



**Testimony of Joan Claybrook
President, Public Citizen
before the Washington, D.C., Council Committee on the Judiciary**

Friday, June 17, 2005

Chairman Mendelson and Members of the Committee on the Judiciary, thank you for the opportunity to testify today. My name is Joan Claybrook, and I am the president of Public Citizen, located in the District of Columbia. Public Citizen is a non-profit public interest organization with 160,000 members nationwide that represents consumer interests through lobbying, litigation, regulatory oversight, research, and public education.

Today, this Council is considering much-needed legislation, the *Homeland Security, Risk Reduction, and Preparedness Act of 2005*. This bill will improve oversight of homeland security readiness in the District of Columbia, raise awareness of critical issues among federal decision makers and preserve a central role for public participation. It should be enacted.

Among its provisions, the Act:

- outlines a strategy for a comprehensive risk assessment of the District of Columbia;
- encourages improved communication about security risks to the D.C. community and federal decision makers;
- establishes a D.C. Homeland Security Commission, which will call on citizens to assist in the assessment of security vulnerabilities;
- requires D.C. government agencies to develop employee security training programs; and
- recognizes the need for a thorough analysis of baseline threats to the city's security.

While all of these measures are critical to protection of the District's residents, I will focus today on the "strict liability" provision of this bill, which will permit Washington, D.C., taxpayers to recover the cleanup costs of a spill involving ultra-hazardous materials, such as toxic-upon-inhalation gases, without the burden of demonstrating negligence. This provision is a significant and legally sound response to the extraordinary exposure Washington, D.C. faces every day from the threat of terrorism.

Since September 11, 2001, the federal government has repeatedly warned that terrorists will attempt to strike America's cities again – and that certain cities are more at risk than others. Indeed, in 2003, former U.S. Secretary of Homeland Security Tom Ridge designated seven American cities, including the District of Columbia, as “High Threat Target Cities” for continued terrorist threats. Even among these seven cities, the District of Columbia is uniquely at risk as the seat of our national government and as a global symbol of democracy.

One of the greatest threats to the District's security exists on the city's roads and rails. Reports issued by Congress, the executive branch, the 9/11 Commission, and many others have all called attention to the catastrophic harm that would result from an attack on transportation infrastructure or the misuse of transportation vehicles by terrorists. In the District, the transportation sector offers terrorists a particularly potent opportunity to inflict devastating damage on the nation's political and economic infrastructure and the city's residents.

Lax oversight of hazardous cargo transported through the District has repeatedly been cited as a subject of serious concern by anti-terrorism experts and government officials. Freight rail trains travel on tracks close to all three branches of the federal government as well as tens of thousands of local residents. Yet these trains are riddled with safety problems and security risks.

The December 2003 derailment of a CSX hazardous materials train (the carrier that operates within the District) in Northern Virginia and the July 2001 derailment of a CSX train transporting hazardous chemicals in Baltimore, which caused an estimated \$10 million in damages, are just two local examples of damaging and costly mistakes involving hazardous materials. Even more worrisome, in 2003 the Federal Railroad Administration rated CSX as the most dangerous freight railroad in the nation. Last year alone, CSX was cited more than 1,200 times for violations involving critical items such as hazmat packaging, communications, response and training, and over 21,000 times for violations of track safety standards. This record is far from reassuring.

The risks posed by ground transportation targets are no less serious than those the federal government takes great pains to avoid in aviation. It is illogical that public officials contemplate firing upon lost pilots who stray into the District's restricted airspace, yet are powerless to take commonsense steps that would ensure the safe transit of larger, slower, and similarly dangerous rail cars and trucks – in the very same restricted areas. Will it take a truck bomb exploding on the National Mall or a punctured rail car releasing chlorine near the U.S. Capitol to generate support for government action? Let us hope not.

In our report of October 2004, *Homeland Unsecured*, we detailed the need for federal safeguards to assure public safety from attacks on critical infrastructure throughout the nation, including the District. Little has happened since publication of this report to meaningfully improve safety, yet the federal government has joined industry's efforts to preempt prudent action on the part of this City Council.

If the federal government remains unwilling or unable to enact much-needed laws to protect the District's residents and America's political infrastructure, then it is the clear obligation of this Council to act. In this spirit, this Council passed a sensible measure earlier this year to establish a permit system and safety cordon around the city's most critical infrastructure targets, including the White House and the Capitol. The law struck an appropriate balance between the needs of public security and private commerce by allowing passage of hazardous materials in an emergency or whenever a carrier demonstrates there is no alternative transportation route.

Yet industry's response to the city's genuine concern has been indifferent at best and hostile at its worst. The railroad industry has sought to delay and defeat the measure through litigation, and the trucking industry has filed a petition for preemption with the Federal Motor Carrier Safety Administration, despite the fact that the trucking provisions of the law await further action by the D.C. Government and are thus not currently in effect.

The measure before the Council today is an eminently reasonable step. The strict liability provisions of the bill are narrowly tailored, and, in fact, are not strict liability measures in the traditional sense. These provisions are a local response under local law, and apply only to those costs incurred by the city or private individuals from a clean-up following a release or threatened release of ultra-hazardous materials within the District. Although the strict liability provisions will financially protect the District and its taxpayers in the event of a release of toxic gases or explosives, the bill does not authorize strict liability lawsuits by citizens under these circumstances. Rather, it merely assures that compensation of the District's costs will not depend on complicated litigation over the activities of a third-party terrorist.

Strict liability is responsible policy when the dangerous (and profitable) activities of a private party threaten to inflict public harm. The costs of a highly risky activity and potentially hazardous spill should be borne by those who would profit from it, rather than by its city host or local taxpayers. Far from prohibiting the transportation of hazardous materials, the bill merely establishes a fair and equitable scheme for the compensation of vulnerable parties, and gives the operators an incentive to make their activities as secure as possible.

The punitive damages provision crafted in this bill is consistent with longstanding legal principles. It authorizes such damages only where there has been "wanton or reckless disregard for public safety" in the transportation of these gases, explosives or other highly poisonous substances. This language reflects a common standard for punitive damages provisions.

In short, this bill is a measured but important step, and falls squarely within the District's legal jurisdiction. It provides sorely needed incentives for private sector companies to assume their shared responsibility for the security of the goods they transport. Indeed, as the 9/11 Commission report noted: "Private-sector preparedness is

not a luxury; it is a cost of doing business in the post-9/11 world. It is ignored at a tremendous potential cost in lives, money, and national security.”

Thank you for this opportunity to appear before you. I look forward to working with the Committee to make technical improvements to the bill and to enact this vital legislation. I would be pleased to respond to any of your questions.