept a damaged container and (2) never open a container loaded onto the vessel.<sup>341</sup>

Perhaps the way to achieve all of these goals is to create an additional “lead agency in [the] DHS for port security,”<sup>342</sup> which would also be of great assistance in achieving the goal of hardening and heightening the requisite cargo container security level.<sup>343</sup>

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<sup>339</sup> See Maney, *supra* note 336, at 329-31 (“Once a shipper closes a container, it is not in the carrier’s interest to open the container again, because should cargo arrive at its destination damaged, it would be much easier for the shipper to prove that the carrier’s negligence caused the damage if the container had been opened after it left the control of the shipper.”); Booth & Altenbrun, *supra* note 337, at 46-47. “While some provisions, such as the imposition of fines and placing financial responsibility for the stowaway on the shipowner, are intended to provide incentives for shipowners to take measures to prevent stowaways, statistics show that both the current statutory regime and shipowners’ prevention measures have been unsuccessful.” *Id.* at 46. With the advent of the cargo container, “today’s stowaway is more likely to load himself, and perhaps several neighbors and relatives, into a container.” *Id.* Consequently, “there is currently little the carrier can do to either prevent or even detect the stowaway.” *Id.* In light of “these circumstances, the present system of shifting the entire cost of the stowaway problem to the carrier seems to be unfair.” *Id.* at 46-47; see also Robert M. Jarvis, *Rusting in Drydock: Stowaways, Shipowners and the Administrative Penalty Provision of INA Section 273(d)*, 13 TUL. MAR. L.J. 25 (1998) (discussing the inability of section 273(d) to deter stowaways); David A. Nourse, *Detention of Stowaways: Who Should Bear the Cost?*, 6 U.S.F. MAR. L.J. 435 (1994) (discussing the detention of stowaways and how detention should be the responsibility of shipowners while stowaways are on the ship but the responsibility of the public, i.e., the government, once stowaways get off the ship).

<sup>340</sup> See Eric Murdoch and David Tozer, *A Master’s Guide to Container Securing*, available at <http://www.scribd.com/doc/153635290/A-Masters-Guide-to-Container-Securing> (discussing how cargo claims have increased due to lost cargos and how ship masters need to be aware of what can be done to prevent container loss, thereby protecting the carriers).

<sup>341</sup> *Id.*; see Maney, *supra* note 336, at 330-32 (discussing the burden of proof in a cargo claim and the current disincentives for a carrier to increase container inspections).

<sup>342</sup> Bondareff & O’Neil, *supra* note 32.

<sup>343</sup> See *id.* (discussing different programs that would help strengthen port and container security).

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The hope is that continued adoption and use of new technologies,<sup>344</sup> tightening security at port facilities, and learning to think outside of the box in terms of expanding the focus of security measures beyond cartographic borders will ultimately result in physical, economic, and environmental safety for the people and ports of the United States.

It is, however, also important to remain ever vigilant. On September 5, 2013, *Bloomberg Businessweek* published an article about the world's largest container ship.<sup>345</sup> The blurb for the full article reads,

On a dry-dock in South Korea[,] Maersk is building the world's biggest ship. A container vessel, it will ply the route between Northern Europe and China. It is called the Triple-E and the Danish shipbuilder has ordered 20 of them, at a cost of \$185 million each. A Triple-E, in one trip, could transport more [than] 182 million iPads, or 111 million pairs of shoes, from Shanghai to Rotterdam. Stood on its stern, its bow would stretch 19 meters above the roof of the Empire State Building.<sup>346</sup>

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<sup>344</sup> See Rep. of the Sub-Comm. on the Proliferation of Military Tech., *Technology and Terrorism: A Post-September 11 Assessment*, NATO Parliamentary Assembly, AV 200 STC/MT (02) 4 rev. 1 (Nov. 2002), available at <http://www.nato-pa.int/default.asp?COM=256&PRINT=1> (discussing potential and current technologies that can be employed to defeat terrorism).

<sup>345</sup> Drake Bennett, *Risk Ahoy: Maersk, Daewoo Build the World's Biggest Boat*, BLOOMBERG BUSINESSWEEK MAG. (Sept. 5, 2013), <http://www.businessweek.com/printer/articles/149396-risk-ahoy-maersk-daewoo-build-the-worlds-biggest-boat>.

<sup>346</sup> *Video of World's Biggest Ship*, BLOOMBERG BUSINESSWEEK VIDEOS, <http://www.businessweek.com/videos/2013-09-04/worlds-biggest-ship-the-185m-maersk-triple-e>. Bigger, however, does not necessarily mean better. See Chris Jasper, *The World's Largest Ship, Maersk's Triple -E, May Be Too Large*, BLOOMBERG BUSINESSWEEK MAG. (Apr. 25, 2013), <http://www.businessweek.com/articles/2013-04-25/the-worlds-largest-ship-maersks-triple-e-may-be-too-large> ("Maersk . . . Line's Triple-E class container supership will be the biggest vessel afloat when it enters service in July, with a capacity of 18,000 20-foot boxes. Unfortunately for the world's largest shipping line, the \$190 million Triple-E is too big for any port in the Americas and can't make it through the Panama Canal. That restricts it to an Asia-Europe market, where growth in cargo demand is weaker than forecast when Maersk ordered 20 of the megaships two years ago from Daewoo Shipbuilding & Marine Engineering

In a time ripe for maritime terrorists to employ containers to deliver destruction, a vessel of such magnitude calls to mind the wise words of the Trojan priest, Laocoön: “*Equo ne credite, Teucri. Quidquid id est, timeo Danaos et dona ferentes.*”

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... for a total of \$3.8 billion.”).