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Rebecca Gregory

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# Random Stops of Commercial Vehicles—The Only Way To Go

## CASE NOTE: *United States v. Alvester Fort*

*Rebecca Gregory\**

### Table of Contents

- I. Introduction
  - A. UNITED STATES V. FORT
  - B. ADMINISTRATIVE INSPECTIONS OF PERVASIVELY REGULATED INDUSTRIES
  - C. THE TRUCKING INDUSTRY IS A “PERVASIVELY REGULATED” INDUSTRY AS DEFINED BY *Burger*
    - 1. *The Government’s Interest in Regulating Commercial Trucking*
    - 2. *Random Stops of Commercial Motor Vehicles by Authorized Officers are Reasonably Necessary to Effectively Enforce the Regulatory Laws of Texas for the Trucking Industry*
    - 3. *The Texas Regulatory Scheme Provides an Adequate Substitute for a Warrant*
    - 4. *The Court Giveth and the Court Taketh Away*
- II. **Fort: On the Heels of NAFTA**
  - A. THE PATRIOT ACT
  - B. THE APPROPRIATIONS BILL
- III. Conclusion

### I. Introduction

Random stops of commercial vehicles, done to conduct administrative searches to ensure compliance with safety regulations, may, at first blush, alarm our notions of privacy and Fourth Amendment constraints against police activity.<sup>1</sup> The constitutionality

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1. The Fourth and Fourteenth Amendments are implicated when any vehicle is stopped and its occupants are detained because such action is considered a seizure within the meaning of these amendments. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976). Stationary

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of such warrantless searches, conducted without probable cause or reasonable suspicion, was before the Fifth Circuit recently in the case of *United States v. Fort*, 248 F.3d 475 (5th Cir. 2001). Although the decision drew a dissent, the majority held that, because commercial trucking is a "pervasively regulated" industry, such stops were permissible under the Texas statutory scheme. Much rested on the outcome. Were state troopers required to first obtain warrants before stopping carriers, it would be virtually impossible to enforce state and federal safety regulations. Were officers required to have probable cause or reasonable suspicion of a violation before stopping trucks, most violators would continue unabated, risking the lives and property of themselves and of other motorists. In fact, numerous types of safety violations are not readily observable to officers on patrol. Additionally, the mobile nature of carriers makes a warrant requirement not only impractical, but also absurd. With the safety concerns recently raised by the North American Free Trade Agreement (NAFTA) and the eventuality that millions of Mexican trucks may soon be traveling on Texas highways, the *Fort* decision takes on even more significance.

#### A. UNITED STATES V. FORT

On September 4, 1999, State Trooper Michael Scales was monitoring commercial traffic on Interstate 20 in Parker County, Texas. At approximately 8:00 A.M., he observed a truck that caught his attention. As the truck passed, the trooper heard the truck's wheel making a sound described as a "flop." This sound is commonly associated with a tire that is either flat or has a flat spot, either of which is a violation of the motor carrier safety regulations. The trooper was additionally concerned because he did not recognize the company name on the side of the truck. Based on those two observations, Scales stopped the truck for a commercial vehicle safety inspection.<sup>2</sup> The driver of the truck, Alvester Fort, told the trooper that he was traveling alone.

The trooper visually inspected the truck and completed a license and inspection report. The report noted numerous violations of the federal safety standards including failure to make proper driver log entries; bad tires; improper taillights; lack of a fire extinguisher, reflectors, flares, fuses and a battery cover; damaged windshield; and a defective speedometer. Fort was issued a ticket for several of the violations. Additionally, in accordance with Department of Public Safety (DPS) policy, Trooper Scales ran a computerized check, which disclosed that Fort had an outstanding warrant from the State of Louisiana.<sup>3</sup> The warrant was for a probation violation that related to possession of marijuana. When questioned concerning it, Fort replied that he thought his lawyer had taken care of it. Trooper Scales told Fort he would have to accompany him to the

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checkpoints are viewed differently from roving patrol or random stops of vehicles because the subjective intrusion is appreciably less in the case of checkpoint stops. *Id.* at 558.

2. Commercial vehicle inspections involve determining whether the truck is operating interstate or intrastate; checking the driver's license, logbook, registration, and bill of lading on the load; as well as inspecting the vehicle itself. *United States v. Fort*, 81 F. Supp. 2d 694, 695 (N.D. Tex. 2000), *aff'd*, 248 F.3d 475 (5th Cir. 2001).
  3. Because this was a valid stop, the trooper was permitted to check Fort's license for outstanding violations. See *United States v. Dortch*, 199 F.3d 193, 198 (5th Cir. 1999); see also *United States v. Zucco*, 71 F.3d 188, 190 (5th Cir. 1995) (holding that an officer can request license, insurance, registration, run a computer check thereon, and issue a citation).
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Parker County Sheriff's Office so the matter could be resolved. The truck was secured at a nearby truck stop and the two men went to the sheriff's office where the outstanding warrant was confirmed and Fort was booked.

Because the warrant was for possession with intent to deliver drugs, Scales asked the canine unit to conduct a "walkaround" of the trailer and truck. The DPS narcotics-detecting canine was taken to the location and "alerted" on an area between the cab and the trailer. Trooper Scales also contacted the El Paso Information Center (EPIC) to determine whether there were any intelligence reports on either Fort or his company, BAMA Trucking.<sup>4</sup> EPIC is an intelligence center that maintains a database on narcotics trafficking. The return information from EPIC reflected two DEA open files on the company and/or the driver. Trooper Scales returned to the Parker County jail, asked Fort if he was transporting illegal contraband, which he denied, and inquired whether he would give consent to search the truck and trailer, which he did. Scales asked for the keys and was told that Fort had given them to a friend named Levi. Although Fort initially told the trooper he was traveling alone, he later said that Cornelius Levi was in the truck at the time of the stop. Scales, accompanied by another trooper, immediately returned to the truck and searched for Levi. Unable to find Fort's companion, the two troopers opened the unlocked driver's door and took the narcotics canine inside the truck. When the dog showed no interest, they took him to the trailer, broke the seal, and entered.<sup>5</sup> Inside, the troopers found a bulk load of pungent, rotting potatoes lying unpackaged and scattered across the trailer floor. Located at the front of the trailer were stacks of wooden pallets holding six canvas duffel bags. The four-foot canvas bags contained forty-one bundles of marijuana, wrapped in plastic. Fort was indicted for possession with intent to distribute the 560 pounds of marijuana.<sup>6</sup>

Fort moved to suppress the evidence, essentially arguing that the trooper's decision to stop him was random and therefore unconstitutional.<sup>7</sup> At the suppression hearing, the prosecutor took the position that he was not relying on the tire noise as grounds to support the stop. Therefore, neither the district court nor the court of appeals considered this fact in determining the constitutionality of the stop,<sup>8</sup> each concluding that the

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4. The BAMA Trucking Company was owned by Fort and his wife.
  5. Seals are thin aluminum strips numbered to match the bill of lading and can be purchased at any truck stop. It is not unusual for troopers performing inspections to break such seals, which are easily replaced with another seal bearing a new number.
  6. See 21 U.S.C. §841(a)(1) (1999).
  7. Fort's Motion to Suppress focused its attack on the initial stop. The search and seizure that followed were not challenged except as fruit of the poisonous tree. Presumably, this was because the search was consensual. See *Fort*, 81 F. Supp. 2d at 696-97. In considering a ruling on a motion to suppress, questions of law are reviewed *de novo* and factual findings for clear error. The evidence is reviewed in the light most favorable to the prevailing party. *Dortch*, 199 F.3d at 197.
  8. At the suppression hearing, DPS Trooper Mike Scales testified that while routinely monitoring commercial traffic, he noticed that the truck driven by Alvester Fort had a faulty tire or tires. The sounds emitting from the tires were consistent with there either being flat or perhaps lacking sufficient tread, which are violations of the motor safety regulations. Based on this, he pulled the truck over for a safety inspection. Trooper Scales noted numerous violations of the federal safety standards for which a citation was issued.
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Government waived its right to rely on this fact.<sup>9</sup>

Following the suppression hearing, Fort's motion was denied.<sup>10</sup> Fort then entered into a plea agreement, but expressly reserved his right to appeal the denial of his motion to suppress.<sup>11</sup> He was sentenced to twenty-one months imprisonment. Fort took this issue of first impression<sup>12</sup> to the Fifth Circuit Court of Appeals arguing that the stop

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Following the trooper's testimony, defense counsel objected to the assertion that Trooper Scales considered the tire noise as a basis for the stop. The objection was based on the fact that the Government's response to the Motion to Suppress failed to include such an assertion. When questioned by the district judge as to whether the Government was relying on the tire noise as a specific ground to support the stop, the prosecutor replied:

PROSECUTOR: Not as a specific ground in the sense that it provides a reasonable suspicion that illegal activity or a violation of the law has taken place, Your Honor. It simply points out that Trooper Scales—let me go—go forward with it.

Trooper Scales advised me—after I had received information, returned the brief, I relied on Agent Farrow's report regarding a routine commercial traffic safety inspection. It was only after talking specifically with Trooper Scales that I found out about the hearing of the tire that caught his attention as to the truck and then the fact that he was unfamiliar with the BAMA trucking as the reasons that he decided to conduct the safety inspections of this truck.

The government would—an argument in its brief—suppose that the trooper has the right to go ahead and stop a truck for safety inspection even without having observed or heard a wheel that was obviously flat or had a flat spot on it.

But it's simply a fact that has been presented to the court. The government would allow the court can [sic] consider it in determining the overall validity of the actions taken by Trooper Scales during the entirety of the course of action of the investigation.

THE COURT: . . . You're relying on it as background and not reasonable suspicion or probable cause for the stop?

PROSECUTOR: That is correct, Your Honor.

This constituted the basis for concluding that the Government waived its right to argue those facts as a basis for the stop and for the ensuing analysis that the stop was purely random. *Fort*, 81 F. Supp. 2d at 695.

9. *Id.* at 695 n.2.

10. *See id.* at 694.

11. Federal Rule of Criminal Procedure 11(a)(2) allows a defendant to enter a conditional plea of guilty while reserving the right to appeal an adverse pretrial ruling. FED. R. CRIM. PROC. 11(a)(2) (West 2000).

12. A similar issue was before the State court in *Schenekl v. State*, 30 S.W.3d 412 (Tex. Crim. App. 2000). In that case, a game warden stopped Schenekl in order to conduct a routine water safety check. The warden observed signs of intoxication and arrested him for boating while intoxicated. *Schenekl* argued the statute authorizing random boat stops violated the Fourth Amendment. The Texas Court of Criminal Appeals held that the state's interest in promoting safety considered in conjunction with a statutory scheme that allowed for minimally intrusive, brief, random inspections was reasonable. *See* \$217, 590,000 in *United States Currency v. State*, 970 S.W.2d 660, 664–65 (Tex. App. 1998), *rev'd on other grounds*, 18 S.W.3d 631, 632 (Tex. 2000) (court noted statutory power to "enter and detain" where stop was based on observing a violation).

was random and therefore in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.<sup>13</sup> Before the Court was the constitutional propriety of administrative stops and searches of commercial vehicles made without probable cause,<sup>14</sup> without reasonable suspicion, and without a warrant.

#### B. ADMINISTRATIVE INSPECTIONS OF Pervasively REGULATED INDUSTRIES

The Fourth Amendment's prohibition against unreasonable searches and seizures applies to private commercial property and to administrative inspections designed to enforce regulatory statutes.<sup>15</sup> However, the expectation of privacy in commercial property is different from a similar expectation in an individual's home.<sup>16</sup> The expectation is particularly attenuated in commercial property used in "closely regulated" industries.<sup>17</sup> Indeed, certain industries "have such a history of government oversight that no reasonable expectation of privacy. . . could exist for a proprietor over the stock of such an enterprise."<sup>18</sup> When an individual engages in a pervasively regulated business, he does so with knowledge that his business will be subject to inspection.<sup>19</sup> Using this reasoning, the Supreme Court has upheld warrantless administrative searches of pervasively regulated businesses in a variety of situations.<sup>20</sup>

In *New York v. Burger*, the Supreme Court summarized the regulatory warrantless search doctrine of businesses in "closely regulated" industries by articulating a three-part test.<sup>21</sup> *Burger* involved the seemingly random administrative inspection of an automobile junkyard for compliance with New York regulations.<sup>22</sup> First, the Court reiterated that because individuals who operate in a closely regulated industry have a reduced expectation of privacy, the warrant and probable cause requirements that satisfy the Fourth Amendment standard of reasonableness for a government search have less application.<sup>23</sup> This exception to the warrant requirement is justified by the important role of periodic inspections conducted to enforce regulatory schemes and by the reduced expectation of privacy flowing from pervasive regulation.<sup>24</sup> For this reason, a warrantless inspection of a pervasively regulated industry will be deemed reasonable if (1) there is a substantial state interest that informs the regulatory scheme to which the inspection is made; (2) the

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13. See *Fort*, 248 F.3d at 477.

14. "Probable cause" is the measure applied to cases when determining whether the Fourth Amendment's reasonable requirement has been satisfied thus permitting the issuance of a warrant. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967).

15. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978).

16. See *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981).

17. *New York v. Burger*, 482 U.S. 691, 700 (1987).

18. *Marshall*, 436 U.S. at 313.

19. *United States v. Biswell*, 406 U.S. 311, 316 (1972).

20. See *Burger*, 482 U.S. at 707-09; see also *McDonald v. State*, 778 S.W.2d 88, 91 (Tex. Crim. App. 1989).

21. 482 U.S. at 702-03.

22. *Id.* at 694 n.2.

23. *Id.* at 702.

24. *Id.* at 704-07, 710.

inspection is necessary to further the regulatory scheme; and (3) the regulatory program provides an adequate substitute for a warrant in terms of the certainty and regularity of its application.<sup>25</sup> The Fifth Circuit utilized the *Burger* standards in determining whether the Texas statutory scheme passed constitutional scrutiny.<sup>26</sup>

C. THE TRUCKING INDUSTRY IS A "Pervasively Regulated" Industry  
As Defined By *Burger*

There is no doubt that commercial trucking is closely regulated by the states and the federal government.<sup>27</sup> The federal highway administration has promulgated voluminous rules and regulations governing the commercial trucking industry. These rules and regulations control virtually all aspects of commercial vehicles including maintenance, equipment, load, and operation—from lights to mud-flaps, repairs to reports. Regulations dictate who can drive, how they can drive, and when they can drive.<sup>28</sup> Texas has adopted most of these regulations in the Texas Transportation Code, which it administers in conjunction with other requirements.<sup>29</sup>

Prior to the *Fort* decision, the Fifth Circuit had not directly addressed the question whether commercial motor carrier vehicles could be subjected to warrantless administrative inspections by a state.<sup>30</sup> At the outset, the Fifth Circuit came to the obvious and

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25. See *id.* at 702–03.

26. *Fort*, 248 F.3d at 480.

27. See *United States v. Hernandez*, 901 F. 2d 1217, 1221 n.4 (5th Cir. 1990) (state may regulate commercial trucking); *State v. Campbell*, 875 P.2d 1010, 1012–13 (Kan. 1994) (motor carriers pervasively regulated); *Lievesley v. Comm'r of Internal Revenue*, 985 F. Supp. 206, 210 (D. Mass. 1997) (trucking is closely regulated); see, e.g., *V-1 Oil Co. v. Means*, 94 F.3d 1420, 1426–27 (10th Cir. 1996); *United States v. V-1 Oil Co.*, 63 F.3d 909, 911 (9th Cir. 1995); *United States v. Dominguez-Prieto*, 923 F.2d 464, 468–70 (6th Cir. 1991); *United States v. Burch*, 906 F. Supp. 592, 598 (D. Kan. 1995), *aff'd*, 153 F.3d 1140, 1141 (10th Cir. 1998) (random stop for safety inspection valid). For state cases upholding random inspections of commercial vehicles as valid regulatory searches, see *State v. A-1 Disposal*, 415 N.W. 2d 595 (Iowa 1987) (random safety inspection valid); *Drive Trans. Corp. v. New York City Taxi and Limousine Comm'n*, 513 N.Y.S.2d 920, 921 (1987); *State v. Williams*, 648 P.2d 1156, 1162 (Kan. Ct. App. 1982) (random commercial stop constitutional); *People v. Velez*, 441 N.Y.S.2d 176, 181–82 (N.Y. Crim. Ct. 1981); cf. *United States v. Seslar*, 996 F.2d 1058 (10th Cir. 1993) (random stop of rental truck prohibited as not heavily regulated industry). The Kansas statute cited in *Burch* is similar to the Texas scheme that allows purely random stops and searches. 906 F. Supp. at 597. In contrast, Tennessee's statute, cited in *Dominguez-Prieto* requires "reasonable belief" that a vehicle is operating in violation of the regulations; however, it is not apparent from reading the facts that the initial decision to stop the truck was other than random. See 923 F.2d at 465–66, 470.

28. See *Dominguez-Prieto*, 923 F.2d at 468.

29. See tex. admin. code ann. §3.62(c)(5) (West 1999) (the Director of the Texas Department of Public Safety is authorized to adopt rules regulating the safe operation of commercial motor vehicles). With a few specified exceptions, the Federal Motor Carrier Safety Regulations were adopted in Texas. *Id.* §3.62(a); see also tex. transp. code ann. §644.051 (Vernon 1999); 49 C.F.R. §§301–99 (2000).

30. In *Marshall v. Texoline Co.*, 612 F.2d 935 (5th Cir. 1980), the court upheld the warrantless inspection provisions of the Federal Mine Safety and Health Act of 1977 as they applied to

inarguable conclusion that the trucking industry is pervasively regulated. This laid the groundwork for applying *Burger's* three criteria.<sup>31</sup>

### 1. *The Government's Interest in Regulating Commercial Trucking*

The need to regulate motor carrier equipment, drivers, cargoes, etc., in order to protect the state's citizens and infrastructure, is compelling. Texas has a substantial governmental interest in ensuring that the commercial motor vehicles traveling its highways and smaller roads are in good, safe condition and are driven by trained, alert, and competent drivers. The concern over highway safety is reflected in our local laws and in the federal statutes and regulations that have also been adopted by Texas.<sup>32</sup> Congress long ago recognized the public's interest in enhancing commercial motor vehicle safety so as to reduce highway fatalities, injuries, and property damage.<sup>33</sup> In Texas, the pervasiveness of commercial motor vehicles—typically larger and heavier than passenger vehicles—raises serious safety concerns.<sup>34</sup> One need only traverse the roads to know that countless thousands of common carrier vehicles perpetually operate on our highways.<sup>35</sup> Again, the inevitable conclusion reached by the Court was the recognition that the state “has a substantial interest in traveler safety and in reducing taxpayer costs that stem from personal injuries and property damage caused by commercial motor carriers.”<sup>36</sup>

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quarry operations. Later, in *United States v. Thomas*, the court recognized the exception to the warrant requirement in an apparently random search of an automobile salvage business. 973 F.2d 1152, 1155–56 (5th Cir. 1992); see also *United States v. Cobb*, 975 F.2d 152, 156 (5th Cir. 1992) (warrantless search of salvage business).

31. Although the issue was one of first impression for the Fifth Circuit, other circuits that have ruled on the issue have found similar stops constitutional. See *Burch*, 153 F.3d at 1141–42 (*Burger* applied to stop of truck); *Means*, 94 F.3d at 1425–28 (warrantless stop of commercial vehicle); *V-1 Oil Co.*, 63 F.3d at 911 (*Burger* applied to facility whose trucks hauled hazardous material); *Dominguez-Prieto*, 923 F.2d at 468.
  32. See *Int'l Bd. of Teamsters v. Dep't of Transp.*, 932 F.2d 1292 (9th Cir. 1991); *United States v. Abreu*, 730 F. Supp. 1018 (D. Colo. 1990).
  33. See 49 U.S.C. §31131(b) (1997). Motor carrier safety became a matter of federal concern in the 1930s. See *Interstate Commerce Commission Reports—Motor Carrier Cases*, Ex Parte No. MC-3, Submitted Dec. 5, 1939 (Commissioners recommended promulgating federal regulations governing qualifications, hours of service, operation and equipment to promote safety). One of the factors used to determine whether an industry is “pervasively regulated” is whether it has a long tradition of close government supervision. See *Donovan*, 452 U.S. at 605–06. Although duration of oversight is an important factor, it is only one of the criteria that will be considered. *Id.* at 606. Were this not so, new industries such as nuclear power plants would not be subject to warrantless searches. *Id.* The vehicle dismantler industry at issue in *Burger* had only been subject to government oversight since the 1950s. 482 U.S. at 705–06.
  34. Regulated vehicles include those weighing in excess of 26,000 pounds. See also tex. admin. code ann. §3.62(c)(1).
  35. In 1998, more than 500,000 interstate common carrier vehicles and more than 250,000 intrastate common carrier vehicles were registered to operate in Texas. See *Texas Department of Transportation, Pocket Facts, Motor Carrier Fiscal 1998* (updated Mar. 29, 1999).
  36. *Fort*, 248 F.3d at 480.
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2. *Random Stops of Commercial Motor Vehicles by Authorized Officers are Reasonably Necessary to Effectively Enforce the Regulatory Laws of Texas for the Trucking Industry*

Commercial motor carriers are by definition mobile.<sup>37</sup> They course the roadways twenty-four hours a day, seven days a week, by the thousands, by the millions. Unannounced inspections are essential to ensure that the laws regulating motor carrier vehicles in Texas are properly enforced because drivers cannot anticipate this type of inspection and, therefore, cannot avoid it.<sup>38</sup> “[I]t could reasonably be concluded that random truck safety inspections are necessary to further [protecting the public’s interest]. . . . Trucks can easily avoid fixed checkpoints and, by use of citizens’ band radios, can avoid temporary checkpoints.”<sup>39</sup> If a driver knows that he is in violation of the law, he can simply locate the inspection stations and avoid them by using side roads.

Additionally, many serious violations of the safety laws are not readily apparent upon simple observation. Driver fatigue due to exceeding the hour requirements, overweight vehicles, defective tires (especially an inside tire), and improperly secured loads can be missed by an officer who simply drives by the vehicle. Random stops by authorized law officers to conduct administrative safety compliance inspections are essential to effectively enforce and carry out the motor carrier safety statutes.<sup>40</sup> Finally, the mobile nature of trucks does not lend itself to inspection by means of an administrative search warrant. “[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection. If the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.”<sup>41</sup> Because trucks pass quickly through the states and out of the jurisdictions of the enforcement agencies, the argument for warrantless inspections is even “more compelling” than the situation presented in *Burger*.<sup>42</sup>

3. *The Texas Regulatory Scheme Provides an Adequate Substitute for a Warrant*

The final criterion of *Burger* requires that the statutory scheme provide “a constitutionally adequate substitute for a warrant.”<sup>43</sup> That is, it must put drivers on notice that they are subject to searches, which are defined in their scope and conducted by officers limited in their discretion.<sup>44</sup>

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37. A commercial motor vehicle means a vehicle that is self-propelled. see tex. transp. code ann. §§621.001(1) and (5) (Vernon 1999).

38. See *V-1 Oil Co.*, 63 F.3d at 912 (unannounced inspections ensure statute is enforced).

39. *Means*, 94 F.3d at 1426.

40. See *Dominguez-Prieto*, 923 F.2d at 468.

41. *Biswell*, 406 U.S. at 316 (upholding warrantless search of firearms dealer).

42. See *Dominguez-Prieto*, 923 F.2d at 469.

43. 482 U.S. at 703.

44. *Id.*

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The Texas regulatory scheme<sup>45</sup> allows authorized troopers to “enter or detain<sup>46</sup> on a highway or at a port of entry a motor vehicle that is subject to this chapter.”<sup>47</sup> Appropriate officers can stop and detain a commercial motor vehicle subject to the statute in order to conduct a safety inspection B, an “administrative search.” Additionally, “[t]raffic law enforcement officers of the department of public safety will conduct inspections of the condition of drivers and the equipment of their vehicle to assure that safety and licensing requirements. . . are being complied with.”<sup>48</sup> Further, the fact that commercial motor vehicles are required to pass periodic inspections of all regulated safety equipment does “not prohibit a State from making *random* inspections of commercial motor vehicles.”<sup>49</sup> Officers are required to complete an inspection of a vehicle using a standardized form and their discretion after the stop is clearly limited by Texas regulations concerning what may be inspected (i.e., log book, bill of lading, tires).<sup>50</sup>

Although section 644.103 has no time and place requirement for random stops of commercial motor vehicles, such a requirement would be an absurdity. Moreover, “the assurance of regularity provided by a warrant may be unnecessary under certain inspection schemes.”<sup>51</sup> When a commercial vehicle is traveling it is, in essence, “open for business.”<sup>52</sup> It is impossible to set up a time and place requirement for random stops of

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45. tex. transp. code ann. §§621.001–645.004 (Vernon 1999).

46. On appeal, Fort argued that although Texas law allows an officer to “enter” or “detain” a commercial vehicle, it does not specifically provide for the “stop” of such vehicle. Although this argument was adopted by the dissent in *Fort*, the majority was persuaded that the term “detain” includes “stop.” See 248 F.3d at 479, 483 (J. Jolly, dissenting). Under Texas law, “words. . . shall be read in context and construed according to the rules of. . . common usage” and common sense. As the majority recognized, common sense compels the conclusion that the same law that empowers an officer to enter or detain a vehicle, also empowers the officer to first stop such a vehicle. Any other construction is nonsense. In any event, the Texas Administrative Code authorizes department of public safety officers to “stop every violator of the traffic laws observed by them.” “Congress cannot be presumed to have granted a power to the courts and yet withheld the only effective means of implementing it.” *Bacon v. United States*, 449 F.2d 933, 939 (9th Cir. 1971); see *Gemsco v. Walling*, 324 U.S. 244, 254 & 257 (1945).

47. tex. transp. code ann. §644.103 (Vernon 1999).

48. tex. admin. code ann. §3.26 (West 2000).

49. 49 U.S.C. §§31142 (a) & (d) (1999) (emphasis added).

50. Federal regulations require that state officials use the North American Standard Inspection form. See 49 C.F.R. §350.111 (2000).

51. See *Donovan*, 452 U.S. at 599 (1981) (commenting on the need for unannounced, warrantless inspections of mines. “[A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.”); cf. *Marshall*, 436 U.S. 307 (Supreme Court struck down warrantless, nonconsensual inspections conducted pursuant to a statutory scheme giving unbridled discretion to administrative officers enforcing OSHA regulations).

52. Compare tex. transp. code ann. §644.104 (West Supp. 2000) (defining the scope of a random premises inspection, including when and how it is performed) with §644.103 (having no time and place requirement for random stops of commercial motor vehicles).

vehicles as opposed to administrative searches of fixed facilities.<sup>53</sup>

Section 644 specifies which officers may detain vehicles for inspection purposes and provides for procedures, including training leading to required certification.<sup>54</sup> The Transportation Code empowers the Director of the Texas Department of Public Safety to adopt all or part of the federal regulations, which Texas has done in large measure. The Transportation Code also mandates that Texas administrative rules be consistent with federal regulations and that a federal motor carrier safety regulation prevails over a conflicting Texas rule.<sup>55</sup>

Thus, the statutes and regulations in place provide a constitutionally adequate substitute for a warrant because trucking companies are on notice that they are subject to periodic inspections and examination of records to assure compliance.<sup>56</sup> The laws and regulations define who may inspect, how inspections are to be conducted, where those inspections occur, and the scope of the agency's authority. Similarly, the federal regulations specifically require that employers and drivers be aware of and comply with the federal regulations.<sup>57</sup> Inspections by authorized officers are not "discretionary acts" by government officials but are conducted pursuant to the statutory and regulatory scheme, relative to motor carriers.<sup>58</sup> Highway patrol officers, by definition, patrol the highways.<sup>59</sup> This fact alone provides motor carriers with notice that their property is subject to scrutiny.<sup>60</sup> Under the statutory scheme in place, truckers using Texas highways "cannot help but be aware that [their property is] subject to periodic inspections undertaken for specific purposes," including routine safety inspections.<sup>61</sup>

#### 4. *The Court Giveth and the Court Taketh Away*

Fort maintained that the DPS officer was required to have probable cause or at least reasonable suspicion of a violation before it was legally permissible to stop his truck. The Fifth Circuit correctly framed the issue: whether random warrantless stops of commercial vehicles are permitted under the *Burger* decision. It then correctly concluded that *Burger's* criteria were satisfied and that the transitory nature of the commercial trucking makes warrantless stops even more compelling than the junkyard inspections upheld in *Burger*. Fort had argued that the Supreme Court outlawed random stops, such

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53. *See Means*, 94 F.3d at 1427; *Dominguez-Prieto*, 923 F.2d at 470.

54. tex. transp. code ann. §644.101 (West Supp. 2000).

55. tex. transp. code ann. §§644.002, 644.051(b) & (e) (Vernon 1999).

56. *See* tex. admin. code ann. §18.30 (West 2000) (advises carriers regarding inspections and maintaining information and records).

57. *See, e.g.*, 49 C.F.R. §§390.3(e)(1), (2), 392.1, 393.5 (2000).

58. *Dominguez-Prieto*, 923 F.2d at 469.

59. In *Means*, the Tenth Circuit commented on a Wyoming statute that similarly allows warrantless inspections. 94 F.3d at 1426.

60. *Id.*

61. *Donovan*, 452 U.S. at 600; *see also Biswell*, 406 U.S. at 316 (holding heavily regulated businesses know they are subject to inspection, understand the purpose of the inspections, and the limits of the task); *Burch*, 153 F.3d at 1142.

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as his, in *Delaware v. Prouse*.<sup>62</sup> The Court also correctly dispatched this claim resolving that the random, suspicionless spot-checks of cars held impermissible in *Prouse* did not apply to commercial trucking. After conducting the correct analysis and reaching a sound resolution, the majority should have stopped. Instead, it concluded its discussion by criticizing the Texas statutory scheme “for failing to provide specific limitations on the officer’s discretion in making the decision to stop.” It next, incomprehensibly and unnecessarily, relied on the DPS officer’s testimony that he had observed a regulatory violation before making the stop. This very fact, which had been earlier deemed “waived” by the panel, was then considered by it as “background” to support the conclusion that the “stop met constitutional muster.”<sup>63</sup>

The target of the inspection in *Burger* was random. As noted by the Supreme Court: “It was unclear from the record why, on that particular day, Burger’s junkyard was selected for inspection.”<sup>64</sup> Provided the three criteria of *Burger* are met, random stops and inspections are allowed and necessary to further important governmental interests. The whole import of *Burger* was to establish that *random* administrative inspections of persons in heavily regulated industries was constitutionally permissible.<sup>65</sup> This means that in Texas, provided the officer is targeting the type of vehicle defined in the Texas Transportation Code, he may stop any such vehicle as being a member of a regulated industry. That officer may then inspect the vehicle and driver to ensure regulatory compliance. Thus, the majority’s closing observation is erroneous dicta that should be disregarded.

The dissent in *Fort* argued that random discretionary stops are not authorized by either the Texas statutory scheme or by the *Burger* decision.<sup>66</sup> In Texas, an officer’s discretion *after* a regulatory stop is clearly limited. Defined officers make stops for a defined

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62. 440 U.S. 648 (1972). The Court struck down random stops of motorists to check for drivers’ licenses and vehicle registration violations, absent probable cause for the stop. The Court noted that Delaware and other states were free to develop methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. *Id.* at 662. Finding *Prouse* inapplicable, the Fifth Circuit noted that *Prouse* itself recognized an exception to the warrant requirement for checkpoints and weigh-ins of commercial vehicles. *Fort*, 248 F.3d at 480. The Supreme Court made a point of stating that its holding does not “cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.” See *Prouse*, 440 U.S. at 663 n.26; see also *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 449 & 454 (1990) (roadside weigh-stations and inspection checkpoints permissible); *Williams*, 648 P.2d at 1161 (*Prouse* not applicable to truck traffic); *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975) (reasonable suspicion required for Border Patrol Agents to stop vehicles, however, “[O]ur decision does not imply that the state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding. . . truck weighs. . .”).

63. *Fort*, 248 F.3d at 482.

64. *Burger*, 482 U.S. at 694 n.2. Junkyards were selected from a list compiled by New York City police detectives.

65. “[T]he inspection scheme in *Burger* required no level of suspicion.” *Dominguez-Prieto*, 923 F.2d at 469.

66. *Fort*, 248 F.3d at 483–84.

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investigation.<sup>67</sup> Drivers who know they are required to follow regulations also know they are subject to inspections for compliance. To limit authority on the front end, by permitting stops only of persons who first create some degree of suspicion of a violation would eviscerate the holding of *Burger*. Random, unannounced inspections are the only way to ensure motor carrier laws are properly enforced because drivers cannot anticipate this type of inspection and thereby avoid it. Drivers in violation of safety laws can easily avoid fixed checkpoints by rerouting. Additionally, many serious violations such as driver fatigue due to exceeding the hour requirements, overweight vehicles, defective tires and improperly secured loads are not readily apparent by simple observation. The dissent further misses the mark by seeming to too closely align administrative stops of heavily regulated industries with criminal investigative detentions.<sup>68</sup> Administrative inspections are administrative in character and are conducted to determine compliance with a regulatory scheme; they are not police searches intended to gather criminal evidence. "An administrative statute establishes how a particular business in a 'closely regulated' industry should be operated, setting forth rules to guide an operator's conduct of the business and allowing government officials to ensure that those rules are followed."<sup>69</sup> Although warrant and probable cause requirements can apply in the administrative search context, they do not require probable cause, as it has been traditionally defined.<sup>70</sup> The Fourth Amendment constraints have lessened application due to the government's heightened interest in regulating businesses.<sup>71</sup> And, in the context of heavily regulated business, probable cause has been eliminated entirely with warrantless, random inspections being deemed reasonable.<sup>72</sup> The fact that evidence of crimes may unexpectedly be discovered while enforcing the administrative scheme does not render the search illegal.<sup>73</sup>

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67. Section 644 of the Texas Transportation Code specifies which officers may detain vehicles for inspection purposes: Officers of the Texas Department of Public Safety and peace officers certified under section 644.101 for vehicles on highways within the territory of the officer's municipality. See tex. transp. code ann. §644.103 (Vernon 1999).

68. The district court's decision was also arguably flawed in one regard. It applied the two-step analysis used in *Terry v. Ohio*, as a prelude to its analysis. See *Fort*, 81 F. Supp. 2d at 694. In *Terry v. Ohio*, 392 U.S. 1, 22 & 30 (1968), the Supreme Court held that before police may "stop and frisk" an individual, such intrusion must be predicated on an officer's "reasonable suspicion" that the person was engaged in wrongdoing, supported by specific, articulable facts. *Terry* has been utilized in evaluating challenges to warrantless stops for traffic violations. *Fort*, 81 F. Supp. 2d at 697. Because *Fort*'s stop was for an administrative search of a person engaged in a heavily regulated industry, the district court's *Terry* analysis was unnecessary and inappropriate. The Fifth Circuit majority opinion did not rely on *Terry* in its analysis. Instead, it correctly focused purely on the *Burger* criteria. Reliance on general principles governing traffic stops is "misplaced" in area of regulatory stops. *Burch*, 906 F. Supp. at 598.

69. *Burger*, 482 U.S. at 712-13.

70. See *Camara*, 387 U.S. at 538 (Supreme Court held that although OSHA inspectors could not insist on entering private homes without a warrant, such warrants could issue to conduct general inspections without a showing of probable cause to believe a violation had occurred).

71. *Burger*, 482 U.S. at 700. For a discussion of administrative searches and relevant cases, see Annual Survey of Criminal Law, *Investigation and Police Practices: Warrantless Searches and Seizures*, 88 Geo. L.J. 912, 978-981, n.335-38 (2001).

72. *Burger*, 482 U.S. at 702.

73. *Id.* at 716. The fact that police officers have the power to arrest, likewise, has no constitutional significance. Police officers often have numerous duties in addition to traditional police work.

## II. *Fort*: On the Heels of NAFTA

The import of the *Fort* decision, which dealt with the stop of a domestic trucker, takes on added significance when considered in conjunction with the safety issues raised by the trucking provisions of NAFTA. This ruling comes on the heels of a raucous public debate over whether Mexican truckers should have free access to American highways. At present, trade between the United States and Mexico is conducted by means of a narrow commercial border zone.<sup>74</sup> Long-haul truckers transfer their loads to short-haul truckers, so-called "bridge carriers," who take the goods across the border, through customs, and to U.S. carriers for ongoing transportation.<sup>75</sup> NAFTA provided that, by 1995, Mexican long-haul truckers would be allowed access to the border states of California, Texas, Arizona, and New Mexico.<sup>76</sup> By the year 2000, this would further expand to allow them full access to all destinations in the United States.<sup>77</sup> The anticipated result: 4.5 million Mexican trucks using U.S. highways.<sup>78</sup> About 75 to 80 percent of that truck trade would pass through Texas, with 40 percent moving through the Dallas/Fort Worth area.<sup>79</sup> Responding to strong opposition, former President Clinton blocked the timetable and continued the limits requiring Mexican trucks to remain within approximately twenty miles of the U.S. border.<sup>80</sup> Congress also began hearings that focused on the inspection records of the

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*Id.* at 717; *see also Fort*, 248 F.3d at 480 n.4 (noting that "[a]lthough a regulatory scheme with a primary purpose of general crime control might not pass constitutional muster. . . there is no allegation in the instant case that the Texas statutory scheme's purpose was to uncover evidence of ordinary criminal wrongdoing").

74. Tim Weiner, *Mexico Vows to Retaliate Against U.S. on Trucking*, N.Y. TIMES, Aug. 3, 2001.
75. *Id.*; *see also* Warren A. Goff, *Transportation of Cargo Across the U.S.-Mexico Border*, 8 U.S.-MEX. L.J., 3, 5 (2000).
76. Weiner, *supra* note 74; *see also* Brendan M. Case, *Mexican Trucks Win NAFTA Ruling: Critics Decry Burden of Ensuring Vehicles' Safety on U.S. Roads*, THE DALLAS MORNING NEWS, Dec. 1, 2000; Michael R. Skahan, Comment: *The NAFTA Trucking Dispute with Mexico: Problem? What Problem?*, 5 NAFTA: L. & BUS. REV. AM., 603 (1999).
77. Weiner, *supra* note 74; *see also* Goff, *supra* note 75; AP, *NAFTA Panel to Rule on Mexican Truck Access*, THE DALLAS MORNING NEWS, Feb. 6, 2001.
78. *See* U.S. Customs Service, *Statistics for Northbound Truck Crossings from Mexico 1984 to 2000*. Estimates put the volume of trade between Mexico and the United States at five million truckloads a year. *See* Jim Landers, *U.S. To Allow Mexican Trucks: NAFTA Ruling Requires Change*, THE DALLAS MORNING NEWS, Feb. 7, 2001.
79. Case, *supra* note 76; George Kuempel, *Eddie Lucio; In the Driver's Seat*, THE DALLAS MORNING NEWS, Jan. 7, 2001; George Kuempel, *Prosperity with a Price: State Weighs Spending as Increasing Traffic Wears Out, Clogs Roads*, THE DALLAS MORNING NEWS, Mar. 4, 2001.
80. *See* Case, *supra* note 76; Steven H. Lee, *Trading Place: San Antonio Sitting Pretty as Place to Host NAFTA Hub*, THE DALLAS MORNING NEWS, Jan. 16, 2001. Mexico challenged former President Clinton's decision to block the entry of its trucks into the United States; a bi-national arbitration panel ruled in February of 2001, that Clinton's action was a violation of NAFTA's trucking provision. Safety concerns intensified when NAFTA's arbitration panel held that Mexican trucks should have access to all U.S. roads. *Id.*; *see also* AP, *supra* note 77; Julie Watson, *Mexican Truckers Say They Can't Afford U.S. Safety Rules*, THE DALLAS MORNING NEWS, Feb. 9, 2001. However, the panel also held that although the United States cannot bar Mexican trucks, "it can enforce safety standards that don't have to be the same as those for U.S. and Canadian trucks." *Id.*
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Mexican short-haul border truckers.<sup>81</sup> Goaded by the fear of unsafe Mexican trucks,<sup>82</sup> poorly trained drivers, and the influence of the Teamsters Union,<sup>83</sup> Congress reacted with both the House and the Senate discussing separate restrictions blocking NAFTA's trucking provisions.<sup>84</sup> Safety recommendations were published for comment in the *Federal Register*.<sup>85</sup>

Although the ultimate resolution is still unfolding, the problem is clear: safety concerns over Mexican truckers are legitimate and present enormous obstacles to the expansion and development originally envisioned by NAFTA. Mexico's freight trucks average fifteen to twenty years of age compared to five years for most U.S. trucks.<sup>86</sup> It would take an estimated ten years with annual investments of one billion dollars to bring Mexico's 375,000 freight trucks into an age bracket with that of American trucks.<sup>87</sup>

Many people perceive that Mexican trucks are often unsafe. The comprehensive regulations imposed on U.S. drivers have, heretofore, been wholly lacking in our Mexican counterparts. In fact, "most regulations on trucking in Mexico have been lifted since 1989."<sup>88</sup> For example, Mexican drivers have no hourly work limits.<sup>89</sup> Mexican trucks often carry hazardous materials.<sup>90</sup> Post-NAFTA audits reflect that 44 percent of Mexican trucks fail safety inspections.<sup>91</sup> To date, it has been impossible for U.S. officers to effectively enforce existing safety regulations. In 1998, the Department of Transportation (DOT) announced that the Federal Highway Administration's motor carrier safety program for commercial trucks at U.S. borders was able to inspect only about 1 percent of trucks.<sup>92</sup> With heavy truck traffic expected to increase by 85 percent during the next thirty years,<sup>93</sup>

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81. Statistics showed that Mexican trucks failed safety inspections 36 percent of the time. Brian Wilson, *U.S. Study to Mexicans: Keep on Truckin'*, N.Y. TIMES, Aug. 9, 2001. However, long-haul American truckers failed safety inspections 25 percent of the time. *Id.*
  82. *Id.* A 1997 Department of Transportation study concluded that 50 percent of Mexican trucks inspected at the Texas border had safety problems. *See Case, supra* note 76.
  83. *Id.*
  84. Proposals include requiring that Mexican carriers be subject to federal safety and insurance audits. *Id.*; *see also* Wilson, *supra* note 81.
  85. *See Revision of Regulations and Application Form for Mexican-Domiciled Motor Carriers to Operate in U.S. Municipalities and Commercial Zones on the U.S.—Mexico Border*, 66 Fed. Reg. 22328-420 (May 3, 2001) (to be codified in 49 C.F.R. pts. 368 & 387).
  86. *See* Watson, *supra* note 80.
  87. *Id.* Texas Congressman Henry Bonilla has suggested Mexican trucking companies replace their trucks with used American trucks which would probably be safer than Mexican vehicles: "The United States has a surplus of used trucks and Mexico needs safer trucks to meet U.S. safety standards. Why not come together and solve both problems?" Brendan M. Case, *Texas Congressman Proposes Plan to Increase Mexican Truck Safety*, THE DALLAS MORNING NEWS, Feb. 15, 2001. For many years, Mexico has blocked sales of U.S. vehicles in Mexico. *Id.*
  88. J. Patrick Larue, *The "Ill-icit" Effects of NAFTA: Increased Drug Trafficking into the United States through the Southwest Border*, 9 CURRENTS: INT'L TRADE L.J. 38, 40 (Summer 2000).
  89. Skahan, *supra* note 76, at 609.
  90. *Id.*
  91. *Id.*
  92. Larue, *supra* note 88, at 39.
  93. Sonny Lopez, *Perry Takes Road Bonds to West Texas: Governor Says Plan Can Help Fix Highway Problem Now; Documents Cite Risks*, THE DALLAS MORNING NEWS, Mar. 2, 2001.
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enforcement will be further strained. Although U.S. agents can turn away Mexican trucks that fail safety tests, the fact remains that it is not feasible, given the volume of traffic, to inspect every truck. Once inside the United States, inspection and enforcement has been virtually nonexistent.<sup>94</sup>

Following the *Fort* decision, post-border administrative stops on Mexican trucks will be possible. State troopers, already understaffed and overworked,<sup>95</sup> can make random stops to further ensure safety; but inspect for what? What restrictions should and will be imposed on Mexican truckers? For some years, discussions have been underway to have Mexican trucks meet U.S. safety standards. But, critics noted that it would also be necessary to improve regulatory compatibility, develop and operate an information exchange system, and establish a process for granting operating authority and increased enforcement and compliance.<sup>96</sup> President Bush recently provided the impetus for these suggested changes. The Patriot Act,<sup>97</sup> signed into law by the president on October 26, 2001, following the infamous events of September 11, 2001, and the Department of Transportation Appropriations Bill,<sup>98</sup> signed by President Bush on December 18, 2001, does much to moot the debate. Collectively, they will spur many adjustments necessary to address safety concerns for Mexican carriers operating beyond the commercial zone.

#### A. THE PATRIOT ACT

Included within the provisions of the newly enacted Patriot Act is the requirement that no state issue a commercial license allowing a driver to transport hazardous materials, unless that individual "does not pose a security risk."<sup>99</sup> The statute impacts NAFTA because it applies to aliens as well as other individuals.<sup>100</sup> This requirement will be

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94. Larue, *supra* note 88.

95. At the time of Fort's Motion to Suppress hearing, there were 371 officers assigned to inspect over one million trucks in Texas. Only one out of every thousand trucks on the road were inspected. Trooper Scales, a Texas License and Weight Inspector, testified that of the 20,000 commercial vehicles that traverse his area, he was able to stop only ten to twenty trucks per day.

96. Skahan, *supra* note 76.

97. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56 sec. 1012, §5103a, 115 Stat. 272, 396.

98. Department of Transportation Appropriations Bill, Pub. L. No. 107-87 §350, 115 Stat. 864 (2001).

99. Patriot Act §1012, §5103a(a)(1); *see also* Appropriations Bill §350(b):

No vehicles owned or leased by a Mexican motor carrier and carrying hazardous materials in a placardable quantity may be permitted to operate beyond a United States municipality or commercial zone until the United States has completed an agreement with the Government of Mexico which ensures that drivers of such vehicles carrying such placardable quantities of hazardous materials meet substantially the same requirements as United States drivers carrying such materials.

100. *Id.* §1012, §§5103a(c) & (d).

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accomplished through a three-part process.<sup>101</sup> First, the state must request a background investigation of the applicant from the Attorney General. Next, the Attorney General, undoubtedly through the FBI, will review criminal history databases, including those maintained by INS in the case of aliens.<sup>102</sup> Lastly, the results of this check will be provided to the Secretary of Transportation. Interestingly, it is the Secretary, not the Department of Justice (DOJ), who will make the final determination concerning whether the individual poses a security risk.<sup>103</sup> It is the Secretary who then tells the state whether an individual poses a security risk. If a license is issued, the state must provide the Secretary with the name, address, and other pertinent information of the licensed individual.<sup>104</sup>

Domestic issues such as security have traditionally been the bailiwick of the DOJ. Resolving questions concerning who poses a "security risk" is a new area for DOT. It remains to be seen how gracefully and effectively these requirements will be juggled among bureaucracies that include, at a minimum, the DOJ, the DOT, and the states. Who will take the fingerprints necessary to initiate the security checks, what factors will be utilized in determining what constitutes a "security risk," and who in the DOT will make these determinations will be among many questions needing resolution.

#### B. THE APPROPRIATIONS BILL

After the publication of the proposed federal regulations that were to implement NAFTA, unions, safety advocates, and members of Congress insisted that the regulations did not go far enough. The recently passed Appropriations Bill has addressed many of the fears raised during the debate. It has also provided guidance concerning how the federal regulations should be modified to address the complicated issues raised by NAFTA that will impact, at a minimum, the border states; the Departments of Justice, Commerce, and Treasury; and the Environmental Protection Agency.<sup>105</sup> It is anticipated that the regulations will be modified accordingly and clarified to comply with the Appropriations Bill.<sup>106</sup>

For now, it is clear that Mexican truckers, both short- and long-haul, that seek to operate either within or beyond the commercial zone must act in conformity with the requirements imposed in the Appropriations Bill. The thrust of the bill, in effect, forces Mexico to enact regulations similar to those of the United States. This is primarily accomplished by requiring the Federal Motor Carrier Safety Administration to conduct standardized safety examinations of each Mexican motor carrier.<sup>107</sup> Additionally, each

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101. See generally *id.* §1012, §§5103(a)-(c).

102. *Id.* §1012.

103. *Id.* §1012, §§5103a(c)(1)(A) and (B).

104. *Id.* §1012, §5103a(d).

105. See generally Appropriations Bill §350.

106. The Appropriations Bill references the need to promulgate interim final regulations to ensure that foreign carriers know of federal safety standards and that safety auditors be appropriately trained and certified. It also requires that policies be established to standardize decisions such as how many inspectors to utilize at the border. *Id.* §§350(a)(10)(A)-(E).

107. *Id.* §350(a)(1)(A). No funds appropriated by the Bill may be expended for processing a Mexican carrier's application to operate beyond the commercial zone until the Federal Motor Carrier Safety Administration requires that a safety examination be performed.

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Mexican carrier must also pass an audit.<sup>108</sup> This audit will essentially focus on four broad areas which can be categorized as follows: whether the carrier keeps maintenance records and has safety programs; whether the company keeps driver qualification files; whether the company has a random alcohol and drug program; and whether the company has driver hours of service requirements, which include keeping log books.<sup>109</sup> Vehicles that pass the safety examination receive a decal, valid for ninety days, following which there must be a reinspection.<sup>110</sup> Companies that pass the audit will be issued a unique DOT identifying number that must be reflected on the body of each vehicle.<sup>111</sup> Companies who pass these hurdles are then granted conditional authority to operate beyond the commercial zone.<sup>112</sup>

Mexican carriers seeking permanent operating authority to operate beyond the commercial zone must complete a second full safety audit consistent with the evaluations currently set forth for U.S. carriers in the Code of Federal Regulations.<sup>113</sup> This safety review must take place within eighteen months of the time a carrier is granted conditional operating authority.<sup>114</sup> It appears that carriers who have been granted permanent operating authority for three consecutive years would be subject to permissive rather than mandatory inspections each time they seek to operate outside the commercial zone.<sup>115</sup>

The green light permitting Mexican vehicles to pass beyond the commercial zone will activate only after the DOT Inspector General has conducted a comprehensive review of border operations.<sup>116</sup> No trucks will operate beyond the commercial zone until the requisite infrastructure (informational and otherwise), inspectors, on-site safety specialists, regulations, and policies are in place. Included is the requirement that Mexico's informational infrastructure be integrated with ours to allow licenses, registrations, and insurance to be verified.<sup>117</sup> Telecommunications must also be linked to allow quick and easy verification at border crossings and a database created to allow safety monitoring of all Mexican carriers that seek to operate beyond the commercial zone.<sup>118</sup> Following

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108. On-site safety inspections are required for 50 percent of all Mexican carriers and must comprise at least 50 percent of estimated truck traffic in any year. *Id.* §350(a)(1)(C).
109. *Id.* §§350(a)(1)(A) & (B). The examination includes verifying performance data and safety management programs; drug and alcohol testing programs; hours of service rules; proof of insurance, the carrier's safety history and preparedness to comply with Federal Motor Carrier Safety and Hazardous Material rules and regulations; drivers' qualifications; an evaluation of the carrier's inspection, maintenance and repair facilities, and an interview with officials of the motor carrier to review safety management controls, policies and practices.
110. *Id.* §350(a).
111. Appropriations Bill §350(a)(4). "[A] distinctive Department of Transportation number to each Mexican motor carrier operating beyond the commercial zone to assist inspectors in enforcing motor carrier safety regulations including hours-of-service rules under part 395 of title 49, Code of Federal Regulations." *Id.* §350(a)(4).
112. *Id.* §350(a)(1)(A).
113. *Id.* §350(a)(2); *see also* 49 C.F.R. pt. 385.
114. Appropriations Bill §350(a)(2).
115. *Id.* §350(a)(5). Inspectors are required to electronically verify the validity and status of the license of each commercial Mexican motor carrier driver who carries hazardous materials and on a random basis for other carriers. *Id.* §350(a)(3).
116. *Id.* §350(c)(1).
117. *Id.* §350(c)(1)(E).
118. *Id.* §§350(c)(1)(E) & (G).
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this, the Secretary of Transportation must certify that no unacceptable safety risk will be posed by opening the border.<sup>119</sup>

### III. Conclusion

The United States Supreme Court has permitted warrantless searches of federally licensed firearms dealers,<sup>120</sup> mines and stone quarries,<sup>121</sup> and junkyards.<sup>122</sup> Under its statutory scheme, Texas has established a constitutionally adequate statutory scheme, which likewise accords it the ability to conduct warrantless administrative searches in the critical sector of commercial vehicles. The state has a substantial governmental interest in traveler safety and this interest is reflected in a regulatory approach that limits inspections made “pursuant to narrow statutes and regulations directed at a particular industry.”<sup>123</sup> For these reasons, trucks can be randomly stopped and inspected under the Texas Commercial Motor Vehicles Act, which provides a constitutionally adequate substitute for a warrant in terms of the limits of its application.

Officials must be able to conduct driver and vehicle safety checks, particularly for problems that may not be apparent to officers on patrol.<sup>124</sup> This necessity is more pronounced because of NAFTA. It has been suggested that “most Mexican trucks will never pass U.S. Department of Transportation standards.”<sup>125</sup> This remains to be seen as Mexican drivers seeking to transport beyond the border will now be required to meet standards like those imposed on domestic drivers, including hours of service and safety

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119. *Id.* §350(c)(2).

120. *See Biswell*, 406 U.S. at 311 (involving the warrantless search of a pawnshop operator done pursuant to the Gun Control act of 1968). The statute permitted entry onto the premises of any firearms or ammunition dealer in order to examine documents such dealers were required to keep. *Id.* at 311, 312 n.1. “[I]f the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment.” *Id.* at 315-16; *but see Colonade Catering Corp. v. United States*, 397 U.S. 72 (1970) (involving the forcible warrantless search of a catering business). Federal revenue statutes permitted inspection of liquor dealers, however, the search was disapproved because the statute did not provide for forcible entry without a warrant. In drafting the statute, Congress had made it a criminal offense to refuse inspection. *Id.* at 76.

121. *See Donovan*, 452 U.S. at 594 (involving the attempted warrantless search of a mine conducted pursuant to the Federal Mine Safety and Health Act of 1977). Section 103(a) of the Act specifically provided “no advance notice of an inspection shall be provided to any person.” In upholding the inspection program, the Court held that “a warrant requirement could significantly frustrate effective enforcement of the Act. . . . [I]n [light] of the notorious ease with which many safety and health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act’s objectives.” *Id.* (quoting S. Rep. No. 95-181, 27, U.S.C.C.A.N. 3401, 3427 (1977)).

122. *Burger*, 482 U.S. at 691. For an overview of the federal circuit decisions allowing warrantless searches in a variety of contexts, see generally Annual Review of Criminal Procedure, *Warrantless Searches and Seizures*, 89 *Geo. L.J.* 1151-1155 n.343 (2001).

123. *Means*, 94 F.3d at 1426-27.

124. *See Hernandez*, 901 F.2d at 1219.

125. *Watson*, *supra* note 80.

equipment requirements. Although American safety standards can be imposed on Mexican trucks, it will never be possible to inspect each truck on each occasion that it crosses the border.<sup>126</sup> For this reason, post-border regulatory inspections become even more critical. The Appropriations Bill does much to promote uniformity in commercial safety rules. It now appears that each country will also operate from an identical database with respect to driver information, commercial drivers' license numbers, and the ability to track safety violators.<sup>127</sup> Compliance review audits will likewise be required.<sup>128</sup> Tens of millions of dollars have been appropriated to hire inspectors and auditors as well as to create and build necessary technology and facilities.<sup>129</sup> Although many questions remain to be answered, the new Appropriations Bill together with certain provisions of the Patriot Act are at least a beginning toward allaying concerns over safety and the "inadequate harmonization between Mexican and U.S. trucking standards."<sup>130</sup>

For the many proponents of free trade, NAFTA is, at first blush, an admirable idea. In execution, its complexities are staggering. The taxpayer costs of implementing NAFTA, particularly as they relate to Mexican trucks operating beyond the commercial zone, are enormous. Numerous federal agencies will be impacted by NAFTA and layers of bureaucracy will have to be added to federal and State governments to address a myriad of concerns. The phenomenal increase in road traffic, which is assured, will undoubtedly take its toll in increasing numbers of accidents. So too will it impact pollution levels and the condition of our highway system, already sorely in need of improvement and investment. Following September 11, 2001, we were left with heightened concerns over how to protect our borders against terrorism and smuggling. Although it presently appears that we are on target to open the border with Mexico to commercial traffic by summer of 2002, it remains to be seen whether we will be better served or worse as a result of NAFTA.

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126. Case, *supra* note 76.

127. Appropriations Bill §§350(c)(1)(E) & (G); see Goff, *supra* note 75, at 8.

128. Appropriations Bill §350(b)(2).

129. *Id.* §350(f). Additionally, states will be given money to build weigh stations and motion stations to screen truckers. *Id.* §350(a)(7)(A).

130. Skahan, *supra* note 76, at 605.

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