

## The Preempt Bill: On Track Toward Addressing Rail-related Terrorism?

R. Michael Pimentel\*

### INTRODUCTION

On March 11, 2004, during the morning rush hour, terrorists attacked a commuter train in Madrid, Spain.<sup>1</sup> It is unfortunate that nations turn to the question of what can be done to enhance their own transportation security only after such tragedies occur; the United States is no exception.<sup>2</sup> Following the terrorist attacks in Madrid, legislative activity regarding rail security has increased.<sup>3</sup> Among the proposed bills is the Protecting against Enemy Efforts through Modernization, Planning and Technology Act (“PREEMPT”).<sup>4</sup> In general, PREEMPT would enhance security for passenger and freight rail systems against terrorist attacks such as the one in Madrid and provide contingency plans for keeping

---

\* JD Candidate 2006, Sturm College of Law, Denver, Colorado.

1. WIKIPEDIA, 11 MARCH 2004 MADRID ATTACKS (Jan. 4, 2005), (“The attacks were the deadliest assault by a terrorist organization against civilians in Europe since the Lockerbie bombing in 1988 and the worst terrorist assault in modern Spanish history.”), at [http://en.wikipedia.org/wiki/March\\_11,\\_20-04\\_Madrid\\_attacks](http://en.wikipedia.org/wiki/March_11,_20-04_Madrid_attacks) (last visited Jan. 31, 2005).

2. BRIAN MICHAEL JENKINS, RAND CORPORATION, TERRORISM AND THE SECURITY OF PUBLIC SURFACE TRANSPORTATION 1 (Apr. 2004) (testimony presented to the Senate Comm. on Judiciary on Apr. 8, 2004), at <http://www.rand.org/publications/CT/CT226/>.

3. *Rail Security Bills Make Their Way Through Congress*, RAILWAY AGE, July 1, 2004, available at [http://www.findarticles.com/p/articles/mi\\_m1215/is\\_7\\_205/ai\\_n6171038r\\_#](http://www.findarticles.com/p/articles/mi_m1215/is_7_205/ai_n6171038r_#).

4. Protecting Railroads against Enemy Efforts through Modernization, Planning, and Technology Act, H.R. 4604, 108th Cong (2004) [hereinafter PREEMPT], available at <http://thomas.loc.gov/cgi-bin/query/C?c108::/temp/~c108yjU7jz> (last visited Jan. 31, 2005).

them operational following a terrorist attack.<sup>5</sup>

The passage of PREEMPT is imperative because rail transportation is an ideal terrorist target for several reasons. First, due to the high concentration of passengers, rail passenger transportation provides terrorists with opportunities to kill in quantity. Second, public rail transportation allows terrorists to blend into the high concentration of people, which, in turn, provides them an easy escape. Third, a terrorist attack on public rail transportation could cause disruption and alarm because it is the circulatory system of urban environments. Fourth, the freight rail system transports over half the nation's hazardous materials. Finally, because aviation received the majority of federal anti-terrorism funding to date, the rail transportation system has not been able to sustain nor improve on its current security measures. In sum, rail transportation has become an attractive target for terrorists.

Part I of this article will detail past attacks on rail transportation in the United States. Part II will give further consideration to why terrorists target rail passenger and freight transportation. Part III will discuss the current status of U.S. rail security following the September 11 attacks. Part IV will describe the United Kingdom's experience with the IRA's bombing campaign and its subsequent actions regarding rail transportation. Part V will summarize PREEMPT and Part VI will discuss the potential impact of PREEMPT on the safety of rail transportation.

#### PART I: ATTACKS ON U.S. RAIL TRANSPORTATION

Beginning in the early 1990s, attacks on rail transportation in the United States have increased. In 1992, an individual left a hand grenade on a railroad station platform in Chicago.<sup>6</sup> In 1993, terrorists bombed the World Trade Center in New York including the train stations below them.<sup>7</sup> "In December 1994, six days apart, two bombs went off on the New York City subway" system.<sup>8</sup> In 1995, "the 'Sons of the Gestapo' derailed Amtrak's *Sunset Limited* in the Arizona desert, killing one passenger and injuring 65 people."<sup>9</sup> Additionally in 1995, a token-sales booth on

---

5. Mary Mosquera, *Rail Security Bill Introduced*, NEWSBYTE NEWS NETWORK, June 18, 2004, available at [http://www.gcn.com/vol1\\_no1/daily-updates/26252-1.html](http://www.gcn.com/vol1_no1/daily-updates/26252-1.html).

6. Steve Dunham, *Mass Transit Defends Itself Against Terrorism* (Mar. 2002), available at <http://www.homelandsecurity.org/journal/Articles/dunhammasstransit.htm>.

7. NEW YORK CITY SUBWAY, PATH/HUDSON & MANHATTAN RR (2004) ("The renovation of the [World Trade Center] station due to the damage from the 1993 bombing was still not complete on September 11, 2001 when the station was totally destroyed."), at <http://www.nycsubway.org/nyc/path/> (last visited Jan. 31, 2005).

8. Dunham, *supra* note 6.

9. *Id.* See also Jim Hill, *Sabotage Suspected in 'Terrorist' Derailment*, CNN News, Oct. 10, 1995, at <http://www.cnn.com/US/9510/amtrak/10-10/>.

[S]abotage was indicated by the removal of a rail joint bar supporting a section of the

a New York City subway line was set on fire and the person occupying the booth was severely burned.<sup>10</sup> In 1997, police authorities raided a Brooklyn apartment where they found a cache of explosives intended for a New York City subway station.<sup>11</sup> The September 11, 2001 attack completely destroyed the New York Transport Authority and Port Authority Trans-Hudson train stations at the World Trade Center.<sup>12</sup> These attacks prove that rail transportation is a vulnerable target—for attacks that could result in high casualties, public alarm, and economic disruption. The following section will discuss why terrorists view the rail transportation system as an ideal target.

## PART II: WHY TERRORISTS TARGET TRANSPORTATION

### A. KILLING IN QUANTITY

Since World War II, the beginning of the modern era of terrorist violence, how to secure mass transit systems against attacks has been a growing concern.<sup>13</sup> For decades, civilian rail passengers were fortunate because terrorists rarely targeted large numbers of people.<sup>14</sup> However, over the last decades, terrorists have become less reluctant to kill large numbers of people, and public transportation systems (particularly passenger rail) have been targeted.<sup>15</sup> Between 1998 and 2003, there were approximately 181 attacks on trains and related rail targets such as depots, and rail bridges worldwide.<sup>16</sup> These attacks resulted in approxi-

---

track leading to the trestle over the 30-foot ravine. The movement of the rail should have triggered an alarm, but the saboteur wired the track in such a way that the signal remained green and the crew had no warning of any problem ahead. . . .

*Id.*

10. Dunham, *supra* note 6.

11. *New York Was 'Close to a Disaster' From Suicide Bomb Plot*, CNN News, Aug. 1, 1997 (The police authorities found an address book on the suspects, which contained the name of a "known terrorist organization." The suspects admitted that their target was the New York City subway station.), available at <http://www.cnn.com/US/9708/01/brooklyn.bomb.pm/index.html>.

12. Brian Michael Jenkins, *Improving Public Surface Transportation Security: What Do We Do Now?*, LEXINGTON INST., at 2, available at <http://www.lexingtoninstitute.org/homeland/Jenkins.pdf> (last visited Jan. 31, 2005).

13. William L. Waugh, Jr., *Securing Mass Transit: A Challenge for Homeland Security*, 21 REV. OF POL'Y RES. 307, 307 (2004).

14. *Id.* at 307.

15. *Id.*

India leads the world in attacks on public transportation and in facilities from those attacks, with countries in Asia and Africa close behind. Terrorists, however, have been targeting mass transit in more industrialized countries as well. The United Kingdom and Germany each experienced six threats or attacks from mid-1997 through the end of 2000; Japan, seven; Israel, eight. Australia and Belgium suffered attacks as well.

Dunham, *supra* note 6.

16. JACK RILEY, RAND CORPORATION, *TERRORISM AND RAIL SECURITY 2* (Mar. 2003) (testimony presented to the Senate Commerce, Science, and Transportation Comm. on Mar. 23, 2004), available at <http://www.rand.org/publications/CT/CT224/CT224.pdf>.

mately 431 deaths and thousands of injuries.<sup>17</sup>

Public transportation is an ideal target for terrorists because it allows them to kill in quantity.<sup>18</sup> Passenger rail is used by millions of people on a daily basis.<sup>19</sup> For example, the MTA Long Island Rail Road is the most busy passenger rail system in North America, averaging 274,000 passengers each weekday.<sup>20</sup> In addition, the logistics of a passenger rail attack are comparatively simple. Given the concentration of people in a passenger rail station, substantial casualties can be inflicted with a backpack-sized bomb.

Although conventional explosives have been the most frequently used weapon in rail attacks up to now, security officials cannot overlook the potential use of unconventional weapons such as chemical or biological weapons.<sup>21</sup> The use of biological or chemical weapons in rail systems is real and not a theoretical threat.<sup>22</sup> In 1995, Japan's Aum Shinrikyo sect members released nerve gas on Tokyo's subways, killing twelve people and causing 5,500 people to seek medical treatment.<sup>23</sup> Moreover, recent arrests of extremists connected with Al Qaeda who manufactured ricin and the discovery of ricin in a Paris train station further proves that chemical or biological weapons are a potential threat to rail systems.<sup>24</sup>

Although a large-scale attack involving chemical or biological weapons would be difficult to execute, a small-scale attack could produce widespread panic. As demonstrated by the anthrax attacks on postal facilities in the United States in 2001, such an attack could deny the use of transportation facilities for a lengthy period and result in expensive cleanups.<sup>25</sup>

## B. KILLING INDISCRIMINATELY

Terrorists target public transportation because it allows them to kill indiscriminately. Public transportation depots have "little security with no

17. *Id.*

18. Dunham, *supra* note 6.

19. *Id.* See also U.S. GENERAL ACCOUNTING OFFICE, RAIL SECURITY, SOME ACTIONS TAKEN TO ENHANCE PASSENGER AND FREIGHT RAIL SECURITY, BUT SIGNIFICANT CHALLENGES REMAIN, Mar. 2004 (statements of Peter F. Guerrero & Norman J. Rabkin before the Senate Comm. on Commerce, Science, and Transportation) [hereinafter GAO TESTIMONY], available at <http://www.gao.gov/new.items/d04598t.pdf>.

20. Hearing Before the Comm. on House Transportation and Infrastructure Subcomm. on Railroad, 108th Cong. (2004) (statement of James Dermody, President, Long Island Rail Road), available at <http://www.house.gov/transportation/rail/05-05-04/dermody.pdf> (last visited Jan. 31, 2005).

21. Jenkins, *supra* note 12, at 3.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

obvious checkpoints,” as compared to airports where passengers and parcels are inspected.<sup>26</sup> Generally, rail passengers do not know each other, which allows terrorists to attack in anonymity and provides an easier escape.<sup>27</sup> In addition, rail passenger facilities are readily accessible, making them all the more vulnerable to a terrorist attack. For example, a typical rail passenger facility relies on open architecture and the rapid and easy movement of passengers in and out of facilities and on and off trains. Furthermore, passenger rail systems pass through dense urban landscapes that may offer multiple attack points and easy escape, as well as vast rural stretches that are difficult to patrol and secure.

### C. PUBLIC TRANSPORTATION AS A CIRCULATORY SYSTEM

“Transportation systems are the nervous systems of large cities.”<sup>28</sup> Attacks on these systems produce significant psychological effects and economic disruption.<sup>29</sup> “As such, the potential loss of service, not to mention the loss of life, that might accompany an [attack] can severely disrupt the social and economic life of communities and even regions.”<sup>30</sup> A terrorist attack is likely to result in a decrease of commuter travel on passenger rail systems, thus increasing highway congestion. Moreover, tourists in metropolitan areas would also become reluctant to travel on passenger rail systems. Furthermore, transit-related businesses would most likely be adversely affected by the decrease in passenger and tourist travel.<sup>31</sup> Thus, “the potential economic impact of infrastructure damage alone may encourage terrorists to target transit systems.”<sup>32</sup>

In addition, “[t]errorists thrive on the psychological effects their actions have upon others. Whenever a government overreacts to a hostage

26. Dunham, *supra* note 6.

27. *Id.*

28. Jenkins, *supra* note 12, at 1.

Light railways (typically one- or two-car electric trains operating on street trackage or other surface right-of-way and sometimes in tunnels) carry more passengers than buses do and hence have a higher potential for casualties in an attack; also, they are more vulnerable to disruption, as a disabled vehicle can block operations on a line. At least 20 U.S. cities have light rail lines; more are planned or under construction. . . . Just as vulnerable to terrorist attacks is the subway (“heavy rail” as it is known in the industry. . . .) Eleven U.S. metropolitan areas have heavy rail rapid transit systems, with electric trains typically four or more cars long running on their own right-of-way, often in tunnels.

Dunham, *supra* note 6.

29. Jenkins, *supra* note 12, at 1.

30. Waugh, *supra* note 13, at 307.

31. *Id.*

32. Waugh, *supra* note 13, at 307. See also Adam Eventov, *FBI; U.S. Rail Lines Among Terror Targets; Trains; A Study Say an Attack on Corridors in the Area Would Cost \$414 Million a Day*, THE PRESS-ENTERPRISE, Sept. 12, 2003 (“If service on either the Union Pacific or Burlington Northern Santa Fe Railroad . . . were cut, the disruption would have an economic impact of \$414 million a day. . .”).

incident or the public becomes engulfed in fear over potential terrorist attacks, the terrorists achieve an important victory.”<sup>33</sup> Consider a report conducted by the American Psychological Association which performed a random survey of 1,900 Americans nationwide in the four months after the September 11 attacks; “[f]indings indicated that about one quarter of Americans reported ‘feeling more depressed than at any other time in their lives.’”<sup>34</sup> Rail transportation, like air travel, can rise or fall with the willingness of passengers to put their personal safety in the hands of others.<sup>35</sup>

#### D. PASSENGER RAIL VULNERABILITIES

Attacks on passenger rail systems are likely to occur more frequently, and to become more deadly than those on airports and airplanes, because the security measures on the rail network have not kept pace with those in aviation.<sup>36</sup> For instance, airports extensively use passenger profiling, passenger screening, metal detectors, X-ray machines, explosives sniffers, hand searchers, and armed guards.<sup>37</sup> The employment of such security measures would conflict with the expectations of the average American rail passenger. The American rail passenger expects rail transportation to be inexpensive and fast.<sup>38</sup> These security measures would cause an increase in fares and longer travel times, which would likely lead to a substantial loss in ridership.<sup>39</sup>

Unlike airports, passenger rail facilities rely on open architecture because it allows passengers more physical space and easier accessibility.<sup>40</sup> However, due to the recent growth of passenger rail ridership,<sup>41</sup> it is

---

33. JEFFREY D. SIMON, *THE TERRORIST TRAP* 376 (1994).

34. Yael Danieli, Brian Engdahl, & William E. Schlenger, *The Psychosocial Aftermath of Terrorism*, in *UNDERSTANDING TERRORISM* 235 (2004). See also SIMON, *supra* note 33, at 348.

35. RILEY, *supra* note 16, at 4.

36. Jenkins, *supra* note 12, at 1.

37. RILEY, *supra* note 16, at 4.

38. *Id.* at 4-5.

39. *Id.* at 5.

40. GAO TESTIMONY, *supra* note 19, at 8.

41. Lyndsey Layton, *Rail Ridership Hits New High: Reagan Funeral, Return of Tourism Lift Metro*, WASH. POST, Sept. 10, 2004, at B01 (“More people rode Metrorail in the past year than any year since the subway opened in 1976, at one point breaking the record for single-day ridership.”); Lucas Wall, *Rail Ridership Figures Called ‘Impressive’*, HOUS. CHRON., Apr. 6, 2004 (“An estimated 604,300 passengers rode the train in March [2004], the highest monthly total logged since passenger operations on Houston’s first light rail line began Jan. 1 [2004].” David Wolff, chairman of the Metropolitan Transit Authority, expected that number to triple by the end of the year.), available at <http://www.chron.com/cs/CDA/ssistory.mpl/metropolitan/2487749>; *RTA Ends 2003 With First Ridership Increase Since 1997*, RTA NEWS, Jan. 21, 2004 (Cleveland “[r]idership was more than 53.5 million, up about 809,000 trips from the 2002 total of 52.7 million.”), at <http://www.riderta.com/pressre-lease/leaselist.asp?listingid=558>; *Amtrak Sets Ridership Record in FY2004*, PROGRESSIVE RAILROADING.COM, Oct. 18, 2004 (“For the second-straight

questionable whether passenger rail facilities should continue to rely on open architecture. For two major reasons, open architecture makes passenger rail facilities more vulnerable to terrorist attacks. First, terrorists benefit by anonymity and easy escape. Second, open architecture prevents passenger rail facilities from employing certain security measures, such as the creation of “safe zones” through separation between check-in counters and departure gates at airports.<sup>42</sup>

The above factors weigh unfavorably against rail passenger transportation and create a potential target for terrorists to exploit. To summarize: (i) the high concentration of passengers provides terrorists with the opportunity to kill in quantity and indiscriminately; (ii) a terrorist attack on public transportation would result in profound psychological effects and economic disruption; and (iii) the impracticality of employing some aviation-style security measures makes rail transportation more vulnerable, thus affording terrorists another avenue to exploit.

#### E. FREIGHT RAIL VULNERABILITIES

Unlike passenger rail systems, freight rail does not have a high concentration of passengers; however, “it does provide terrorists with some opportunities that passenger rail does not afford.”<sup>43</sup> In particular, freight rail is used to transport large quantities of hazardous materials and dangerous cargoes.<sup>44</sup> Nearly half of the hazardous materials shipped in the U.S. move by rail.<sup>45</sup> Sometimes these freight trains travel through densely populated urban areas, which creates the potential for a very serious accident.<sup>46</sup> For instance, the New York City area had two million tons of hazardous materials travel through it on freight cars in 2004.<sup>47</sup> Tank cars of chlorine have routinely passed within four blocks of the Capitol.<sup>48</sup> The breadth of the problem was highlighted in June of 2002, when the state of Nevada filed a federal civil action against the Department of Energy for failing to “address the environmental impacts and terrorism risks from tens of thousands of . . . rail . . . shipments of high-level radioactive waste through 44 states, 109 major cities and 703 counties with a combined pop-

---

year, Amtrak posted record ridership. The national passenger railroad carried 25,053,564 passengers in fiscal year 2004, a 4.3 percent increase. . .”), at <http://www.progressiverailroading.com/transitnews/article.asp?id=5613>.

42. RILEY, *supra* note 16, at 5.

43. *Id.*

44. *Id.*

45. *Id.*

46. See Greg Clary, *Schumer: Rail Safety is Lax*, J. NEWS, Jan. 22, 2005, at 1B.

47. *Id.*

48. Michael Dresser, *Derailment Brings Home Potential Peril of Toxic Traffic*, BALTIMORE SUN, Jan. 16, 2005, at A1.

ulation of 123 million.”<sup>49</sup>

In July 2001, a railcar carrying noxious chemicals<sup>50</sup> caught fire in the Howard Street Tunnel under downtown Baltimore.<sup>51</sup> The fire disrupted freight rail movements throughout the East Coast, and damaged the underground infrastructure of downtown Baltimore.<sup>52</sup> In January 2002, a freight train derailed outside Minot, North Dakota.<sup>53</sup> The derailment caused five tanker cars to leak anhydrous ammonia; one man was killed and sixty-one people sought emergency care.<sup>54</sup> Recently, in January 2005, a train derailment in Graniteville, South Carolina, caused chlorine gas to leak killing nine people, sending more than 500 to hospitals, and evacuating nearly 5,500 residents.<sup>55</sup>

More than twenty-eight million freight car shipments haul everything from coal to children’s food.<sup>56</sup> Tracks travel through every major city and within yards of the most important symbols of our country and tourist attractions.<sup>57</sup> Although terrorists have not attacked a U.S. freight rail system, this could change. With terrorism a threat, railroads will face increasing pressure to divert hazardous cargoes from heavily populated areas.

### PART III: STATUS OF U.S. RAIL TRANSPORTATION SECURITY EFFORTS

Before September 11, 2001, the United States focused its security

49. *Nevada Suit Alleges Irregularities in EIS Are ‘Tantamount to Fraud,’* NUCLEAR WASTE NEWS, June 13, 2002. *But see* Roland M. Frye, Jr., *The Nuclear Regulatory Commission is Not Required by Statute to Terrorism-Related Portions of Environmental Impact Statements*, 55 ADMIN. L. REV. 643 (2003). *See also* Chessa Bieri, *The Time has Come for the Government to Develop and Implement a Transportation Plan For Yucca Mountain*, 29 TRANS. L.J. 333 (2002) (discussing the shipment of nuclear waste from Yucca Mountain where 77,000 tons of nuclear waste is stored).

50. Tim Doulin, *Rails Bring Danger to Town, But Threat Hard to Quantify*, COLUMBUS DISPATCH, Jan. 20, 2005, at 1A.

51. Dresser, *supra* note 48, at A1.

52. *Id.*

53. *1 Killed After Train Derails, Leaks Ammonia*, CNN NEWS, at <http://archives.cnn.com/2002/US/0-1/18/minot.chemical.leak/?related> (last visited Jan. 31, 2005).

54. *Id.* Anhydrous ammonia is particularly noxious. “It sucks the water right of your system . . . If your skin comes in contact, it causes a chemical burn. It freezes clothing to the body and sucks the moisture right out of your eyes, breathing system, bronchial tubes, anything that’s moist. It goes directly to those areas.” said Lt. Douglas Lockrem of Minot police. *Id.*

55. Gregory Richards, *CSX To Reduce Train Movements in Jacksonville, Fla., During Super Bowl Week*, FLORIDA TIMES-UNION, Jan. 20, 2005.

56. Congressman Jon C. Porter, Statement on the Protecting Railroads Against Enemy Efforts Through Modernization and Technology Act (PREEMPT) (June 17, 2004), available at <http://www.house.gov/t-ransportation/press/press2004/release72.html>.

57. *Id.*



efforts almost exclusively on aircraft and airport facility protection.<sup>58</sup> Since September 11th, the focus of America's security efforts has continued to center on aviation.<sup>59</sup> This has been true at the U.S. Department of Transportation ("DOT"), at the new Department of Homeland Security ("DHS"), and at the Transportation Security Administration ("TSA"), which has been transferred from DOT to DHS.<sup>60</sup> This focus on aviation is somewhat understandable given the nature of the September 11 attacks.<sup>61</sup>

Since September 11, however, passenger rail systems have conducted further drills, testing, and preparation for emergency situations.<sup>62</sup> Railroad employees have been trained to look for unusual or suspicious activity and report it on toll-free hotlines.<sup>63</sup> The Washington, D.C. subway system recently initiated a program for identifying suspicious packages.<sup>64</sup> Some transportation systems are experimenting with chemical and biological detection systems,<sup>65</sup> having been reminded by the sarin attacks in Tokyo that the next attack may not involve conventional weapons.<sup>66</sup>

The March 2004 bombings of four commuter trains in Madrid were followed by the discoveries of bombs under railroad tracks in Spain and France, and by the recent intelligence reports that terrorists might try to bomb rail lines and buses in major U.S. cities.<sup>67</sup> These developments suggest that the measures taken thus far to protect rail systems are insufficient, and that a greater degree of planning, preparation, and coordination between government and the rail industry in dealing with terrorism is imperative.<sup>68</sup>

#### PART IV: THE IRA & THE UNITED KINGDOM

Only a few rail systems have been confronted with sustained terror campaigns; as a result, it has been difficult to evaluate the effects of rail

---

58. GAO TESTIMONY, *supra* note 19, at 1.

59. See Jessica Ramirez, *The Victims Compensation Fund: A Model for Future Mass Casualty Situations*, 29 TRANS. L.J. 283, 283-84 (2002).

60. Waugh, *supra* note 13, at 307.

61. *Id.*

62. RILEY, *supra* note 16, at 6.

63. Sara Kehaulani Goo, *Accidents Spur New Focus on Securing U.S. Rail System*, WASH. POST, Jan. 29, 2005, at A5.

64. RILEY, *supra* note 16, at 6.

65. *Id.*

66. *Id.*

67. In fact, a rough sketch of Grand Central Terminal was found on a laptop of a suspect in the Madrid Bombings. Robert Polner, Rocco Parascandola, & Wil Cruz, *Sketchy Information; Kelly Says a 'Crude' Drawing of Grand Central Found in Spain was Withheld From the Public to Avoid a Scare*, NEWSDAY, Mar. 3, 2005, at A3.

68. Hearing Before the Comm. on House Transportation and Infrastructure Subcomm. on Railroad, 108th Cong. (2004) (statement of Allan Rutter, Administrator, Federal Railroad Administration), available at <http://testimony.ost.dot.gov/test/pasttest/04test/Rutter3.pdf>.

security measures.<sup>69</sup> The terrorist attacks of the Irish Republican Army (the “IRA”) on the United Kingdom’s rail facilities provide a good example of terrorist behavior and the value of security measures.<sup>70</sup>

The IRA waged a twenty-five year terrorist campaign against London’s Underground and British railroads.<sup>71</sup> Between 1991 and 1999, British transportation authorities had to deal with more than 6,000 bomb threats and had to inspect more than 9,000 suspicious objects.<sup>72</sup> During the same period, the IRA planted eighty-one explosive devices.<sup>73</sup>

The IRA terrorist campaign exploited simple security gaps of the United Kingdom’s rail facilities.<sup>74</sup> For example, the IRA successfully exploited breaks in fences, poor lighting, and trash containers allowing the hiding of packages.<sup>75</sup> These incidents led the United Kingdom to develop a broad security strategy.<sup>76</sup> The security elements included:

- Repairing gaps in fencing to provide more control around the perimeter of rail facilities.
- Improving lighting, both to deter terrorists and to improve facility observation.
- Installing blast resistant trash containers to reduce the utility of placing bombs in trash containers. . .
- Installing close-circuit television to provide stationmasters and security personnel with better visibility throughout the facilities during emergencies. . . .
- Training of personnel and passengers to have a role in security by reporting suspicious behavior, identifying suspicious . . . packages and luggage, and improving readiness for evacuation and emergency actions.<sup>77</sup>

Other methods used in the United Kingdom included covert testing of security measures, increased presence of armed security officers, and the use of public communication strategies to advise on threats, service disruptions and the availability of alternate routes and transportation methods.<sup>78</sup>

No security measures will be perfect and completely end a terrorist

69. RILEY, *supra* note 16, at 7.

70. Paula Zahn Now, *Defending America; America’s Railways Vulnerable?* (CNN television broadcast, Jan. 17, 2005).

71. Jenkins, *supra* note 12, at 3. See Brian Michael Jenkins & Larry N. Gersten, *Protecting Public Transportation Against Terrorism and Serious Crime: Continuing Research on Best Security Practices*, (Mineta Transp. Inst. Coll. of Bus., San Jose State Univ., Sept. 2001) (for a chronology of IRA terrorist attacks on public transportation in England).

72. Jenkins, *supra* note 12, at 2.

73. *Id.*

74. RILEY, *supra* note 16, at 7.

75. *Id.*

76. *Id.* at 8.

77. *Id.*

78. *Id.*

campaign. However, improved security measures can limit the effects of such a campaign. The security measures implemented by the United Kingdom forced terrorists to retreat to more remote targets.<sup>79</sup> Moreover, improved training for rail employees resulted in prompt and well-planned responses, which avoided needless casualties.<sup>80</sup> Overall, the United Kingdom's security measures resulted in very low casualties and disruptions were at a tolerable minimum.<sup>81</sup> One lesson taken from the United Kingdom's experience with the IRA's bombing campaign is that we need to be more proactive to stop terrorism on rail transportation rather than reactive, waiting for an attack to occur. One such proactive approach is reflected in PREEMPT, which will be discussed in detail below.

#### PART V: SUMMARY OF PREEMPT

On June 17, 2004, U.S. Representatives Don Young,<sup>82</sup> Jack Quinn,<sup>83</sup> and Jon Porter<sup>84</sup> introduced PREEMPT<sup>85</sup> as a legislative vehicle for expanding and improving anti-terrorist security programs for passenger railroad and freight rail systems.<sup>86</sup> PREEMPT would provide the resources both to harden our nation's rail system against the possibility of terrorist attack and to improve our ability to recover from such an incident.<sup>87</sup>

PREEMPT would provide in excess of \$1 billion in new money, including more than \$600 million to improve the safety of critical rail tunnels used by commuter railroads and Amtrak.<sup>88</sup> PREEMPT would also require the development of a coordinated comprehensive security plan between the DOT and Homeland Security.<sup>89</sup> Other provisions for the enhancement of railroad security address the following areas:

- Automated security inspection;
- Emergency bridge repair and replacement technology and testing;
- Establishment of a unified railroad emergency operations center;
- Security and redundancy for critical communications, electric power (in-

---

79. Jenkins & Gersten, *supra* note 71, at 23.

80. *Id.*

81. *Id.*

82. Don Young is a Republican from Alaska and is the chairman of the House of Transportation and Infrastructure Committee.

83. Jack Quinn is a Republican from New York and is the chairman of the Railroad Subcommittee of the House of Transportation and Infrastructure Committee.

84. Jon Porter is a Republican from Nevada and is the vice chairman of the Railroad Subcommittee of the House of Transportation and Infrastructure Committee.

85. PREEMPT, *supra* note 4.

86. AMERICAN PUBLIC TRANSPORTATION ASSOCIATION, *House T&I Leaders Introduce 'PREEMPT' Rail Security Bill* (Oct. 19, 2004) [hereinafter *T&I Leaders Introduce PREEMPT*], available at [http://www.apta.com/passenger\\_transport/thisweek/040628\\_6.cfm](http://www.apta.com/passenger_transport/thisweek/040628_6.cfm)

87. PREEMPT, *supra* note 4.

88. *T&I Leaders Introduce PREEMPT*, *supra* note 86.

89. PREEMPT, *supra* note 4.

cluding traction power), computer, and train control systems essential for secure railroad operations or to continue railroad operations after an attack impacting railroad operations;

- The security of hazardous material transportation by railroad;
- Secure passenger railroad stations, trains, and infrastructure;
- Public security awareness campaigns for passenger train operations;
- The sharing of intelligence and information about railroad security threats;
- Additional police and security officers, including canine units<sup>90</sup>

The most important feature of the bill is that the rail industry played a large role in writing PREEMPT.<sup>91</sup> As Representative Porter stated, "What you find in this bill, the bulk of it, is written by the industry who understands the needs."<sup>92</sup>

## PART VI: POTENTIAL IMPACT OF THE BILL

The September 11th attacks have proven that terrorists have learned to attack areas of particular vulnerability while avoiding those that are more protected and predictable.<sup>93</sup> Therefore, because aviation is now more protected and predictable, it is more likely that terrorists will target the vulnerable rail transportation system. Lack of funding is the primary reason for the vulnerabilities of the rail transportation system.<sup>94</sup> PREEMPT would provide the rail transportation system with funding to better identify terrorist attacks at the earliest stages, and also would require creation of a coordinated federal policy on rail security.

### A. IDENTIFYING AN ATTACK

Identifying an attack in its early stages can be pivotal to limiting casualties and contamination. The same techniques can also assist in recognizing hoaxes, thereby reducing unnecessary shutdowns and

---

90. *Id.*

91. Angela Greiling Keane, *Rail Security Bill Parked*, TRAFFIC WORLD, June 28, 2004.

92. *Id.*

93. Larry M. Wortzel, *Securing America's Critical Infrastructures: A Top Priority for the Department of Homeland Security*, Address Before a Conference on Critical Infrastructure and Homeland Security: Public Policy Implications for Business (Apr. 23, 2003), in Heritage Foundation Lectures, May 7, 2003, at 1-5.

94. John M. Doyle, *House Bill Would Spend \$1.1B to Improve Railroad Security*, HOMELAND SEC. & DEF., June 23, 2004.

Every day, more than 14 million people use mass transit compared with 1.8 million daily air passengers and 63,000 Amtrak passengers. However, in fiscal 2002 and 2003, mass transit received only \$115 million for transit security grants compared to the \$11 billion in federal money spent on aviation security, according to the [Transportation] committee.

*Id.*

disruptions.<sup>95</sup> PREEMPT would provide rail facilities with the necessary funding to install chemical or biological detectors. Chemical and biological detectors can alert public health authorities to the release of dangerous pathogens that otherwise might not become apparent for days (i.e., until symptoms developed and medical diagnosis was confirmed).<sup>96</sup> The Washington, D.C., Metro recently installed chemical and biological detectors.<sup>97</sup> Moreover, the TSA has conducted test programs at passenger train stations, such as New Carrollton Maryland, to screen passengers for explosive residue.<sup>98</sup> Overall, these detectors are useful for detecting potential terrorist attacks and natural outbreaks of disease, and could be implemented more broadly through PREEMPT.<sup>99</sup>

As noted earlier, Amtrak and other major commuter rail carriers have implemented several new measures to ensure passengers' safety and security.<sup>100</sup> "Most of [these measures have] been accomplished without any direct financial assistance from the federal government."<sup>101</sup> Representative Quinn has stated. "This effort is commendable, but we have to do more."<sup>102</sup>

Among other things, PREEMPT would provide the necessary funding for rail security authorities to develop simulation exercises for administrative and response personnel. For example, The Metropolitan Atlanta Rapid Transit Authority ("MARTA") is one rail transit agency that had an extensive security program before September 11; this was due to its hosting of the 1996 Olympic games.<sup>103</sup> MARTA conducted numerous simulation exercises prior to the Olympics, including a simulation held at the civic center that focused on a takeover of a train with hostages.<sup>104</sup> Such simulations of terrorist attacks will help refine the rail transportation response time, and will keep skills and response plans sharp and up-

---

95. Jenkins, *supra* note 12, at 3.

96. *Id.* But see Eric A. Posner, *Fear and the Regulatory Model of Counterterrorism*, 25 HARV. J.L. & PUB. POL'Y 681, 689 (2002) ("Some authors argue that governments aggravate the risks of panic by taking visible or unusual steps to combat the underlying risks of harm. Individuals are more likely to panic if they see government agents wearing protective suits, or chemical weapons detectors in subway stations.").

97. Jenkins, *supra* note 12, at 3.

98. Goo, *supra* note 63, at A5 ("The passenger screening program at New Carrollton was completed . . . and TSA officials say they plan to use explosive detection machines at rail stations only during major public events, such as the inauguration earlier this month.").

99. Jenkins, *supra* note 12, at 4.

100. Humberto Sanchez, *House Transportation Chief Pushes \$1.1B for Rail Security*, BOND BUYER, June 21, 2004.

101. *Id.*

102. *Id.*

103. Dunham, *supra* note 6.

104. *Id.*

to-date.<sup>105</sup> Moreover, they will help security authorities assess preparedness and identify the most vulnerable areas for attack.<sup>106</sup>

PREEMPT also would provide the rail transportation the funding to install better surveillance technology. Improved surveillance can alert security of suspicious activities or abandoned bags. For instance, in a test, it took more than thirty minutes for security personnel to notice an abandoned bag left in clear view in a New York train station.<sup>107</sup> Likewise, improved surveillance can alert authorities to a vehicle parked on a rail tracks.<sup>108</sup> In addition, PREEMPT could help equip all rail transit facilities with closed-circuit television monitors, which would improve a facility's visibility and, thus, its security. Finally, PREEMPT would increase funding for security officers, including canine units, to patrol train facilities and trains.<sup>109</sup> An increase in security presence would help identify suspicious activity and abandoned parcels and ultimately, deter terrorists from attacking vulnerable areas.

As in the United Kingdom's response to the IRA bombings, rail transportation needs to perform active maintenance facility security. Many of the existing rail facilities are old and lack the necessary components of adequate security. PREEMPT would permit funding to repair fencing and force terrorists to more remote areas. Moreover, improved lighting would deter terrorists and improve rail facility observation.

PREEMPT would identify security weaknesses for freight rail as well.<sup>110</sup> As noted earlier, freight rail is a concern because it is used to transport hazardous materials and dangerous cargoes.<sup>111</sup> An estimated forty percent of inter-city freight, including half of the nation's hazardous materials moves by rail. PREEMPT would fund technologies such as automated freight car inspection, and surveillance.<sup>112</sup> In addition, with increased funding, freight rail transportation could invest in improved railcar design, which could reduce the release of hazardous materials following a terrorist attack.

---

105. Council on Foreign Relations, *Terrorism: Questions & Answers* [hereinafter *Terrorism: Q & A*] at <http://cfrterrorism.org/security/ground2.html#Q7> (last visited on Mar. 22, 2005).

106. *Id.*

107. *Paula Zahn Now*, *supra* note 70. *But see Terrorism: Q & A*, *supra* note 105. ("[I]n the United Kingdom . . . police are confident that unattended packages will be reported within minutes, giving authorities early warning to thwart possible attacks.")

108. Goo, *supra* note 63, at A5. ("[A] suicidal man who parked his vehicle on the tracks in California, caused a multi-train accident, killing 11 and injuring 200.")

109. PREEMPT, *supra* note 4.

110. Keane, *supra* note 91.

111. GAO TESTIMONY, *supra* note 19, at 1.

112. Mosquera, *supra* note 5.

## B. NEED FOR COORDINATED FEDERAL POLICY

Coordinated federal policy on security is necessary for protection of America's rail systems, including freight, passenger and commuter services.<sup>113</sup> Compared to other sectors in transportation, decision-making for rail systems appears decentralized among a number of federal, state, local, and private stakeholders.<sup>114</sup> As it stands, the roles and responsibilities of DHS and DOT could create the potential for duplicating or conflicting efforts as both entities work to enhance security.<sup>115</sup>

PREEMPT would require DHS and DOT to delineate each department's railroad security roles and responsibilities.<sup>116</sup> In particular, DHS and DOT would be required to enter into a memorandum of understanding within 180 days after the date of enactment to clearly establish their respective rail transportation security roles.<sup>117</sup> Furthermore, a coordinated rail security plan would be required to identify the vulnerabilities of rail assets and infrastructure.<sup>118</sup> In addition, PREEMPT would require DHS and DOT to develop a contingency plan to keep the rail system operational after a terrorist attack.<sup>119</sup> Finally, a coordinated approach would allow the two agencies to share intelligence and information about railroad security threats.<sup>120</sup> This could be accomplished through PREEMPT's provision for a unified railroad emergency operations center.<sup>121</sup>

## PART VII: CONCLUSION

Americans have been told to expect the worst: a terrorist attack is probably coming; it may be terrible.<sup>122</sup> Since September 11, the federal government has focused on aviation security.<sup>123</sup> However, terrorist attacks around the world, such as the recent terrorist attack in Spain, have shown that rail systems, like all modes of transportation, are potential targets of attack.<sup>124</sup> No security system for passenger and freight rail will be perfect.<sup>125</sup> Nonetheless, as the United Kingdom's experience with the

---

113. RILEY, *supra* note 16, at 10.

114. *Id.*

115. GAO TESTIMONY, *supra* note 19, at 2-3.

116. Keane, *supra* note 91.

117. PREEMPT, *supra* note 4.

118. Keane, *supra* note 91.

119. *Id.*

120. PREEMPT, *supra* note 4.

121. *Id.*

122. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 364 (2004).

123. GAO TESTIMONY, *supra* note 19, at 1.

124. *Id.*

125. RILEY, *supra* note 16, at 10.

IRA demonstrates, we can and should take proactive steps to secure our rail transportation system.

Even without major direct federal assistance, Amtrak and other large commuter rail carriers have acted to enhance security.<sup>126</sup> However, more work is needed and more work requires more money. The passage of PREEMPT would provide the rail system with \$1 billion in new money for security purposes.<sup>127</sup> This financial commitment would be accompanied by a much-needed coordinated security plan between DHS and DOT. In addition, PREEMPT would provide funding to develop better methods for detecting and identifying a potential attack, such as improved surveillance and better-trained personnel. Moreover, simulation exercises could help identify vulnerabilities to attack and keep rail systems operational after an attack.

---

126. GAO TESTIMONY, *supra* note 19, at 6.

127. *T&I Leaders Introduce PREEMPT*, *supra* note 86.