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## Air Traffic Control in the United States: Is Privatization the Path Back to the Top?

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**AIR TRAFFIC CONTROL IN THE UNITED STATES:  
IS PRIVATIZATION THE PATH BACK TO THE TOP?**

LINDSEY RATTIKIN\*

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## I. INTRODUCTION

ON JUNE 30, 1956, TWO commercial airplanes collided over the Grand Canyon.<sup>1</sup> No one saw the crash occur, but the impact was heard around the world.<sup>2</sup> All 128 people aboard the two planes died in the accident, making it “the deadliest aviation disaster of the time.”<sup>3</sup> That morning, the planes, a United Airlines Douglas DC-7 and a TWA Lockheed Super Constellation, both left California and headed east. Communicating with two different control stations on the ground, the planes both chose to fly at 21,000 feet, above the clouds.<sup>4</sup> The airspace was uncontrolled; it was up to the pilots to avoid each other.<sup>5</sup> According to the Civil Aeronautics Board investigative agency, the planes never saw each other coming.<sup>6</sup>

This deadly crash in 1956 inspired the fledgling aviation industry to finally get serious about safety in the skies by investing heavily in an essential mechanism: air traffic control.<sup>7</sup> Air traffic control, specifically defined, “is concerned with (1) keeping aircraft safely separated while operating in controlled airspace, on the ground, during takeoff, during ascent, enroute and during approach and landing; and (2) providing preflight and in-flight services to all pilots.”<sup>8</sup> As our aviation industry continues to grow and change, air traffic control remains indispensable not only in ensuring passenger safety, but also in organizing the massive amount of flights that crisscross the United States each day.<sup>9</sup>

On September, 11, 2001, disaster hit the United States when four commercial airplanes were hijacked by Islamic terrorists and crashed into the World Trade Center towers, the Pentagon, and a field in Pennsylvania.<sup>10</sup> While most Americans mourned

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<sup>1</sup> *1956 Grand Canyon Airplane Crash a Game-Changer*, CBS NEWS (July 8, 2014, 9:50 AM), <http://www.cbsnews.com/news/1956-grand-canyon-airplane-crash-a-game-changer/> [<http://perma.cc/3W4D-G9A4>].

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

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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

<sup>7</sup> *Id.*

<sup>8</sup> Anthony W. Adams, *The Effects of Air Traffic Control Privatization on Operating Cost and Flight Safety*, 14 J. AVIATION/AEROSPACE EDUC. & RES. 21, 22 (2005).

<sup>9</sup> *A History of Air Traffic Control*, NAT'L AIR TRAFFIC CONTROLLERS ASS'N (2015), [http://www.natca.org/images/NATCA\\_PDFs/Publications/ATCHistory.pdf](http://www.natca.org/images/NATCA_PDFs/Publications/ATCHistory.pdf) [<http://perma.cc/SJ3S-7NG8>].

<sup>10</sup> *9/11 Attacks*, HISTORY (2010), <http://www.history.com/topics/9-11-attacks> (last visited Sept. 7, 2017) [<http://perma.cc/L9W3-AFGC>].

on this tragic day, air traffic controllers sprang into action.<sup>11</sup> At the time of the attacks, there were nearly 5,000 aircraft in American skies.<sup>12</sup> The controllers began by halting takeoffs, and then over the next two and a half tense hours, safely brought every plane down onto American soil, all while fearing further attacks.<sup>13</sup> During this period, American air traffic controllers were bringing planes down at a rate close to one plane per second, even while operating with limited staffing as the controllers in the western part of the country were not yet on duty.<sup>14</sup> This feat of precision and bravery is indicative of both the United States's air traffic controllers' technical abilities and their devotion to maintaining safety in the skies.<sup>15</sup>

From the time when the Wright brothers flew the first powered aircraft over Kitty Hawk, North Carolina, in 1903, to the establishment of the first commercial air service in 1914, the United States has always stood at the forefront of the aviation.<sup>16</sup> Each day, the American aviation industry serves millions of air travelers, and the United States should be able to promise each of these travelers a safe and efficient flight. But for too long, due to funding deficits and bureaucratic holdups, the United States has been falling behind in air traffic control, especially in the areas of efficiency, modernization, and safety, creating more delays and more inconveniences for passengers.<sup>17</sup> It is time for the United States to retake its spot at the top of the aviation industry, and our air traffic control system currently stands as one of the most significant burdens to the United States's success in this endeavor.

The quintessential nature of air traffic control creates much debate, both in political spheres and in the forum of public

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<sup>11</sup> *A History of Air Traffic Control*, *supra* note 9.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Tim Sharp, *World's First Commercial Airline: The Greatest Moments in Flight*, SPACE.COM (July 19, 2012, 1:00 PM), <http://www.space.com/16657-worlds-first-commercial-airline-the-greatest-moments-in-flight.html> [<http://perma.cc/S9CU-YHEZ>]; *The Wright Brothers & The Inventions of the Aerial Age: Inventing a Flying Machine*, SMITHSONIAN NAT'L AIR & SPACE MUSEUM, <https://airandspace.si.edu/exhibitions/wright-brothers/online/fly/1903/> (last visited Sept. 7, 2017) [<http://perma.cc/4L2S-Q2A5>].

<sup>17</sup> See *A History of Air Traffic Control*, *supra* note 9; see also Chris Edwards, *Reforming Air Traffic Control*, CATO INST.: TAX & BUDGET BULL. NO. 74 (Feb. 17, 2016), <https://www.cato.org/publications/tax-budget-bulletin/reforming-air-traffic-control> [<http://perma.cc/LB95-HHRD>].

opinion, about how the function should be managed in order to maximize safety and efficiency. Currently, the responsibility of air traffic control rests with the Federal Aviation Administration (FAA). For decades, however, many in the aviation industry have suggested a possible overhaul of air traffic control by taking it out of the hands of the federal government and creating a private, not-for-profit entity to manage the United States's air traffic.<sup>18</sup> Proponents argue that if air traffic control were to be moved into the hands of a private corporation, the system could be modernized and the burden on taxpayers relieved.<sup>19</sup> Opponents, however, cite concerns of the impact this change might have on safety, relaying the mantra "if it ain't broke, don't fix it."<sup>20</sup> Also paramount to this issue are the legal consequences a change like this would have, both concerning the state of federal regulations and the burden of liability. In evaluating the potential ramifications of privatization, both legal and policy-related, the answer is clear: Congress should pass an air traffic control privatization measure, taking the responsibility of air traffic control away from the FAA and putting it in the hands of a private corporation. Privatization will not only result in benefits including modernization, more efficiency, and lower cost, but drafting and debating a new privatization measure would also give the federal government the flexibility to make decisions about how regulation, oversight, and liability issues could and should be handled.

While many pieces have been written about both the policy ramifications of privatization of air traffic control and the reality of what privatization would look like in practice, the existing literature on the subject lacks analysis that looks into the legal ramifications of privatization in the context of today's political

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<sup>18</sup> Dan Reed, *Air Traffic Control Privatization Finally Has a Realistic Shot at Being Passed by Congress*, FORBES (Feb. 5, 2016, 7:05 AM), <https://www.forbes.com/sites/danielreed/2016/02/05/air-traffic-control-privatization-finally-has-a-realistic-shot-at-being-passed-by-congress/#765e9d5bdb47> [https://perma.cc/NX7M-PVHB].

<sup>19</sup> *H.R. 4441: Aviation Innovation, Reform, and Reauthorization Act of 2016*, GOVTRACK (last updated Mar. 11, 2016), <https://www.govtrack.us/congress/bills/114/hr4441/summary> [http://perma.cc/7ANZ-QQ8X]; Rep. Bill Shuster, *Rep. Bill Shuster: How to Fix America's Crumbling Aviation System*, FOX NEWS (Feb. 3, 2016), <http://www.foxnews.com/opinion/2016/02/03/rep-bill-shuster-how-to-fix-america-s-crumbling-aviation-system.html> [http://perma.cc/K8MM-6623].

<sup>20</sup> *H.R. 4441: Aviation Innovation, Reform, and Reauthorization Act of 2016*, *supra* note 19; *Don't Privatize Air Traffic Control*, N.Y. TIMES (Feb. 15, 2016), [http://www.nytimes.com/2016/02/15/opinion/dont-privatize-air-traffic-control.html?\\_r=0](http://www.nytimes.com/2016/02/15/opinion/dont-privatize-air-traffic-control.html?_r=0) [http://perma.cc/TY7T-ZCRZ].

climate. With the inception of President Donald J. Trump's administration and with the Republican party retaining control of Congress, this article looks to the possible outcomes of a likely pro-business agenda on the aviation industry. This article combines these considerations to look at the big-picture impact of privatization, using evidence from the experience of privatization in other countries as a predictor of how it might operate in the United States.

To best evaluate the future of air traffic control in the United States, we must first look to the past. Part II will offer an in-depth look into the history of air traffic control, starting with its roots in the mid-1930s and looking through history toward the initiation of the idea of privatization. Next, Part III will analyze the current state of the law. This section of the article will discuss the role of the FAA within the current transportation code, the Aviation, Innovation, Reform, and Reauthorization (AIRR) Act (a 2016 House bill that officially put privatization into Congressional debate), as well as the state of air traffic control in other large nations that have already installed privatized systems. Part IV will dive deeper into the argument over privatization, looking at the legal issues and the policy pros and cons. This analysis will compare air traffic control in the United States to that of other privatized nations around the world, looking to whether or not this avenue is feasible in our comparably large aviation industry. Most importantly, this section will also look to the legal impact of privatization, considering both the changes that would occur in the federal government in relation to the ability to regulate air traffic and the potential liability issues under different privatization frameworks. Lastly, Part V will conclude by discussing the potential impact of a Trump presidency on the aviation industry.

## II. THE HISTORY OF AIR TRAFFIC CONTROL IN THE UNITED STATES

### A. ESTABLISHMENT OF AIR TRAFFIC CONTROL IN THE UNITED STATES

The story of air traffic control in the United States begins in the mid-1930s, a period during which the airline industry began to rapidly grow due to the introduction of new commercial planes with improved performance and new features that at-

tracted passengers, including air conditioning and heating.<sup>21</sup> In response to the updated planes, more Americans began to show interest in air travel, and between 1934 and 1939 the number of passengers using American commercial airlines annually increased from 461,743 to 1,900,000.<sup>22</sup> As the skies became more congested, a need arose to find a way to monitor and control planes to avoid collisions in the air and on the ground.<sup>23</sup> The responsibility of enacting these protections through air traffic control was initially taken up by local airports, but conflicts resulted as controllers became overburdened and “near misses” became commonplace.<sup>24</sup> Due to this safety threat, many in the industry saw the need for a more extensive air traffic control system.<sup>25</sup>

In 1935, the Bureau of Air Commerce (Bureau) began the process of studying and developing a plan to deal with the United States’s air traffic control needs.<sup>26</sup> The Bureau began by devising regulations, but eventually recommended that an organization of federal employees be formed, stationed throughout the country, and tasked with controlling air traffic and avoiding collisions.<sup>27</sup> The Bureau intended that the group would coordinate all air traffic in the country, especially in busy areas.<sup>28</sup> While the Bureau sought funding for its air traffic control plan, airlines temporarily took it upon themselves to initiate the comprehensive air control system.<sup>29</sup> Finally, in mid-1936, the Bureau got the necessary funding and the federal government took control of operations of the three air traffic control stations that the airlines had developed in Newark, Chicago, and Cleveland.<sup>30</sup> As soon as it took over, this newly-formed federal corps of airway controllers began to modernize air traffic control by improving communication with pilots, regulating flying instru-

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<sup>21</sup> Theresa L. Kraus, *Celebrating 75 Years of Federal Air Traffic Control*, FED. AVIATION ADMIN. 1 (June 21, 2011), [https://www.faa.gov/news/communications/atc\\_anniversary/media/Celebrating%2075%20Years%20of%20Federal%20Air%20Traffic%20Control%2006-21-11.pdf](https://www.faa.gov/news/communications/atc_anniversary/media/Celebrating%2075%20Years%20of%20Federal%20Air%20Traffic%20Control%2006-21-11.pdf) [http://perma.cc/7KHQ-MESX].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2–4.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> *Id.* at 4–5.

<sup>30</sup> *Id.* at 5.

ments, and creating systems to organize flight information.<sup>31</sup> The Bureau also immediately expanded the air traffic control network, opening stations in nine more cities by the end of 1939.<sup>32</sup>

#### B. AIR TRAFFIC CONTROL AND THE FAA

The air traffic control system continued to grow and develop over the next two decades, but the most significant change came in 1958 when Congress passed the Federal Aviation Act, creating the FAA.<sup>33</sup> This act tasked the FAA with, among other things, sole responsibility for air traffic control.<sup>34</sup> In addition to passing the transformative act, Congress appropriated \$250 million to initiate much-needed upgrades to the previously underfunded air traffic control system, largely in response to the tragic 1956 crash.<sup>35</sup> This money allowed the new FAA to apply military technologies, like radar surveillance, to commercial aviation.<sup>36</sup> Computerized systems also began to develop during this time, automating and further modernizing air traffic control.<sup>37</sup>

Over the coming decades, however, problems continued to plague the air traffic control industry.<sup>38</sup> As air travel became more and more popular, air traffic controllers again became overburdened and their equipment obsolete.<sup>39</sup> Strikes in the 1980s rocked the industry.<sup>40</sup> The FAA tried to relieve pressure by restructuring flight schedules and control towers, but it did not have the funding to make serious changes.<sup>41</sup> Finally, in 1996, Congress passed legislation to reform the FAA and increase budget allowances to fund updates to technology and pay scales.<sup>42</sup>

Today, more than 52,000 federal employees serve the air traffic control industry in some capacity, making up half of the FAA's workforce.<sup>43</sup> There are air traffic control facilities in all

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<sup>31</sup> *Id.* at 6–8.

<sup>32</sup> *Id.* at 10.

<sup>33</sup> *A History of Air Traffic Control*, *supra* note 9.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

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

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

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

<sup>43</sup> Adams, *supra* note 8, at 23.



fifty states utilizing modern technologies to ensure seamless protection for all flights across the country.<sup>44</sup> Air traffic control workers experience an intensive training process to learn how to handle the technical, high-stress job on which thousands of lives depend every day.<sup>45</sup> As of 2005, the United States is the only country in which all air traffic control, both military and commercial, falls under the purview of one civil air traffic control system.<sup>46</sup>

### C. AIR TRAFFIC CONTROL PRIVATIZATION

For more than twenty years, aviation experts have been proposing changes to the air traffic control system.<sup>47</sup> As early as the late 1980s, the idea of instituting a privatized air traffic control system began to circulate in the United States.<sup>48</sup> These ideas came in response to continuing concerns of flight delays, quickly outdated technology, and the financial burden that the air traffic control system puts on the government.<sup>49</sup> In 1994, President Clinton's administration put forth a proposal "to restructure the nation's air traffic control system as a quasi-government corporation to be run like a private business" with the goal of creating a corporation that had the potential to be "efficient, financially self-sufficient, financially able to respond to rapid change, and technologically superior."<sup>50</sup> This proposal, and others, failed because of "warring and vested interest[s]" within the industry.<sup>51</sup>

Other countries, however, have taken advantage of the concept of privatization.<sup>52</sup> Some countries, like Canada and the United Kingdom, have instituted models in which air traffic control is completely privatized, while others, like Germany and France, manage air traffic control through companies owned by their respective governments.<sup>53</sup> While all of the countries that have privatized have seen generally positive results, Canada's private system, called Nav Canada, has been especially success-

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<sup>44</sup> *Id.*

<sup>45</sup> *A History of Air Traffic Control*, *supra* note 9.

<sup>46</sup> Adams, *supra* note 8, at 23.

<sup>47</sup> Reed, *supra* note 18.

<sup>48</sup> *Id.*

<sup>49</sup> Adams, *supra* note 8, at 21.

<sup>50</sup> *Id.*

<sup>51</sup> Reed, *supra* note 18.

<sup>52</sup> *Id.*

<sup>53</sup> *Don't Privatize Air Traffic Control*, *supra* note 20.

ful.<sup>54</sup> Since privatization in 1996, the not-for-profit organization has been able to handle fifty percent more traffic using twenty-five percent fewer employees.<sup>55</sup> Nav Canada has also been able to modernize and develop new air traffic control technologies that have generated profit through global sales.<sup>56</sup> Though the United States has consistently been slow to come around to changes in air traffic control throughout its history, many in the industry have come to realize the potential benefits of privatization, while watching the models employed in countries like Canada thrive.<sup>57</sup>

### III. THE AIRR ACT AND THE LAW TODAY

#### A. AIR TRAFFIC CONTROL UNDER FEDERAL LAW

Since 1958, air traffic control has remained under the authority of the federal government and under the guidance of the FAA.<sup>58</sup> Federal law codifies the responsibilities and duties of the FAA within the Transportation Code, specifically in 49 U.S.C. § 106, creating an Air Traffic Services Committee to “oversee the administration, management, conduct, direction, and supervision of the air traffic control system.”<sup>59</sup> The statute lists the general responsibilities of the Committee as “oversight” and “confidentiality,” while the specific responsibilities are “strategic plans,” “modernization and improvement,” “operational plans,” “management,” and “budget.”<sup>60</sup> This wide-reaching statute uses broad language to bring all of the powers and duties of air traffic control into one centralized organization within the federal government.<sup>61</sup> Other important regulations of how air traffic control should be operated, including details about safety and fees, however, are sprinkled throughout the transportation code, including within Subtitle VII, which addresses aviation programs.<sup>62</sup>

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<sup>54</sup> Justin Bachman, *Should the U.S. Privatize Air Traffic Control?*, BLOOMBERG (Sept. 11, 2015, 11:57 AM), <https://www.bloomberg.com/news/articles/2015-09-11/should-the-u-s-privatize-air-traffic-control-> [http://perma.cc/H8CU-BZ2B].

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *A History of Air Traffic Control*, *supra* note 9.

<sup>59</sup> 49 U.S.C. § 106(p)(7)(D)(i) (2012).

<sup>60</sup> *Id.* § 106(p)(7)(D)–(E).

<sup>61</sup> *Id.* § 106(p)(7).

<sup>62</sup> *See, e.g., id.* § 44506 (2012) (mandating that the FAA conduct research into methods to ensure that the training and practices of air traffic controllers create the safest possible air traffic control system).

## B. THE AIRR ACT

In February of 2016, Representative Bill Shuster (R-PA) introduced the H.R. 4441, the Aviation Innovation, Reform, and Reauthorization Act (AIRR Act), a bill which would revolutionize the aviation industry.<sup>63</sup> Among other major proposed innovations, the most controversial proposition of the bill was to take responsibility for air traffic control away from the federal government, instead creating a private, not-for-profit organization to manage the task.<sup>64</sup> The contentious proposal has drawn strong opinions on both sides.<sup>65</sup> The stated purpose of the privatization measure is “to provide for the more efficient operation and improvement of air traffic services.”<sup>66</sup> The newly-formed corporation would manage or contract to manage all air traffic services in the United States and airspace controlled by the United States with the exception of military operations.<sup>67</sup> The eleven-member Board of Directors of the corporation would be comprised of representatives of six different groups as follows:

- (1) The CEO.
- (2) 2 Directors appointed by the Secretary.
- (3) 4 Directors nominated by the Nominating Member appointed by the principal organization representing mainline air carriers.
- (4) 2 Directors nominated by the Nominating Member appointed by the principal organization representing noncommercial owners and recreational operators of general aviation aircraft.
- (5) 1 Director nominated by the Nominating Member appointed by the principal organization engaged in collective bargaining on behalf of air traffic controllers employed by the Corporation.
- (6) 1 Director nominated by the Nominating Member appointed by the principal organization representing the largest certified collective bargaining representative of airline pilots.<sup>68</sup>

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<sup>63</sup> *H.R. 4441: Aviation Innovation, Reform, and Reauthorization Act of 2016*, *supra* note 19.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Aviation Innovation, Reform, and Reauthorization Act of 2016, H.R. 4441, 114th Cong. § 201 (2016).

<sup>67</sup> *Id.* § 90302(c) (“After the date of transfer, no entity, other than the Corporation, is authorized or permitted to provide air traffic services within United States airspace or international airspace delegated to the United States, except for- (1) the Department of Defense, as directed by the President; (2) entities to which the United States has delegated certain air traffic service responsibilities; and (3) entities with which the Corporation has contracted for the provision of air traffic services.”).

<sup>68</sup> *Id.* § 90306(b).

The requirements for and terms of these directors are specifically detailed.<sup>69</sup> The Board would manage all functions of the corporation including strategic planning and budgetary operations.<sup>70</sup> The corporation would be largely funded by fees collected from air travelers in the United States in conjunction with the offering of air traffic services, and the Board would assess and modify those fees as necessary.<sup>71</sup>

After the AIRR Act was introduced in the House on February 3, 2016, it was immediately referred to the House Committee on Transportation and the Subcommittee on Aviation.<sup>72</sup> A committee consideration and mark-up session was quickly held afterward on February 11.<sup>73</sup> After discussion, the committee ordered the bill to be amended by a vote of thirty-two to twenty-six.<sup>74</sup> While interest in enacting some form of the privatization was high, the House found itself facing a deadline: funding for the FAA was set to expire at the end of March 2016.<sup>75</sup> Knowing that the privatization measure would not be passed within a month, members of the House moved forward drafting a new bill to push through other provisions of the AIRR Act, namely to reauthorize and refund the FAA.<sup>76</sup>

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<sup>69</sup> *See id.* §§ 90306–09.

<sup>70</sup> *Id.* § 90306(k)(2) (“The Board shall be responsible for actions of the Corporation, including the following matters: (A) Adoption of an annual budget. (B) Approval of a strategic plan and updates thereto. (C) Authorization for issuance of indebtedness. (D) Assessment, modification, and collection of charges and fees to air traffic services users. (E) Hiring of the Interim CEO and CEO. (F) Adoption and amendment of the bylaws of the Corporation.”).

<sup>71</sup> *Id.* § 90311 (“Beginning on the date of transfer, and subject to section 90502, the Corporation may assess and collect charges and fees from any air traffic services user for air traffic services provided by the Corporation in United States airspace or international airspace delegated to the United States.”).

<sup>72</sup> Aviation Innovation, Reform, and Reauthorization Act of 2016, 114th Bill Tracking H.R. 4441, LEXISNEXIS (Feb. 11, 2016).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Pia Bergqvist, *ATC Privatization Bill Thrown Out: FAA Maintains Control Over Air Traffic Control, For Now*, FLYING MAG. (Mar. 1, 2016), <http://www.flyingmag.com/atc-privatization-bill-thrown-out> [<http://perma.cc/FD39-P279>].

<sup>76</sup> Andy Pasztor, *Senate Overwhelmingly Passes Bipartisan FAA Bill without Air-Traffic Control Privatization: Legislation Aims to Beef up Airport Security and Promote Widespread Use of Commercial Drones*, WALL ST. J. (Apr. 19, 2016, 1:57 PM), <http://www.wsj.com/articles/senate-set-to-pass-bipartisan-faa-bill-without-air-traffic-control-privatization-1461070930> [<http://perma.cc/7HY9-92G5>].

### C. STATE OF PRIVATIZATION MEASURES TODAY

While devising a series of measures that, in the end, extended funding through September 2017, the Senate diverged from the House by expressing “stiff opposition” to major changes to the air traffic control system.<sup>77</sup> Because of the relatively short funding extension, however, debate over the future of the FAA is likely to reignite in the coming years<sup>78</sup> as Congress searches for more permanent solutions for the future of the FAA.<sup>79</sup> After the passage of the 2016 FAA funding bill, Schuster pledged to continue to pursue privatization, saying a change to the air traffic control system “is absolutely necessary to end the unacceptable status quo at the FAA and to ensure the future of America’s aviation system.”<sup>80</sup> According to Representative John Mica (R-Fla.), another supporter of privatization legislation, future attempts by Congress to enact privatization measures are likely to explore ways to compromise on privatization to appease the concerns of the Senate, including “keeping the financing under government control and contracting oversight to an independent agency.”<sup>81</sup>

### IV. WOULD PRIVATIZATION WORK IN THE UNITED STATES? AN ANALYSIS

Despite the obstacles preventing the passage of the 2016 air traffic control proposal, the debate over privatization remains at the forefront of the minds of those in the aviation industry, and the question rings anew: would privatization work in the United States? Both the proponents and opponents of this measure have strong policy reasoning behind their positions, and of additional important concern are the legal issues associated with this matter, including the effect on federal regulation of the aviation industry and the assignment of potential liability for injuries or collisions resulting from air traffic control mistakes. Taking all

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<sup>77</sup> Susan Carey & Andy Pasztor, *Senate Passes FAA Reauthorization Bill*, WALL ST. J. (July 13, 2016), <http://www.wsj.com/articles/senate-passes-faa-reauthorization-bill-1468437144> [<http://perma.cc/4SKU-DG8N>].

<sup>78</sup> While early 2017 attempts to pass air traffic control legislation were unsuccessful, the conversation is not over. See Bart Jansen, *Senate Panel Rejects Air-Traffic Control Privatization*, USA TODAY (July 25, 2017), <https://www.usatoday.com/story/travel/flights/todayinthesky/2017/07/25/senate-panel-rejects-air-traffic-control-privatization/508479001/> [[perma.cc/H6Y9-33KW](http://perma.cc/H6Y9-33KW)].

<sup>79</sup> Carey & Pasztor, *supra* note 77.

<sup>80</sup> Pasztor, *supra* note 76.

<sup>81</sup> Susan Ferrechio, *Can Air Traffic Control Ever Be Privatized?*, WASH. EXAMINER (May 2, 2016, 12:01 AM), <http://www.washingtonexaminer.com/can-air-traffic-control-ever-be-privatized/article/2590071> [<http://perma.cc/53PF-VMEE>].

of this into account, this article argues that privatization is the proper next step for the American aviation industry, especially in the face of the overwhelming success of privatization in other nations around the world. This analysis will begin by arguing in favor of privatization due to the flexibility of the model under federal regulation and then will look to the favorable liability situation that would result from privatization. Next, this analysis will evaluate the policy pros and cons of privatization, finally relying on a look at privatization models around the world to exemplify the benefits of privatization.

#### A. PRIVATIZED AIR TRAFFIC CONTROL UNDER FEDERAL AVIATION REGULATIONS

A significant question in the debate over air traffic control privatization is as follows: what would and should the role of the federal government be in the new system? More specifically in a legal context, would the federal government have any power to oversee or regulate this new system? As mentioned above in Part II above, different models of privatization involve different levels of government intervention.<sup>82</sup> After the failure of the 2016 AIRR Act, Republicans in the house, including Representative Mica, have indicated that legislators might be open to pursuing a compromise that could leave some aspects of air control, specifically financing, under government control.<sup>83</sup> While this situation is not ideal in the minds of many privatization supporters, who would prefer a set-up that creates an air traffic control corporation completely independent of the federal government, compromise is probably the more appropriate solution as it is likely to garner more support.

Making air traffic control independent from the federal government would certainly have its benefits in regard to federal regulation. For one, it would lift “an often-ineffective and cumbersome federal bureaucracy” off the backs of the aviation industry, offering more flexibility to innovate.<sup>84</sup> It would additionally free up billions of tax dollars as air traffic control moves to a fee-based system.<sup>85</sup> Further, privatization would allow the FAA to focus on its most crucial purpose: ensuring the safety

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<sup>82</sup> See *Don't Privatize Air Traffic Control*, *supra* note 20.

<sup>83</sup> Ferrechio, *supra* note 81.

<sup>84</sup> *H.R. 4441: Aviation Innovation, Reform, and Reauthorization Act of 2016*, *supra* note 19.

<sup>85</sup> *Id.*

of air travel.<sup>86</sup> Also importantly, separation would insulate air traffic control from government shutdowns, preventing travel disasters when the government hits an all-too-frequent point of gridlock.<sup>87</sup> Despite these positive effects of privatization related to federal regulation, however, opponents, backed by a report by the Congressional Research Service, worry that privatization could bring about legal challenges as to “whether Congress handed too much power to the corporation and whether the federal government maintained enough surveillance of the [ ] system.”<sup>88</sup>

The best thing about the privatization model, however, is that it is flexible. As Congress toys with the idea of privatization, legislators could debate and customize exactly how this private corporation would function in keeping with both the goals of the aviation industry and the concerns over a need for legislative oversight. Legislators could devise a system not only with the modernization benefits of private industry, discussed *infra*, but also with the safety protections of the tried-and-true FAA system. Additionally, as Representative Mica indicated, financing could stay within the federal government to some desired extent if it would ease the concerns of some opponents who worry that an important safety industry could end up underfunded.<sup>89</sup> Without a current proposal on the table, it is difficult to predict exactly how federal government regulations would interplay with a new air traffic control system, but this uncertainty should not stand in the way of pursuing a more effective system.

To devise a system that would appease the aviation industry while getting enough legislators on board to pass a privatization measure, the compromise drafters should consider looking to the models of Germany and France, where air traffic control is centralized into a corporation with the singular task of operating the air traffic control industry, but that corporation is owned by the government and is subject to government oversight and management.<sup>90</sup> While a government-owned model might compromise the benefits that usually accompany a move into the private industry, an air traffic control corporation would already

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<sup>86</sup> Shuster, *supra* note 19.

<sup>87</sup> Bart Jansen, *House Transportation Chairman: Privatize Air-Traffic Control*, USA TODAY (June 15, 2015, 1:29 PM), <http://usat.ly/1SikaPS> [<http://perma.cc/FD29-EYPC>].

<sup>88</sup> *Id.*

<sup>89</sup> See Ferrechio, *supra* note 81.

<sup>90</sup> See *Don't Privatize Air Traffic Control*, *supra* note 20.

lack some of these benefits as it would not have shareholders encouraging efficiency and would not be subject to market competition, as discussed *infra*.<sup>91</sup> While strong proponents like Representative Shuster might be hesitant to compromise on strict privatization, Congress might have to sacrifice some independence and flex the concept to allow for an appropriate amount of federal regulation and oversight for the benefit of the industry. While part of the cumbersome bureaucracy, the FAA would no doubt pursue the goal of ensuring air travel safety in whatever role it had in the new industry, a goal that would perfectly align with the mission of a private air traffic control corporation.

#### B. LIABILITY ISSUES: WHO IS RESPONSIBLE?

Another legal matter of important consideration is liability. Prior to 1944, an air traffic controller could be held personally liable for negligence that led to a collision or other air traffic control mistake.<sup>92</sup> In 1944, however Congress passed the Federal Tort Claims Act (FTCA) under which it waived its immunity to be sued in front of a federal court.<sup>93</sup> This statutory provision is complex, oft-litigated, and ripe with exceptions, the most significant of which being that the U.S. government cannot be held liable for failure to perform a “discretionary function.”<sup>94</sup> While not specifically defined, the Supreme Court has held this “discretionary function” exception to apply, generally speaking, “where there is room for policy judgment” in decision making

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<sup>91</sup> See Max B. Sawicky, *Low Visibility: The Fate of Air Traffic Control Privatization*, CTR. FOR ECON. & POL’Y RES. 1 (Feb. 2016), <http://cepr.net/images/stories/reports/low-visibility-atc-privatization-2016-02.pdf> [<https://perma.cc/HQ3G-RRSU>].

<sup>92</sup> Chrystel Erotokritou, *The Legal Liability of Air Traffic Controllers*, 4 INQUIRES J. 1 (2012), <http://www.inquiriesjournal.com/articles/613/the-legal-liability-of-air-traffic-controllers> [<http://perma.cc/DZ7A-58FE>].

<sup>93</sup> *Id.*; see also, Federal Tort Claims Act 28 U.S.C.S. 1346(b)(1) (2012) (“[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”).

Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2012).

<sup>94</sup> Erotokritou, *supra* note 92.



by an employee of the government.<sup>95</sup> Experts say, however, that air traffic controllers rely on their extensive training rather than policy to make judgements and decisions, therefore the “discretionary function” exception does not apply in the context of air traffic control.<sup>96</sup> Because of this, courts have held that “the controller owes a duty of care to the pilot and that the US government can be vicariously liable on their [sic] behalf.”<sup>97</sup> This government liability, of course, would change drastically if the responsibility of air traffic control was delegated to a private corporation.

The text of the 2016 privatization proposal, the AIRR Act, included a provision that the private “[c]orporation . . . may sue or be sued.”<sup>98</sup> This provision indicates that the congressional proponents of privatization would intend to remove air traffic control liability from the federal government and put it on the shoulders of the newly-formed corporation.<sup>99</sup> In other countries with privatized systems, the private organizations have the burden of vicarious liability for torts committed by their employees.<sup>100</sup> Under the Swiss model, the government of Switzerland steps in to offer compensation to victims only when the private organization does not have the fiscal ability to do so.<sup>101</sup> In the United Kingdom, however, the government has no duty to its private organization as to liability and provides no financial assistance.<sup>102</sup>

If the United States relies on a privatization model that creates a corporation totally independent from federal control, it is likely that the United States could devise a privatization proposal that shifts vicarious liability to the newly-formed corporation, which, assuming the corporation is sufficiently funded to handle lawsuits, would be another source of savings for the federal government—a positive impact of privatization. However, as discussed *supra* in regard to federal regulations, it is probably in the best interest of privatization proponents to compromise on their model and to accept some form of federal regulation over

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<sup>95</sup> *Id.*; *Dalehite v. U.S.*, 346 U.S. 15, 36 (1953).

<sup>96</sup> Erotokritou, *supra* note 92.

<sup>97</sup> *Id.*

<sup>98</sup> Aviation Innovation, Reform, and Reauthorization Act of 2016, H.R. 4441, 114th Cong. § 90310(a)(5) (2016).

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

<sup>100</sup> Erotokritou, *supra* note 92.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

the new air traffic control corporation, likely in relation to oversight and management. In this case, delegation of liability would become more complicated as potential plaintiffs might attempt to bring claims under the FTCA for any air traffic control-related suits due to the federal government's continued involvement in the industry.<sup>103</sup> To avoid this, drafters of the privatization measure must make clear that air traffic controllers and other personnel are employees of the private corporation and not of the federal government.<sup>104</sup> By ensuring this clarity, drafters would be able to appease privatization opponents with compromise while still welcoming the liability benefits that privatization could enact on the federal budget and on the government's vulnerability to suit.

### C. IMPACT OF THE STATE ACTION REQUIREMENT

In a discussion of a liability framework, it is important to consider the potential impact of the State Action Requirement. The Fourteenth Amendment to the Constitution says that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>105</sup> Clear in the language of this provision is that it only applies to “state actors;” specifically, individuals are only protected from violations of their constitutional rights perpetrated by actors of the state.<sup>106</sup> The definition of a “state actor,” however, can be more complex than it appears.<sup>107</sup> The Supreme Court has consistently held that even if private, an entity is liable for violation of a person's constitutional rights if that entity, or a representative thereof, is “acting on behalf of the government or perform[ing] . . . a duty that is traditionally carried out by the state.”<sup>108</sup> Because air traffic control, throughout most of its history, has been handled by the state, it could likely fall into this category of “a duty that is traditionally carried out by the state,” making any private entity that manages this

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<sup>103</sup> See Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2012).

<sup>104</sup> See *id.* The federal government is only liable under the FTCA for actions of “employee[s] of the Government.” *Id.*

<sup>105</sup> U.S. CONST. AMEND. XIV, § 1.

<sup>106</sup> Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 Mo. L. REV. 561, 562 (2008).

<sup>107</sup> *Id.* at 563.

<sup>108</sup> *Id.* at 564.

responsibility a state actor in the context of the Fourteenth Amendment.<sup>109</sup> Under this assumption, an air traffic control corporation would hold not only vicarious tort liability, but additionally constitutional liability for any violation of the Fourteenth Amendment. While this would create a burden of liability beyond that of an average private corporation, it is no different than the liability burden currently saddling the federal government. Whether air traffic control is managed by the FAA or a private corporation, liability expenses would likely remain the same, and would be factored into any budget just as they are now. However, if privatization succeeds in its goals of creating a safer air traffic control industry with fewer safety-related incidents, there would likely be fewer lawsuits and therefore fewer liability expenses.<sup>110</sup>

#### D. POLICY PROS OF PRIVATIZATION

There is widespread support for the idea of air traffic control privatization.<sup>111</sup> Not only does the measure find roots of support in Congress, within both the Republican and, to a lesser extent, the Democratic parties, but it is also supported by three former transportation secretaries as well as President Obama's first FAA Administrator.<sup>112</sup> Importantly, within the aviation industry, the measure is supported by every major airline with the exception of Delta Air Lines.<sup>113</sup> Further, both Airlines for America, a group representing the airlines, and the National Air Traffic Controllers Association, the union representing the United States's 11,000 air traffic controllers, lobby for privatization.<sup>114</sup>

One of the most often cited reasons for privatization of air traffic control is that it would save taxpayer money.<sup>115</sup> Because the system, as proposed by the AIRR Act, would be fee-based, only air travelers would shoulder the burden of paying for air

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<sup>109</sup> *See id.*

<sup>110</sup> *See* Adams, *supra* note 8, at 26; Shuster, *supra* note 19. As discussed, reports both by the U.S. government and global entities claim that privatization in other countries has led to better safety records.

<sup>111</sup> Kathryn A. Wolfe & Heather Caygle, *Shuster's FAA Breakup Bill Readies for Takeoff*, POLITICO (Feb. 2, 2016, 3:07 PM), <http://www.politico.com/story/2016/02/bill-shuster-faa-air-traffic-controllers-218633> [<http://perma.cc/LZ5C-A3XA>].

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

<sup>113</sup> *Id.*

<sup>114</sup> Reed, *supra* note 18.

<sup>115</sup> H.R. 4441: *Aviation Innovation, Reform, and Reauthorization Act of 2016*, *supra* note 19.

traffic control.<sup>116</sup> Fees levied on airline tickets would, by nature, be proportional to a traveler's frequency of use of the system, but would certainly have an impact on the price of air travel and might inhibit some from being able to afford it. Relieving the financial burden on the federal government is one of the largest benefits of the private industry, freeing up more money for important government functions and preventing increase of the deficit. The FAA is currently budgeted to spend \$16.4 billion in 2017, a total which would decrease greatly if the responsibility of air traffic control was moved into the private sector.<sup>117</sup> Further, proponents contend that the new model "would save billions of dollars and provide more stable funding than congressional appropriations."<sup>118</sup>

Another aspect that proponents emphasize is modernization.<sup>119</sup> According to Representative Shuster, "[t]he FAA's attempts at modernization have been extremely costly and unquestionably ineffective; government watchdogs have frequently highlighted the various missteps, cost overruns, and setbacks."<sup>120</sup> Further, "[t]he Department of Transportation's Inspector General has stated that the implementation costs for NextGen (which is the FAA's latest modernization plan) were initially estimated at \$40 billion, but could ultimately cost as much \$120 billion and may take an additional decade, by which time the technology will likely be obsolete."<sup>121</sup> Beyond these budget impasses, the FAA's failure to modernize has put the United States behind on the world stage.<sup>122</sup> Former transportation secretaries and President Obama's FAA Administrator expressed in a letter that "[t]he U.S. no longer has the most modern equipment, the most efficient airplane routings or the best technology of any of the world's air traffic control providers."<sup>123</sup> Airlines including American and Southwest have come out to say that they do not believe that the FAA will ever be able to "complete a long-delayed airspace modernization program,"

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<sup>116</sup> See Aviation Innovation, Reform, and Reauthorization Act of 2016, H.R. 4441, 114th Cong. § 90311 (2016).

<sup>117</sup> Kerry Lynch, *U.S. Senate Clears FAA FY2017 Budget*, AIN ONLINE (May 22, 2017, 4:34 AM), <http://www.ainonline.com/aviation-news/business-aviation/2016-05-22/us-senate-clears-faa-fy2017-budget> [<http://perma.cc/HZ5A-WYZ2>].

<sup>118</sup> Jansen, *supra* note 87.

<sup>119</sup> Shuster, *supra* note 19.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Wolfe & Caygle, *supra* note 111.

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

but they agree that a privatized organization could do so because it would be “more efficient and financially stable.”<sup>124</sup>

Generally, it is understood that the private sector is better at innovating than the federal government due to the cumbersome nature of the bureaucracy.<sup>125</sup> For this reason, it is sensible to assume that a private organization with a singular purpose, not to mention greater financial incentives, might be able to find a way to bring American air traffic control technology into the twenty-first century in a more economically feasible way than the federal government has been able to do. A new private system “will have the agility to innovate and adapt that is lacking in any government agency, as well as the flexibility to borrow resources necessary to achieve the modern [air traffic control] system and air transportation network that continues to elude us.”<sup>126</sup> Not to mention that if a private sector air traffic control corporation could create new technologies that could be sold to other countries around the world, this could generate profit to alleviate the costs of the modernized systems.<sup>127</sup> As the CEO of Nav Canada has noted, “governments are not good at running big IT projects,” so maybe the private sector could do better.<sup>128</sup>

Lastly, proponents see this change as necessary because a private system would be better able to handle a growing air travel market.<sup>129</sup> The number of annual passengers is approaching one billion in the United States, and the current system is not set up to handle that level of air traffic.<sup>130</sup> Proponents are concerned that without radical change, “the headaches air travelers know too well already—delays, lost bags, cancelled flights—will become more prevalent.”<sup>131</sup> By increasing the air traffic control system’s capacity to handle larger numbers of flights, airlines could increase their volume of flights each day while maximizing efficiency of flight plans through more effective use of air-

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<sup>124</sup> Justin Bachman & Michael Sasso, *Airlines to Trump: Block Rivals and Privatize Air Traffic Control*, BLOOMBERG (Nov. 9, 2016), <https://www.bloomberg.com/news/articles/2016-11-09/airlines-to-trump-block-rivals-and-privatize-air-traffic-control> [http://perma.cc/5GM8-VFTC].

<sup>125</sup> See H.R. 4441: *Aviation Innovation, Reform, and Reauthorization Act of 2016*, *supra* note 19.

<sup>126</sup> Shuster, *supra* note 19.

<sup>127</sup> See Bachman, *supra* note 54.

<sup>128</sup> *Id.*

<sup>129</sup> Shuster, *supra* note 19.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

space.<sup>132</sup> With these major changes, private control of air traffic could have a direct result on the daily experience of American air travelers.<sup>133</sup> While no one claims that air traffic control privatization would solve all of our air travel problems, many in the industry acknowledge that “privatization needs to be done as a necessary first step toward eventually ending this country’s enormous and chronic problem with flight delays.”<sup>134</sup>

#### E. POLICY CONS OF PRIVATIZATION

Among the opponents of privatization are leaders from both parties in the House and Senate committees responsible for managing the FAA’s budget, in addition to many congressional Democrats.<sup>135</sup> While privatization is generally supported in the aviation industry, with the narrow exception of Delta Air Lines and some unions, these powerful politicians stand in the way of passage of meaningful reform legislation.<sup>136</sup>

The primary concerns of opponents of air traffic control privatization relate to safety. Opponents worry that transitioning air traffic control to an entirely new system might result in safety lapses that would leave air travelers at risk.<sup>137</sup> Further, in separating commercial and private air traffic out from control over military and law enforcement air traffic, which likely would remain in the hands of the Department of Defense under any privatization proposal, there is a threat that communication problems could cause at best, inefficiency, and at worst, collisions.<sup>138</sup> While these concerns are certainly valid, and while safety should be the premiere consideration when devising an air traffic control system, there is no evidence that private air control would be any less safe.<sup>139</sup> The communication and protection measures in place today would continue to function, and the experienced air traffic controllers would continue to perform their duties as

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<sup>132</sup> *Id.*

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

<sup>134</sup> See Reed, *supra* note 18.

<sup>135</sup> *Id.*

<sup>136</sup> Ted Reed, *Airlines Want Privatized Air Traffic Control but Delta Remains Opposed*, THE STREET (Sept. 16, 2016, 9:25 AM), <https://www.thestreet.com/story/13741799/1/airlines-want-privatized-air-traffic-control-but-delta-remains-opposed.html> [<http://perma.cc/N4UE-JUF5>].

<sup>137</sup> H.R. 4441: *Aviation Innovation, Reform, and Reauthorization Act of 2016*, *supra* note 19.

<sup>138</sup> *Id.*

<sup>139</sup> See Shuster, *supra* note 19; Adams, *supra* note 8, at 25 (privatization measures in other countries have not resulted in a decrease in safety).

they do today, only under the umbrella of a different employer.<sup>140</sup> Further, reports both by the U.S. government and global entities claim that privatization in other countries has led to better safety records.<sup>141</sup> Without evidence of a negative impact on safety, this concern should not stand in the way of innovation in the industry.

Opponents further look to the economic impact of privatization. First, even though it would be privatized, the proposed air traffic control system would not merit the normal benefits of the private sector.<sup>142</sup> Because air traffic control is centralized into one entity, there is no competitive market.<sup>143</sup> The infrastructure and expertise of the current system could not be matched, so competition is unlikely to arise.<sup>144</sup> Further, because the corporation would not have shareholders, opponents question the incentive for minimizing costs and maximizing efficiency.<sup>145</sup> There are concerns about the guiding principles of this not-for-profit organization when operating outside of government control.<sup>146</sup>

Next, while private sector operations have the potential for big gains, they also can incur big losses if managed improperly.<sup>147</sup> Opponents of privatization contend that there is danger in subjecting such an important industry to the ups and downs of the economy without government oversight ensuring financial consistency.<sup>148</sup> According to a report by the Congressional Budget Office (CBO) estimating the potential cost of air traffic control privatization, the measure would have the potential to raise the deficit by up to \$19.8 billion over the next ten years, along with increases in spending and discretionary outlays.<sup>149</sup> These numbers, however, presented with minimal description or context, are deceptive.<sup>150</sup> The CBO explains that even though

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<sup>140</sup> See Adams, *supra* note 8, at 23–25.

<sup>141</sup> Shuster, *supra* note 19.

<sup>142</sup> Sawicky, *supra* note 91, at 1.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> H.R. 4441: *Aviation Innovation, Reform, and Reauthorization Act of 2016*, *supra* note 19.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> H.R. 4441, *Aviation Innovation, Reform, and Reauthorization Act of 2016: Cost Estimate*, CONG. BUDGET OFF. (Mar. 9, 2016), <https://www.cbo.gov/publication/51362> [<http://perma.cc/A92W-PBMT>].

<sup>150</sup> See *id.*

the new air traffic control system would be managed and financed as a private entity, a 1967 budgetary guidance measure instructs that the corporation's cash flow should be recorded in the federal budget because the entity would "effectively act as an agent of the federal government in carrying out a regulatory function," a seemingly misleading method of record-keeping.<sup>151</sup> Further, the CBO concedes that its calculations evaluate the AIRR Act as isolated legislation, not in the context of other federal regulations and activities.<sup>152</sup> Therefore, these estimations do not offer much clarity as to the true financial impact of this legislation.

Another main concern of opponents is that "[t]here are too many unanswered questions about this proposal."<sup>153</sup> While studies can look at the impact of privatization on other countries, the United States, in many respects, represents a unique case because of its significantly large size.<sup>154</sup> It is hard to predict the exact impact any small change on the air traffic control system might have on the aviation industry, much less a complete overhaul. Further, there is no concrete evidence that the new proposed system would be any more effective than the current one.<sup>155</sup> In fact, some argue that rather than allowing the system to quickly innovate and modernize, privatization would serve only to disrupt the FAA's current work to increase flight capacity and reduce delays, slowing down the timeline for improvements.<sup>156</sup> The final significant con to privatization is related: why remake a system that, strictly speaking, isn't broken?<sup>157</sup> While the air traffic control system certainly has its problems, the most significant being outdated equipment, cost on taxpayers, and rampant flight delays, the system as it stands generally functions

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

<sup>152</sup> *Id.*

<sup>153</sup> CBO: *Privatizing Air Traffic Control Would Increase Budget Deficit*, 58 No. 12 GOV'T CONTRACTOR 98 (Mar. 23, 2016).

<sup>154</sup> Compare U.S. DEP'T. BUREAU OF TRANSPORTATION STATISTICS, *BTS 18-16, 2015 U.S.-Based Airline Traffic Data* (Mar. 4, 2016), [https://www.rita.dot.gov/bts/press\\_releases/bts018\\_16](https://www.rita.dot.gov/bts/press_releases/bts018_16) [<https://perma.cc/ZNX3-US7M>], with STATISTICS CANADA, *51-203-X, Air Carrier Traffic at Canadian Airports* (2015), <http://www.statcan.gc.ca/pub/51-203-x/51-203-x2015000-eng.pdf> [<https://perma.cc/G6XP-ED A2>], and *Overview of EU 28 Air Passenger Transportation by Member States in 2015*, EUROSTAT (Nov. 28, 2016), [http://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Overview\\_of\\_EU-28\\_air\\_passenger\\_transport\\_by\\_Member\\_States\\_in\\_2015.png&oldid=316243](http://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Overview_of_EU-28_air_passenger_transport_by_Member_States_in_2015.png&oldid=316243) [<http://perma.cc/HVR8-H4UV>].

<sup>155</sup> *Don't Privatize Air Traffic Control*, *supra* note 20.

<sup>156</sup> *Id.*

<sup>157</sup> *See id.*



adequately day-to-day and has a positive safety record.<sup>158</sup> However, these oft-used arguments considering uncertainty and compliance with the status quo are poisonous stalemates to innovation.

#### F. COMPARISONS TO PRIVATIZED AIR TRAFFIC CONTROL AROUND THE WORLD

As briefly noted in Part II, *supra*, many countries around the world have instituted some kind of privatized air traffic control system. In fact, “[s]ince 1987, more than 50 nations have shifted the responsibility for providing [air traffic control] services to an independent entity.”<sup>159</sup> Generally, reports have cited mostly positive impacts resulting from privatization.<sup>160</sup> A 2005 study looked at the privatized air traffic control systems of four countries—Australia, Germany, New Zealand, and Switzerland—all of which have systems that operate similarly to the privatized system that President Clinton had proposed in 1994 involving some form of federal oversight, a compromise which Congress would likely create.<sup>161</sup> The study hypothesized that “[p]rivatization of the [air traffic control] system will result in reduced operational cost and improved air traffic safety.”<sup>162</sup> The results of the study indicated that this hypothesis was true.<sup>163</sup> Of significant note were the following findings: three of the four countries saw an increase in efficiency, two saw a decrease in operating cost (one saw an increase and one saw no change), and all four reported that they had the ability to modernize their air traffic control systems within their new frameworks.<sup>164</sup> Additionally, “[i]ncreased flight safety was indicated but could not be measured or forecasted.”<sup>165</sup> The study concludes in favor of privatization with the observation that

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<sup>158</sup> *Id.*

<sup>159</sup> Shuster, *supra* note 19.

<sup>160</sup> *Id.*; Adams, *supra* note 8, at 25–26.

<sup>161</sup> Adams, *supra* note 8, at 25.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 26 (“The results can be considered valid because the variables were observed in an uncontrolled and naturalistic state. With an ex post facto design, investigators have no control over the variables in the sense of being able to manipulate.”).

<sup>164</sup> *Id.* It is noteworthy that Delta Air Lines has made claims that air traffic control costs “have increased more in Canada and Britain than in the United States since they privatized.” *Don’t Privatize Air Traffic Control*, *supra* note 20.

<sup>165</sup> Adams, *supra* note 8, at 26.

[t]here is little reason to doubt that privatization would increase efficiency thus reducing operating cost and increasing safety. Reduced operating cost would also come from personnel reductions and efficient equipment procurement procedures not requiring present bureaucratic red tape. The literature review indicated new equipment purchases would not have been possible under previous rigid systems tied to government budgets. New state of the art equipment would definitely increase safety regarding air traffic control.<sup>166</sup>

While the conclusions of this study are significant indications of the effectiveness of privatization, there are other important considerations that add context to its results. One of the most significant considerations is that the U.S. aviation industry, as previously mentioned, is massive in comparison to those of other major countries that have privatized air control.<sup>167</sup> For reference, airlines serving the United States carried 895.5 million passengers in 2015, making the United States “the largest and most complex air transportation system in the world,” while the United Kingdom and Germany recorded 232.3 million and 193.9 million passengers respectively.<sup>168</sup> Canada, whose air control system is often looked to as a model for American privatization, handled only 133.4 million passengers in 2015.<sup>169</sup> Even the 2005 study cited above concedes that “[t]he factor of size and volume of the U.S. [air traffic control] system as compared to the systems of this study could possibly affect the outcome and produce different results than indicated by this study.”<sup>170</sup> A 2015 report by the FAA further details that

[t]here are significant differences between FAA and the foreign [air navigation service providers] we reviewed, including their operational and financing structures, as well as their approaches to modernization efforts. Regardless, when examining possible changes to FAA’s organizational structure, several factors should

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<sup>166</sup> *Id.*

<sup>167</sup> AIR CARRIER TRAFFIC AT CANADIAN AIRPORTS: HIGHLIGHTS, *supra* note 154; OVERVIEW OF EU-28 AIR PASSENGER TRANSPORT BY MEMBER STATES IN 2015, *supra* note 154; 2015 U.S.-BASED AIRLINE TRAFFIC DATA, *supra* note 154.

<sup>168</sup> FEDERAL AVIATION ADMINISTRATION, AV-2015-084, THERE ARE SIGNIFICANT DIFFERENCES BETWEEN FAA AND FOREIGN COUNTRIES’ PROCESS FOR OPERATING AIR NAVIGATION SYSTEMS (Sept. 2, 2015), at 6; OVERVIEW OF EU-28 AIR PASSENGER TRANSPORT BY MEMBER STATES IN 2015, *supra* note 154; 2015 U.S.-BASED AIRLINE TRAFFIC DATA, *supra* note 154.

<sup>169</sup> AIR CARRIER TRAFFIC AT CANADIAN AIRPORTS: HIGHLIGHTS, *supra* note 154.

<sup>170</sup> Adams, *supra* note 8, at 25.

be considered, including size and complexity, aviation research and development, and financing.<sup>171</sup>

In this report wherein the FAA looked at the air traffic control systems of Canada, the United Kingdom, Germany, and France, researchers came to the conclusion that it was difficult to extrapolate results in these smaller countries to the United States's massive and comprehensive aviation industry.<sup>172</sup> Regardless of this impediment, however, the FAA concluded in this report that the organizational structure of the FAA, or more specifically the air traffic control system, was not as important as ensuring that there is sufficient funding to maintain safety as the number one priority.<sup>173</sup> The FAA also looked to the experience of transition from government-controlled to corporation-controlled systems in other countries to recommend that specific attention is paid to safety issues, financial considerations, and labor-management relations during any transition period.<sup>174</sup> Under this outlook, as long as a proposed private corporation was sufficiently funded, it would likely be successful.<sup>175</sup>

While there are undoubtedly complications in any effort to compare the United States's massive aviation industry to that of any smaller country, we do not have any large-scale model which could serve as a better reference. The United States's volume of air traffic is unparalleled and therefore no entity as large has attempted privatization. However, looking at the experiences of other major industrialized countries like the United Kingdom, Germany, Canada, and Australia gives us the best insight available into the results we might see if the United States ventures down the privatization path. Further, it gives us data to make comparisons between the options available within the privatization framework. For example, the complete privatization model of Canada and the United Kingdom and the government-owned corporation model of Germany and France are both ideas that have been discussed by congressional leaders and could both possibly be embodied in the next privatization proposal.<sup>176</sup> For this reason, there is certainly value in studying and recognizing the impact of privatization around the world, and as most coun-

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<sup>171</sup> THERE ARE SIGNIFICANT DIFFERENCE BETWEEN FAA AND FOREIGN COUNTRIES' PROCESSES FOR OPERATING AIR NAVIGATION SYSTEMS, *supra* note 168, at 3.

<sup>172</sup> *Id.* at 6.

<sup>173</sup> *Id.* at 9.

<sup>174</sup> *Id.* at 8.

<sup>175</sup> *Id.* at 9.

<sup>176</sup> See *Don't Privatize Air Traffic Control*, *supra* note 20.

tries that have gone through the privatization process have deemed it a success, these comparisons provide strong evidence that privatization would be a positive move for the United States.<sup>177</sup>

## V. CONCLUSION

While there is no solution that will fix every problem in our air traffic control system, we have to start somewhere. That starting point should be some form of privatization. Privatization checks the boxes of many policy interests that the aviation industry wants to accomplish: saving taxpayers' money, creating flexibility to allow for much-needed innovation and modernization, and creating a system that can expand and adjust along with the growing air travel market.<sup>178</sup> Opponents have expressed valid policy concerns about privatization, including the need to maintain safety, the possible negative economic impacts, and the lack of certainty about the impact of privatization, but these concerns are largely speculative.<sup>179</sup> Moreover, of the more than fifty countries that have already privatized their air traffic control in some capacity, most have deemed the transition to be a success.<sup>180</sup> Countries that have privatized have cited increased efficiency, increased safety, and decreased costs, all of which are major goals of the aviation industry of the United States.<sup>181</sup> As to regulatory concerns about privatization, the government would have ultimate flexibility in drafting a regulatory proposal to create a private corporation that has the freedom to innovate but which also remains within the confines of necessary federal or contractual oversight.<sup>182</sup> All the while, however, the private corporation would be lifting burdens off the federal government, especially in the form of liability for negligence by air traffic controllers.<sup>183</sup>

As of January 20, 2017, President Donald J. Trump and his administration now oversee the Department of Transportation,

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<sup>177</sup> Bachman, *supra* note 54.

<sup>178</sup> See H.R. 4441: *Aviation Innovation, Reform, and Reauthorization Act of 2016*, *supra* note 19; Shuster, *supra* note 19.

<sup>179</sup> See H.R. 4441: *Aviation Innovation, Reform, and Reauthorization Act of 2016*, *supra* note 19; Sawicky, *supra* note 91, at 1; CBO: *Privatizing Air Traffic Control Would Increase Budget Deficit*, *supra* note 153.

<sup>180</sup> See Bachman, *supra* note 54; Shuster, *supra* note 19.

<sup>181</sup> Adams, *supra* note 8, at 26.

<sup>182</sup> See Ferrechio, *supra* note 81.

<sup>183</sup> See Erotokritou, *supra* note 92.

and within it, the FAA and the current federalized air traffic control system. With the Republicans now in control of the executive branch and both houses of Congress, many are optimistic, though tentatively so, that headway will finally be made in addressing the concerns of the aviation industry.<sup>184</sup> For years, progress in the industry has been halted by political gridlock.<sup>185</sup> While Republicans can generally be counted on to operate out of a pro-business framework, there is no guarantee that President Trump's administration will follow this conservative precedent.<sup>186</sup> Indeed, there is little evidence that President Trump has plans to prioritize aviation interests in his agenda.<sup>187</sup> Many in the industry eagerly await word on President Trump's plans for this important area of regulation.<sup>188</sup>

Representative Bill Shuster, champion of air traffic control privatization in the House, won reelection to his Pennsylvania seat in 2016 and has renewed his pledge to continue to fight for privatization.<sup>189</sup> Representative Shuster, a Trump supporter, has reported that he has spoken directly with President Trump about the idea of privatization and has claimed that President Trump is interested in the idea of privatization and is open to pursuing the matter further.<sup>190</sup> Between the election and the inauguration, Representative Shuster also met with President Trump's transition team on transportation to discuss the matter.<sup>191</sup>

As a further development, Senator John Thune (R-SD), Representative Shuster's counterpart in the Senate and chairman of the Senate Commerce, Science, and Transportation Committee, has stated that the Senate, previously hostile to privatization, is beginning to come around to the idea.<sup>192</sup> He told reporters,

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<sup>184</sup> Bachman & Sasso, *supra* note 124.

<sup>185</sup> *Id.*

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

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* In June 2017, President Trump issued a memo signaling his support for air traffic control privatization. Julie Hirschfeld Davis, *Trump Backs Air Traffic Control Privatization*, N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/2017/06/05/us/politics/trump-privatize-air-traffic-control.html?mcbuf=0> [https://perma.cc/D873-STPY].

<sup>189</sup> Bachman & Sasso, *supra* note 124.

<sup>190</sup> Joan Lowy, *House Chairman: Trump Favors Privatizing Air Traffic Control*, ASSOCIATED PRESS (Nov. 18, 2016), <http://bigstory.ap.org/article/f286ef2e25a8413aad2bf99cbfee528a/key-lawmaker-trump-favors-privatizing-air-traffic-control> [https://perma.cc/VG2W-YHD7].

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

<sup>192</sup> *Id.*

“Congress has different options, and we will continue to explore them, but the case for changing the FAA’s approach to air traffic control modernization has become stronger.”<sup>193</sup> Congressional Democrats, however, still express caution towards the idea.<sup>194</sup> Generally though, in light of the new administration, the continual failure of the FAA to achieve modernization, and strong support within the aviation industry, privatization now seems more likely than ever.<sup>195</sup>

The FAA has had fifty-nine years to establish an air traffic control system that can keep up with growing air traffic and ever-changing technology, but budgetary constraints and overburdened bureaucracy have held it back.<sup>196</sup> It is time for the United States to follow the global trend of privatization in order to cement itself as an industry leader for the remainder of the twenty-first century and beyond. With all three branches of federal government under the control of one party, there is no time like the present to push through innovative legislation without the resistance of political gridlock.<sup>197</sup> Privatization of air traffic control is not a perfect plan, but it is a strong first step towards improving our aviation industry. Under the leadership of President Trump, with the guidance of Representative Shuster, and with the support of major airlines and major aviation players, it is time to privatize air traffic control in the United States.

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<sup>193</sup> *Id.*

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

<sup>195</sup> See Lowy, *supra* note 190.

<sup>196</sup> See *A History of Air Traffic Control*, *supra* note 9.

<sup>197</sup> See Bachman & Sasso, *supra* note 124; Lowy, *supra* note 190.