Maintaining Privacy in a World of Technological Transparency: The BARR Program's ups and downs in Changing Times

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ON A TUESDAY AFTERNOON, representatives from two companies come together in Milwaukee for a secret meeting. One company’s jet takes off from Peoria, Illinois, to make the trip to the other company’s headquarters. The company’s representatives are accustomed to taking such flights on their luxurious, private jets, and the company believes that jets are imperative for the safety and privacy of its executives. However, imagine if the general public was able to obtain flight tracking data simply by looking it up on a flight tracker website. With this data, a person could see the exact position of the airplane using real-time tracking. What would this do to the supposed “safety” and “privacy” of these executives? Even more, what if it turns out these two companies have come together to discuss a possible merger? Now the companies run the risk of tipping off investors as well as business rivals, thus giving them the upper hand. These are just a few of the potential risks stemming from the advance of flight tracking data.

The above could have well been a reality for Caterpillar Corporation in September 2010, when executives met with Bucyrus International “to ‘explore the possibility of some type of combination.’” That meeting then stemmed a series of meetings, all of which took place in Milwaukee, and were reached by corporate jet. The companies ultimately consummated the merger, causing stock prices to increase by 28%. Investors could have used flight information to predict such a merger, thereby leading them to purchase more stock and make a profit. However,

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2 Id.
3 See id.
5 Id.
6 Maremont & McGinty, Departure, supra note 1.
7 Id.
8 Id.
the Block Aircraft Registration Request (BARR) Program successfully kept this issue from becoming a reality.\(^9\)

Congress implemented the BARR Program in 2000 to allow private jet owners to request that their flight patterns be blocked from public view.\(^10\) The National Business Aviation Association (NBAA), an advocate for corporate jets, manages the block requests and then provides the Federal Aviation Administration (FAA) with the block list.\(^11\) However, recent scrutiny over the BARR program has placed many companies and the NBAA on alert for possible changes.\(^12\) In a time of economic downturn, the Obama Administration takes the position that there should be more transparency in the system.\(^13\) Taxpayers should be allowed to see how their tax dollars are being spent, and investors should be able to see how corporations are spending their money.\(^14\)

While advocates for the BARR program argue that corporate jets ensure the “safety, security and . . . privacy” of executives and confidential business information, others respond that such flight information “helps shareholders evaluate whether the company is using its resources wisely.”\(^15\) The controversy sparks further constitutional implications pertaining to the right to privacy, with the NBAA arguing that “Congress has repeatedly enacted protections for the American people against disclosures of personal information.”\(^16\) Although the Constitution does not explicitly grant the right of privacy, many argue that it is a “core freedom guaranteed by the First, Fourth, and Fifth Amendments.”\(^17\) However, the modernization and improvement of technology raises questions as to how much of this core freedom still exists today.


\(^10\) Id.

\(^11\) Id.


\(^13\) Id.

\(^14\) Id.

\(^15\) Id.


\(^17\) Id.
The purpose of this comment is to explore the continuing debate over tracking flight paths of private jets, more particularly corporate jets, and to determine how the FAA can implement a plan that retains the core value of privacy without sparking further concerns from corporations and their investors. Part II begins with the history and evolution of flight tracking, and explores how the contradicting policies of governmental transparency and privacy law have sparked debate. Part II further examines both Congress’s and the NBAA’s role in the creation of the BARR Program. Part III explains the recent BARR changes, delves into the background of shareholder versus corporate disputes by examining how the business judgment rule can be applied, and examines how insider trading strengthens or weakens the argument on each side. Finally, Part IV examines the validity of both sides’ arguments, looks at the growing list of implications that stem from any policy changes, and ultimately concludes with projections of the FAA’s future plan in regard to the BARR Program.

II. HISTORY AND CONSTITUTIONALITY OF RELEASING FLIGHT TRACKING DATA

The evolution of technology has revolutionized flight tracking, making it more accurate and specific than could have ever been imagined in the early 1900s when the Wright brothers flew the first airplane.\(^\text{18}\) Flight tracking information became prevalent in the 1990s to make airspace safer.\(^\text{19}\) The data provides detailed information on flights, including location, altitude, speed, destination, aircraft registration number, and estimated time of arrival.\(^\text{20}\) In 1997, the information evolved into an Aircraft Situation Display to Industry (ASDI) data feed, and the FAA began providing the information to commercial vendors.\(^\text{21}\) The data includes both commercial and private flights; however, it is filtered to exclude governmental and military operations.\(^\text{22}\)


\(^{19}\) See Access to Aircraft Situation Display (ASDI) and National Airspace System Status Information (NASSI), 76 Fed. Reg. 32,258–59 (June 3, 2011).


\(^{21}\) Id.

\(^{22}\) 76 Fed. Reg. at 32,259.
Commercial vendors are granted access to the ASDI data feed by the FAA through a Memorandum of Agreement (MOA).\textsuperscript{23} The MOA explains to subscribers that the FAA tested its first prototype in 1992, which showed that such data access could provide “significant economic benefits to airlines by providing an increased dispatching flexibility” as well as an opportunity to “achieve advances in commercial services to the aviation community.”\textsuperscript{24} Shortly thereafter, the FAA created the ASDI data feed.\textsuperscript{25} In 1998, the FAA further increased the amount of ASDI data by including National Airspace System Status Information (NASSI), thereby triggering the need for the MOA to authorize access.\textsuperscript{26} The MOA sets out the rights and responsibilities of both the FAA and commercial vendors, and warns vendors of the penalties if they fail to fulfill any requirements.\textsuperscript{27} Ultimately, such information access, as well as the increased popularity and development of the Internet, led to the creation of multiple flight tracker websites, making flight tracking an even more public matter.\textsuperscript{28}

By the late 1990s, opposing views and issues regarding the general publishing of flight tracking data entered the forefront.\textsuperscript{29} Ultimately, the problem would become most prevalent among corporations because of their desire for private use of jets.\textsuperscript{30} On one hand, Americans grow up expecting a certain degree of privacy in their lives; on the other hand, individual investors and taxpayers feel they have a right to see where their money is going—even if it invades the privacy of another, especially a corporate executive. In due course, sacrifices were made in order to find a compromise. In the meantime, corporations were in need of a group of advocates who would fight for their rights and ensure that the corporate voice was heard.\textsuperscript{31}

\textsuperscript{23} Id.


\textsuperscript{25} Id.

\textsuperscript{26} Id. at 2; 76 Fed. Reg. at 32,259.

\textsuperscript{27} Memorandum of Agreement for Industry Access to Aircraft Situation Display and National Airspace System Status Information Data, supra note 24, at 3–7.

\textsuperscript{28} Block Aircraft Registration Request (BARR) Program, supra note 16.

\textsuperscript{29} See id.


\textsuperscript{31} Id.
A. The National Business Aviation Association and the BARR Program

The NBAA was formed in 1947 when a group of businessmen met to discuss the positive and negative aspects of air transportation. While groups such as the Air Line Pilots Association and the Air Transport Association represented other segments of the air operations industry, the corporate jet segment clearly lacked representation. In its early years, the NBAA operated in New York, but shortly thereafter moved to Washington, D.C., to work more closely with the Civil Aeronautics Administration, the predecessor to the FAA. During this time, the NBAA's accomplishments included seeking "improvements in airways and airports, [a] better weather reporting service, . . . [an] equitable tax ruling for business aircraft operations . . . and aircraft designed to meet the special requirements of business flying."  

Today, the NBAA continues to work through the many developing matters relating to airspace and aircraft. As big business grows and becomes more international, the NBAA continues to expand its focus to include foreign issues and air policy standardization. The NBAA has grown from a membership of nineteen companies in 1947 to over eight thousand in the present day, thus making an even larger impact on the business aviation community. As a result, the NBAA must stand ready to represent businesses in any related disputes that arise. One of the NBAA's largest initiatives has been the BARR Program, which was enabled by Congress in 2000 when it enacted Section 729 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (the Act). The Act requires commercial vendors of the ASDI data feed to verify that they have the capacity to selectively block ASDI data upon the

32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id.
38 Id.
39 Id.
40 See id.
41 Block Aircraft Registration Request (BARR) Program, supra note 16.
NBAA's request.\textsuperscript{42} The FAA fulfilled the requirements of the Act by amending Section 9 of the MOA to include language that requires vendors to accept this requirement and assist in promoting the safety and security of aircraft owners.\textsuperscript{43} As a result of the Act, the NBAA now has two options: (1) it can send the block list to the FAA, which prevents the data from being sent to flight tracker sites; or (2) it can send the block list directly to the vendors, who are bound to keep the information private through their MOA.\textsuperscript{44}

By enabling the BARR Program, Congress allows private aircraft owners to request that their air movements be blocked, thus addressing privacy and security imperatives.\textsuperscript{45} The owners' requests need not include any specific language or purpose.\textsuperscript{46} The BARR program has become a safe haven to many aircraft owners who are required to file information with the FAA under the Instrument Flight Rules, including their flight plan, departure location, destination, and time en route.\textsuperscript{47} Without the BARR Program, this information stored by the FAA could become public data published on a flight tracking site; but, much to the relief of corporations and their executives, the BARR Program prevents this from occurring.\textsuperscript{48} Throughout the past ten years, the FAA has continued to honor Congress's wishes by recognizing that aircraft owners deserve a right to privacy just as people do in their daily lives.\textsuperscript{49} The BARR Program is often analogized to other "Do Not Track" options.\textsuperscript{50} For example, the Federal Trade Commission (FTC) maintains the "'Do-Not-Call'" list to offer people the opportunity to opt out of unsolicited calls from marketers to their home phones.\textsuperscript{51} The FTC also places stringent requirements on website owners to inform users about their sites' privacy policies.\textsuperscript{52} Further, some personal informa-

\textsuperscript{43} Shane & Carneal, \textit{supra} note 20, at 2.
\textsuperscript{45} Block Aircraft Registration Request (BARR) Program, \textit{supra} note 16.
\textsuperscript{46} See Grabell & Jones, \textit{supra} note 44.
\textsuperscript{47} See Kate Murphy, \textit{Losing Privacy in Route Plans}, N.Y. TIMES, Aug. 16, 2011, at B6.
\textsuperscript{48} See id.
\textsuperscript{49} Block Aircraft Registration Request (BARR) Program, \textit{supra} note 16.
\textsuperscript{50} Id.
\textsuperscript{51} Shane & Carneal, \textit{supra} note 20, at 5, 10.
\textsuperscript{52} Block Aircraft Registration Request (BARR) Program, \textit{supra} note 16.
tion, such as health records, tax returns, and credit card transactions, is non-reviewable by the general public.\textsuperscript{53} While these programs address the importance of individual privacy,\textsuperscript{54} technology today creates new challenges to privacy, "not the least of which is the tracking of personal activity."\textsuperscript{55} The BARR Program serves as one illustration of how the American government must keep up with such changes.\textsuperscript{56}

B. The National Business Aviation Association vs. the Federal Aviation Administration

It was not long until the strength of the BARR Program would be tested by the judicial system.\textsuperscript{57} In National Business Aviation Ass'n\textsuperscript{58} v. FAA, the court held that the FAA could provide commercial vendors with a list of block requests because of the historical nature of such data.\textsuperscript{59} The ultimate issue was whether the FAA could provide a list to a commercial vendor, ProPublica, of all block requests made under the BARR program that were normally filtered out by the FAA from the ASDI data feed before vendors received it.\textsuperscript{60} In 2008, ProPublica sent a letter to the FAA requesting the list of block requests.\textsuperscript{61} The FAA initially determined that the information was, in fact, releasable and contacted the NBAA for its input; this initial determination was quickly rejected by the NBAA.\textsuperscript{62} The NBAA stated that the block requests were commercial or financial information, and thus subject to an exemption under the Freedom of Information Act (FOIA), whereas the FAA argued that the data did not fall under any exemption.\textsuperscript{63} Ultimately, the court determined whether the information could be released.\textsuperscript{64}

In reaching its decision, the court considered whether the list of blocked airplane registration numbers did in fact constitute "commercial information."\textsuperscript{65} While the NBAA argued that the

\begin{footnotes}
\footnotetext{53}{Shane & Carneal, supra note 20, at 5–6.}
\footnotetext{54}{Id.}
\footnotetext{55}{Id. at 8.}
\footnotetext{56}{See id. at 8, 10.}
\footnotetext{57}{See Nat'l Bus. Aviation Ass'n v. FAA, 686 F. Supp. 2d 80, 81–82 (D.D.C. 2010).}
\footnotetext{58}{Id. at 87.}
\footnotetext{59}{Id. at 83–84.}
\footnotetext{60}{Id. at 83.}
\footnotetext{61}{Id.}
\footnotetext{63}{Nat'l Bus. Aviation Ass'n, 686 F. Supp. 2d at 84.}
\footnotetext{64}{Id. at 85.}
\end{footnotes}
registration numbers fell into an exemption category because they “pertain[ed] to airplanes used by companies, in commerce, and [were] thus part of a commercial enterprise,” the FAA emphasized that the information was merely a list of numbers, and thus not in depth enough to be commercial information.65 The court sided with the FAA, concluding that the registration numbers would reveal little other than the owner’s name, make and model of the aircraft, and historical flight tracking data.66 Most importantly, the information would not provide any real-time tracking and thus would not raise any security or privacy concerns.67

This case ignited a flame that led the FAA to look further into the rationale of the BARR Program.68 Marc Warren, the acting chief counsel for the FAA, stated that the case caused the FAA to “cast a critical eye at the rationale for blocking tail numbers.”69 However, the NBAA has not shown too much concern just yet, explaining that the ProPublica case was a “singular event” only dealing with historical data.70 Although the block list obtained by ProPublica never resulted in any security breaches, it did cause bad publicity.71 Investors, as well as other members of the public, began examining corporations’ past airplane movements, and began questioning flights to exotic spots and other personal events that were clearly non-business.72 Some were shocked to find out that the block list not only included information about corporations, but also about government agencies and politicians, causing taxpayers to wonder if they were merely subsidizing the aviation system.73 The NBAA continued to defend its position, rationalizing that the lower costs and other benefits of corporate jet travel far outweigh the hassles of alternatives, such as driving or flying commercially.74 As a result, a battle was brewing between the supporters and the opponents of the BARR Program.

65 Id. at 85–86.
66 Id. at 87.
67 Id.
68 Murphy, supra note 47.
69 Id.
70 Id.
71 See Grabell & Jones, supra note 44.
72 See id.
73 Id.
74 Id.
C. PRIVACY VS. OPENNESS

An inherent conflict exists between the constitutional right to privacy and the more recent policies of openness and transparency. When the Framers created the Constitution, they could have neither imagined what this country would be like today, nor foreseen how their words would conjure several different meanings.\footnote{See Geoffrey R. Stone et al., Constitutional Law 712 (Vicki Been et al. eds., 6th ed. 2009).} For example, originalism, a theory of constitutional interpretation, focuses on the original intent of the Framers in applying meaning to the words of the Constitution.\footnote{Id.} However, this method is problematic when courts make decisions on matters that were neither foreseen by the Framers, nor possibly intended by them.\footnote{Id.} Privacy is one of those rights that evolved through time due to the evolution of technology, making it difficult to reconcile with the original expressions of the Framers.\footnote{Martin E. Halstuk & Bill F. Chamberlin, The Freedom of Information Act 1966–2006: A Retrospective on the Rise of Privacy Protection over the Public Interest in Knowing What the Government's up to, 11 Comm. L. & Pol'y 511, 512–13 (2006).} Today, the tension between the right to privacy and the furtherance of transparency "represents a conflict between two vital democratic values" that the drafters of the Freedom of Information Act attempted to solve with their legislation.\footnote{Id. at 511; see Freedom of Information Act, 5 U.S.C. § 552(a)(2)(E), (b)(6)–(7) (2006).}

1. Freedom of Information Act

The FOIA was enacted in 1966 in order to promote a policy of government openness and transparency.\footnote{Halstuk & Chamberlin, supra note 78, at 512.} Signed by President Lyndon B. Johnson, it relied on "democratic political theory," emphasizing that citizens have the right to know what their government is doing.\footnote{Id.} The FOIA provides any person, citizen or not, the right to access federal agency records unless the information requested falls into one of nine exemptions.\footnote{What is FOIA?, FOIA.Gov (last updated Jan. 2011), http://www.foia.gov/about.html.} More recent initiatives encourage agencies not to use exemptions unless the nature of the information truly fits into one of the nine categories.\footnote{Id.} The Executive Branch oversees the administration of
the FOIA and verifies that the agencies are complying.\textsuperscript{84} To make a FOIA request, a person sends a written request, in no particular format, directly to the agency in charge of the information.\textsuperscript{85} However, many agencies automatically post the more relevant information on their websites for public viewing.\textsuperscript{86}

In drafting the FOIA, Congress realized that the right to privacy outweighs transparency when it comes to particular types of information.\textsuperscript{87} As a result, the nine exemptions include information such as national defense or foreign policy information, internal personnel rules of an agency, trade secrets and commercial information, medical files, certain investigation records, and geological information concerning wells.\textsuperscript{88} If an agency refuses to release a record under one of the nine exemptions, a court may decide whether the privacy interest is great enough to justify the withholding of the information.\textsuperscript{89} Exemption number four, commercial or financial information, has served as a defense to the BARR Program, as evidenced by the ProPublica case.\textsuperscript{90} A two-part test exists to determine whether information falls under this exemption: (1) whether disclosure would hinder the ability to receive government information in the future; and (2) whether disclosure would cause substantial harm to the person or agency who owns the information.\textsuperscript{91} In the ProPublica case, the court determined that the historical tracking information was not sufficient to cause substantial harm to the private aircraft owner.\textsuperscript{92} However, the issue pertaining to real-time tracking remained unanswered.\textsuperscript{93} The NBAA and corporate aircraft owners feared more citizens would start bringing FOIA requests, and that improved tracking would cause this data to be more specific and thus pose a greater danger to their privacy.\textsuperscript{94}

\begin{itemize}
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} See Freedom of Information Act, 5 U.S.C. § 552(b) (2006).
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Halstuk & Chamberlin, supra note 78, at 513.
\item \textsuperscript{90} Nat’l Bus. Aviation Ass’n v. FAA, 686 F. Supp. 2d 80, 87 (D.D.C. 2010).
\item \textsuperscript{92} Nat’l Bus. Aviation Ass’n, 686 F. Supp. 2d at 87.
\item \textsuperscript{93} See id.
\item \textsuperscript{94} Mark Maremont & Tom McGinty, For the Highest Fliers, New Scrutiny, WALL ST. J. (May 21, 2011), http://online.wsj.com/article/SB100014240527487035513045
The FOIA has become more significant in the past few years, with President Obama proclaiming his goal of making his Administration the most transparent in history.\(^{95}\) In his Presidential Memorandum on the FOIA, Obama explained that the FOIA achieves "accountability through transparency" and that "in the face of doubt, openness prevails."\(^{96}\) Agencies are bound by the presumption of disclosure and are expected to make the first move when it comes to releasing information.\(^{97}\) President Obama believes that the FOIA assists the U.S. government in becoming more transparent, participatory, and collaborative by providing citizens with more information to approve or disapprove of agency actions.\(^{98}\) After understanding the most recent push by the Obama Administration relating to transparency, it is unsurprising that corporations and the BARR Program have received particular scrutiny in the past few years.\(^{99}\)

FOIA requests have begun to reveal the "hidden world" of corporate jet travel by revealing the air movements of every private aircraft recorded in the FAA's system.\(^{100}\) The FAA maintains that the information does not interfere with the right to privacy because it fails to reveal the identity of the passengers or the reason for the flight.\(^{101}\) Others argue that the information is specific enough to provide competitive and private data, thus falling under a FOIA exemption.\(^{102}\) As a result, it appears that the FOIA has yet to strike the perfect balance between privacy and openness in an era of big business and technology progression. To better understand where Congress is going with the FOIA, it is important to know how the right to privacy evolved.

2. Constitutional Right to Privacy

Although the Framers failed to explicitly guarantee a general right to privacy in the Constitution, many argue that it is implied in the First, Fourth, and Fifth Amendments, with the First Amendment guaranteeing the right to privacy of beliefs, the
Fourth Amendment protecting against unreasonable searches and seizures, and the Fifth Amendment protecting against self-incrimination.\(^{103}\) However, privacy today is a much broader topic, encompassing ideas such as “freedom of thought, control over one’s body, solitude in one’s home, control over information about oneself, freedom from surveillance, protection of one’s reputation, and protection from searches and interrogations.”\(^{104}\) With a changing environment, Congress is forced to alter old rules in new and innovative ways.

Despite the unclear meaning of privacy, Congress continues to enact programs, such as the “Do Not Call” list and “Do Not Track” web browsing option, that protect the privacy of Americans.\(^{105}\) These programs recognize that “control over personal information” is one of the most “predominant theories of privacy.”\(^{106}\) On the other hand, they also raise further questions as to what constitutes personal information, considering most personal information is not even that personal these days,\(^{107}\) and may cause Americans to question just what is protected from the government and the public.

While advances in technology create an efficient and forward-moving society, they also come at a cost to those who value their private information.\(^{108}\) Legislators recognize the impending issues and need for up-to-date laws, and have thus proposed numerous privacy bills and programs.\(^{109}\) Just as drivers expect their global positioning device data to remain private, private aircraft owners have the same expectations as to their airplane movements.\(^{110}\) These fundamental principles of privacy led Congress to enable, and the FAA to accept, the BARR Program in 2000.\(^{111}\) The FOIA, however, has assisted in the release of certain corporate information, thus raising the question of how the FOIA and the constitutional right to privacy can exist in the same world.\(^{112}\) In fact, the current FOIA–privacy balance is the “product of judicial overreaching” and is “at odds” with the prin-
principle of openness advocated by the FOIA.\textsuperscript{113} Could the perfect balance ever be achieved? Regardless, the Executive Branch sought to make changes to the BARR Program in 2011, rehashing opposing views and sparking debate.

III. RECENT SCRUTINY OVER THE BARR PROGRAM AND THE RESULTING CONTROVERSY

The tension between the FOIA and the right to privacy merely foreshadowed the issues that would arise pertaining to the BARR Program during the Obama Administration.\textsuperscript{114} While the Administration continued to look for ways to change current programs and encourage transparency, some groups felt that their rights should remain unchanged.\textsuperscript{115} The first proposed change came in early 2011 when Transportation Secretary Ray LaHood moved to require more public disclosure concerning corporate jet flight plans.\textsuperscript{116} Corporations argued that these changes would come at the expense of the security of their executives and the privacy of business deals, but Secretary LaHood insisted that many of the fliers taking advantage of the program “don’t deserve it.”\textsuperscript{117} LaHood’s proposed plan would only allow aircraft owners to block flight plans if a significant threat existed, explained as a “death threat or recent terrorism in the area where the aircraft is head[ing],” thereby drastically limiting the number of planes that qualify under the block list.\textsuperscript{118} The plan was added to an aviation funding bill and inspired many corporations to rally against it, arguing that the value of privacy is greater.\textsuperscript{119} Luckily for them, the House of Representatives, at this early stage, sided with the corporate jet owners in keeping the flight paths private.\textsuperscript{120}

Secretary LaHood’s plan eventually won over in August 2011, leading the BARR Program to face a big change.\textsuperscript{121} Now, aircraft owners would have to submit a “valid security threat” with

\begin{thebibliography}{9}
\bibitem{113}哈尔斯汀 & 奇伯林, \textit{supra} note 78, at 564.
\bibitem{114}《航空注册申请（BARR）计划》，\textit{supra} note 16.
\bibitem{116}同上。
\bibitem{117}同上。
\bibitem{118}同上。
\bibitem{119}同上；迈克尔，\textit{supra} note 47.
\bibitem{120}休斯，\textit{supra} note 115.
\bibitem{121}迈克尔，\textit{supra} note 47.
\end{thebibliography}
their block requests to keep their flight data from being released on public flight tracking websites. This outraged corporate jet owners who, prior to the change, submitted their block requests to the NBAA without listing a particular purpose for their request. Supporters of the change argued that the new plan conformed with the FOIA and the Administration’s commitment to transparency, but the NBAA argued that not all information the government collects must be public. Ultimately, the new change placed private aircraft in the same position as commercial aircraft, a change that seemed unfair to many companies, which were preparing for a big fight. Under the 2000 BARR Program, 7,400 out of 357,000 registered airplanes were blocked, but the August 2011 change would sharply lower that number to 970. The fight over the new change was not an easy one; investors found the new change useful for obtaining information on alliances and mergers, whereas businesses took the position that the data made them vulnerable and open targets. The August 2011 change caused the NBAA to take action quickly by filing a complaint with the U.S. Court of Appeals for the District of Columbia, comparing the change to posting global positioning data on all individuals. The new, strict measures did not last long; in December 2011, the FAA announced change to the BARR Program once again. Aircraft owners would no longer need to submit a certified security reason along with their block requests. However, the FAA stated in its press release that a new permanent policy would be announced in early 2012. So why the quick change? The FAA cited the 2012 Appropriations Bill for the change.
funds to programs that limit the ability of private aircraft owners to request blocked flight data. By implementing such a bill, Congress essentially forced the FAA to go back to the original BARR Program. Companies that presented a certified security reason in conformity with the August 2011 change still continue to be placed on the block list; however, those who could not present a valid reason can rest easy once again. Although the FAA states that the limitations are gone for good, it is hard to predict what the newer, more specific procedure will entail. While executives are winning the fight thus far, the debate has also come at a high price by bringing attention to their executive perk programs, thereby invading the one thing they sought to protect in the first place, their privacy.

A. Executive Perks Under Pressure

The recent tension inspired investors to cast a more critical eye on the compensation packages of top executives. The rising popularity of private jet usage in big business has proved to be a way of promoting efficiency, security, and cost savings, but the popularity has also come at a cost. Flight tracking data, released under the FOIA, provides a glimpse into the problem, showing corporate jets landing in exotic places, such as Tahiti, the Cayman Islands, and Palm Beach. Over the four-year period between 2007 and 2010, 6.7 million private jet flights were recorded, of which one-third were to resort destinations, causing investors to question just how many of their dollars were going toward luxurious executive perks. Companies often use this perk, along with country club and fitness club memberships, tickets to entertainment events, luxury vehicles, and other reimbursements to compensate executives far above their salary

135 Id.
136 Id.
137 Maremont & McGinty, Highest Fliers, supra note 94.
139 Maremont & McGinty, Highest Fliers, supra note 94.
140 Id.
141 Id.
In fact, corporate aircraft usage is one of the most treasured executive perks and has increased in popularity over the last decade, with businesses emphasizing the importance of security for both business and personal travel. Executives also receive more preferable tax treatment regarding the use of the corporate jet and its inclusion in gross income. Treasury Regulations dictate that taxpayers include personal use of the corporate jet under their wages using the Standard Industry Fare Level Formula, which often calculates the cost at an amount equal to or less than a first-class ticket, whereas the cost of flying on a luxurious private jet is much greater. Even so, many companies tend to understate the personal usage of the corporate jet. For example, EMC Corporation’s Chief Executive Officer (CEO) admits to having limited use of the corporate jet for leisure, yet records show otherwise. One of EMC’s five jets spent 46% of its time flying to resort locations during a four-year period, while the overall fleet devoted 31% of its flights to resort locations, thereby painting a much different picture, and one of much concern to the average citizen.

The current Administration is not only pushing for its policy of government transparency, but also for continued scrutiny over executive perquisites. For example, the Auto Industry Financing and Restructuring Act required recipients of federal aid “to divest [themselves] of any ownership stake in private aircraft.” Although the bill never passed, it provided a preview into the Administration’s goals and what future bills may propose. The NBAA argues that such bills only discourage private use of jets when such use offers flexibility and time savings. In June 2011, President Obama placed private jet use in the spotlight again when he proposed to take away acceler-
ated depreciation for business aircraft. Currently, businesses can take tax deductions on depreciation through the life of the equipment, with greater amounts in the earlier years; thus, such a change would come at a great cost to businesses. Although President Obama argues that the change would be a step toward ending tax breaks for millionaires, the NBAA insists that mainly small and mid-size companies use private aircraft, thus it would target the wrong group. The Administration also proposed a $100 flight fee for corporate jets to correct the disparity between what commercial airlines and private jet owners pay for the upkeep of the air-traffic system. In times of economic downturn, it is clear that the government will over-scrutinize big business and its so-called millionaires. However, other businesses must be prepared to be in the path of scrutiny as well.

1. **SEC Disclosure Requirements**

The Securities and Exchange Commission (SEC) sets business regulations pertaining to executive perks by requiring companies to disclose compensation paid to top executives and officers, unless the amount falls below a $10,000 threshold. Item 402 of Regulation S-K governs the requirement and asks for “clear, concise, and understandable” reporting of all items, even if the items are reported elsewhere. Besides identifying each perquisite, companies must also quantify them when the perquisites exceed the greater of $25,000 or 10% of the total amount of perquisites received by the particular executive. These benefits are valued on the basis of “aggregate incremental cost[s],” which are additional costs other than fixed costs, such as fuel, landing fees, and crew expenses. This valuation is far

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154 Id.


159 Id.

more preferable to businesses than having to value the perquisite at open-market cost, which would be a high price for a luxury aircraft.\textsuperscript{161}

Although defining a “perquisite” can be a gray area, the SEC, in its recent revision, listed two factors that play a large role in identifying a perquisite: (1) whether the item is “integrally and directly” related to the person’s duties; and (2) whether it confers a benefit that has a personal aspect and is not available to all employees.\textsuperscript{162} These two factors affect the evaluation of corporate aircraft usage as a perquisite. In applying the second factor, it is easy to see that corporate jet usage may confer a benefit that is beyond business, and that the jets are not usually available to all employees.\textsuperscript{163} The first factor raises more issues because for most executives there may not be a clear line between personal and business travel.\textsuperscript{164} Imagine the typical executive or businessman on a family vacation that still spends copious amounts of time on his laptop or cell phone.\textsuperscript{165} In that instance, just how much of the travel costs should be included as perquisites? To this, there is no clear answer. The SEC has purposefully stayed away from creating a rigid rule for defining perquisites.\textsuperscript{166} Regardless, SEC disclosure is serious business as the SEC has brought, and continues to bring, actions against companies for failing to report or underreporting perquisites.\textsuperscript{167}

The ASDI data feed has assisted in making airplane tracking simple with the click of a button, thus making it even easier for the SEC to find offenders.\textsuperscript{168} The flight records reveal some incriminating numbers.\textsuperscript{169} Leucadia National Corporation disclosed $30,000 of personal flying, while the records show an amount of personal flying that would cost at least $708,000.\textsuperscript{170} EMC reported $664,079 of personal flying; the Wall Street Journal estimates a figure closer to $3.1 million.\textsuperscript{171} Jarden Corporation reported giving their CEO $1.9 million of personal flying,

\textsuperscript{161} Bateman, \textit{supra} note 138, at 237–38.
\textsuperscript{162} Id. at 241; Ekblom, \textit{supra} note 157.
\textsuperscript{163} Ekblom, \textit{supra} note 157.
\textsuperscript{164} Maremont & McGinty, \textit{Jet Set, supra} note 146.
\textsuperscript{165} Id.
\textsuperscript{166} Bateman, \textit{supra} note 138, at 241.
\textsuperscript{168} Ekblom, \textit{supra} note 157.
\textsuperscript{169} Maremont & McGinty, \textit{Jet Set, supra} note 146.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
whereas records show a large amount of flights realistically cost-
ing about $3.7 million. The information below provides a
comparison of the amounts spent by the CEOs of some of the
world’s largest companies on personal use of the corporate jet.

**PERSONAL USE OF CORPORATE JET**

<table>
<thead>
<tr>
<th>Executive &amp; Company</th>
<th>Personal Use of Corporate Jet</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robert J. Couri - Mylan</td>
<td>$535,590.00</td>
</tr>
<tr>
<td>Jeffrey R. Immelt - General Electric</td>
<td>$381,254.00</td>
</tr>
<tr>
<td>Samuel J. Palmisano - IBM</td>
<td>$311,288.00</td>
</tr>
<tr>
<td>Robert A. McDonald - Procter &amp; Gamble</td>
<td>$223,620.00</td>
</tr>
<tr>
<td>James Dimon - JP Morgan Chase</td>
<td>$95,293.00</td>
</tr>
<tr>
<td>Michael T. Duke - Walmart</td>
<td>$93,258.00</td>
</tr>
<tr>
<td>Randall L. Stephenson - AT&amp;T</td>
<td>$77,182.00</td>
</tr>
<tr>
<td>J. Christopher Donahue - Federated Investors</td>
<td>$68,608.00</td>
</tr>
</tbody>
</table>

In fact, many companies not only provide, but also require, use
of corporate jets for business travel by their top executives, cit-
ing security as a top concern, but other companies, such as Eli
Lily & Co., oppose personal use of corporate aircraft, suggesting
that it would send the “wrong message” to shareholders.

An ongoing SEC investigation involves Nabors Industries and
its failure to provide amounts for 2008 and 2009 perquisites, ex-
plaining that the total was far too little to report. The Wall
Street Journal, however, estimates that former CEO Eugene
Isenberg’s flights to Palm Beach and Martha’s Vineyard alone
cost $704,000. Nabors explained that its employment con-
tract with Isenberg allowed him to maintain company offices in
Palm Beach as well as at any other residence he desired, spark-
ing further questions to the SEC. Although the SEC has not

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172 Id.
173 Len Boselovic, *Executive Jet Use, “Cross Ups” Alive, Well*, PITTSBURGH POST-
supra note 146.
177 Id.
stated whether flights to a home office constitute business travel, many attorneys speculate that the argument would be a difficult one to make. Nabors continues to insist that it follows all protocols and filing requirements despite the serious allegations. It is not clear what the SEC will ultimately decide, but one thing is clear: the SEC takes all investigations seriously and is firm about companies following the disclosure requirements.

2. Business Judgment Rule

Although companies may not be able to prevent themselves from having to disclose to the SEC, the business judgment rule can be useful in protecting some of the executives’ and directors’ decisions. Tough economic times may have caused many to over-scrutinize big business and their decision-making processes. Although businesses fight back time and time again to prove that their decisions are rational, some may wonder if the questioning is even necessary. The business judgment rule allows directors, executive officers, and majority shareholders of a corporation to make decisions without being questioned as long as the following five elements are met: (1) the directors acted (not making a decision is not an action); (2) on a reasonably informed basis without gross negligence; (3) in good faith; (4) with no conflict of interest; and (5) with the belief that the action was in the best interest of the company. The rule’s purpose is to limit inquiries into business decisions and to promote “free exercise of the managerial power.” The rule was created in Delaware but has since been applied in many other jurisdictions.

In applying the rule, courts will presume that the directors acted on an informed and good faith basis, thereby placing the burden on the party challenging the decision. However, the rule may be nullified if it is shown that the directors acted either as interested parties or in a negligent manner. Complying

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178 Id.
179 Id.
180 Id.
182 Id.
183 Id.
185 Id.
186 Id.
with the rule should be a regular part of a director’s duties as the court stated in Smith v. Van Gorkom:

Since a director is vested with the responsibility for the management of the affairs of the corporation, he must execute that duty with the recognition that he acts on behalf of others. Such obligation does not tolerate faithlessness or self-dealing. But fulfillment of the fiduciary function requires more than the mere absence of bad faith or fraud. Representation of the financial interests of others imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye in assessing information of the type and under the circumstances present here.187

Regarding recent BARR Program scrutiny, businesses have fought back with various reasons for the decisions they make including security, privacy, and protection of competitive information from rivals.188 If all else fails, can businesses use the business judgment rule as a defense to protect them from the backlash of information released about them? A business may argue that its decision to allow personal use of the jet meets the five elements of the rule, and thus it is not subject to scrutiny. The rule can also protect the decisions of executives to take private jets in lieu of commercial flights. Most businesses evaluate the costs and benefits of private jet air travel compared to commercial travel before purchasing expensive company aircraft.189 Certainly, they can argue that their judgment should not be questioned, yet the FOIA and BARR Program curtailment place the information in the public eye, leaving people to judge the rationality of their decisions, decisions which even a court may not judge. Regardless of the success of this defense, corporations have valuable information to protect and should try every possible avenue.

B. INSIDER TRADING

To better understand the perspective of businesses and executives regarding the public flight tracking issue, it is important to consider the basics of insider trading. When executives mention the worry over competitive information being released through flight tracker websites, they are greatly concerned not only with competitors but also with their own investors.190 The SEC in-

187 Smith, 488 A.2d at 872.
188 Grant, supra note 12.
189 Maremont & McGinty, Jet Set, supra note 146.
190 Id.; Maremont & McGinty, Departure, supra note 1.
vokes strict rules on insider trading, which occurs when an investor trades based on privileged or confidential information. The SEC implemented the rigid rules to protect investors and to create a more trustworthy market, recognizing that many Americans invest in the stock market. The Supreme Court recognized the illegality of insider trading in 1909 when it determined that a director was not allowed to buy stock of his own corporation from a third party when the director knew that the value was about to "skyrocket." Ultimately, Congress enacted the Securities Act of 1933 and the Securities Act of 1934 to deal with trading abuses. Section 16(b) of the Securities Act of 1934 prevents corporate insiders from realizing short swing profits, while Section 10(b) is more applicable to investors as a whole, stating that a person cannot trade using any "manipulative or deceptive device." Rule 10b-5 was enacted by the SEC to broaden the anti-fraud provisions, making it illegal to engage in fraud or misrepresentation in relation to securities. In the United States, insider trading is both a criminal and civil offense, thus subjecting the perpetrator to monetary penalties as well as imprisonment. The SEC is given great authority to investigate potential acts of insider trading and to call witnesses to determine which path to take. Despite this strong regulation by the United States and the fact that "insider trading often crosses borders," many other countries left insider trading unregulated until the 1980s.

Citing several reasons, some investors feel that there should not be a prohibition on insider trading. First, insider trading can be considered a form of compensation by incentivizing employees to work harder and be more creative, thus increasing stock prices. Second, the danger with insider trading is that the SEC may act too quickly to punish traders who straddle a

192 Id.
193 Id.
194 Id.
196 NEWKIRK & ROBERTSON, supra note 191.
197 Id.
198 Id.
199 Id.
200 Id.
201 Id.
gray line, engaging in what some think may or may not be insider trading.\textsuperscript{202} Third, the strict rules may limit the discussion between analysts and corporate officials.\textsuperscript{203} Lastly, the cost of enforcing insider trading may be more than the monetary recovery from it.\textsuperscript{204} Nevertheless, permitting insider trading would create an unfair market and prevent investors from playing on an equal level.\textsuperscript{205} Ultimately, this could discourage some Americans from participating in the stock market altogether.

Can making corporate flight paths public create insider trading issues for potential investors? Take, for example, the plot in the introduction where Caterpillar met with Bucyrus International to discuss a possible merger.\textsuperscript{206} The multiple meetings could have tipped off investors, causing them to either buy or sell depending on their attitude toward the potential merger.\textsuperscript{207} Corporations may worry that such information would cause volatile changes in the stock price and cause unnecessary, premature uproar. Insider trading regulations are meant to curtail such actions by severely punishing those who do not follow the rules.\textsuperscript{208} However, the problem with corporate flight data is that it would be hard to track the use of such information in trades since people could interpret the data differently. Not all investors may have access to the flight tracker websites, or even know how to use them. Some may also argue that since the data is available to the general public, it is not insider trading; but the flight tracking data may mean different things to each investor, depending on his level of knowledge. Insider trading is often difficult to prove considering it is “what is in the mind of the trader” that creates the crime.\textsuperscript{209} It is unclear whether the SEC would consider such data to fall into the confidential or privileged information category, but it is a risk that many companies do not want to take.\textsuperscript{210} Changing times, as well as the implementation of new programs, place the privacy versus transparency argument and their respective consequences at the

\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
\textsuperscript{206} Maremont & McGinty, Departure, supra note 1.
\textsuperscript{207} Id.
\textsuperscript{208} NEWKIRK & ROBERTSON, supra note 191.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
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forefront of current issues, but proving who is right is not an easy matter.

IV. APPLYING THE RESPECTIVE VIEWS IN DETERMINING THE FUTURE OF PUBLIC FLIGHT TRACKING

The debate over public flight tracking is not an easy one to resolve as neither side will be pleased with a balanced approach. On the one hand, there are the shareholders, investors, and other pro-transparency groups who take the position that the public release of information benefits their investment decisions. The information allows shareholders to make wise investments and gain knowledge regarding how their contributions are helping the company. On the other hand, businesses and their executives urge that the information is a potential threat that does more harm than good. The information risks the safety of executives, the privacy of company dealings, and the eruption of shareholder disputes. Although the Obama Administration has been more sympathetic to the first group in attempting to curtail the BARR Program, both sides of the argument invoke valid reasoning.

A. THE SHAREHOLDER VS. EXECUTIVE PERSPECTIVE

For investors, public flight tracking data allows them to glean a wealth of information regarding the whereabouts of the top executives in a company. Are the executives spending their time and the investors' money traveling to productive meetings, thereby creating value for the company, or are they spending their "long days" at golf clubs and resorts? In fact, studies show that high personal jet usage by executives can be a sign of other potential problems within a company. If a company is willing to allow such extreme usage, then it is likely also showering its executives with large bonuses and other lavish perks, all of which are concerning and costly to an investor. If investors

211 Grant, supra note 12.
212 Id.
213 Id.
214 Grant, supra note 12; Murphy, supra note 47.
215 Maremont & McGinty, Highest Fliers, supra note 94.
216 Grant, supra note 12.
217 Id.
218 Id.
219 Id.
can see the early warning signs, they may change their views and avoid huge losses in the future. Shareholders rightly believe that buying into a company should provide them a more in-depth look into the company and assist them in making wiser investment decisions. Although a strong argument, investors should partake in research at the beginning, before purchasing securities. If investors cannot trust a company, then perhaps it is not one they should be investing in. Those encouraging transparency also argue that the public has a right to view information about “public airspace,” and because all airspace is part of the public domain, the argument is a rational one. However, there is a distinction between viewing the public arena of information and going too far into the private details. A clear line should be drawn between the two. Although the “identity of the passengers [and] purpose of the flights” are not revealed through flight tracking data, this argument completely ignores the fact that other sensitive information is revealed. A few private jet owners actually encourage public flight tracking, arguing that the information allows their family and friends to see where they are and make sure they are safe. For David Pomerance, Chief Operating Officer of Premier Aircraft Sales, those who insist on blocking the data obviously have something to hide, whether it is an extramarital affair or personal use of a business aircraft. Perhaps some executives are taking advantage of the program and have something to hide, but we cannot forget about those with legitimate reasons.

Businesses are not the only ones using private jets; many government agencies do as well, and often at the cost of the taxpayer. The above arguments can also be applied to the use of these jets. In 2005, records revealed that the governor of South Dakota used a government plane to attend his son’s basketball games and other social events, thereby infuriating taxpayers. The vast majority of Americans contribute to the air-traffic system by paying taxes on their commercial airline tickets, whereas other general aviation uses 16% of the air-traffic system and pays

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220 Maremont & McGinty, Jet Set, supra note 146.
221 Maremont & McGinty, Highest Fliers, supra note 94.
222 Murphy, supra note 47.
223 Id.
224 Grabell & Jones, supra note 44.
225 Id.
only 3% of the taxes. As a result, taxpayers feel that they have as much of a right to the flight data as anyone else.

Executives, on the other hand, argue that their safety and privacy would be jeopardized as a result of the information becoming public and easily accessible. Considering some of the top corporations employ high profile CEOs, the safety issue becomes an even bigger concern. For many businesses, their CEOs and other top executives are valuable assets and ones that they do not want placed at risk. Corporations view the publishing of the real-time tracking data as the equivalent of having big red targets on their backs. In a post 9/11 world, safety is one of the timeliest and most significant issues to take into account in terms of any sort of aircraft travel, and with many businesses urging their executives to use aircraft for both personal and business travel, it is clear that safety remains a top concern. Just as the general public would feel unsafe if their Global Positioning System (GPS) data were published for all to see, top executives feel the same way and often have more reason due to their notoriety. For Apple Inc.’s former CEO, Steve Jobs, public flight records would have revealed over ten trips to Memphis pertaining to his liver transplant. That information not only would have been a potential stock market mover, but also could have been considered an invasion of personal privacy. Health records are protected from the general public, so should the same protection not be afforded to other information relating to health matters? Although safety and privacy concerns are mentioned time and time again, corporations cannot emphasize enough how important those concerns are in keeping the BARR Program at status quo.

Businesses also worry that flight data may provide competitive rivals with valuable information, thereby tipping them off and leading to “corporate espionage.” This becomes an issue particularly when take-offs and landings tip off rivals to merger and acquisition talks. Further, some businesses, particularly Boyd

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226 Id.
227 Murphy, supra note 47.
228 Id.
229 Id.
230 Grant, supra note 12.
231 Id.
232 Maremont & McGinty, Departure, supra note 1.
233 Shane & Carneal, supra note 20, at 5–6.
234 Maremont & McGinty, Departure, supra note 1.
235 Id.
Bros. Transportation, use their corporate jets to conduct surprise visits and inspections at their various sites, but public data would take the "surprise" out of such visits and eliminate their purpose.\textsuperscript{236} Besides shielding the information from rivals and corporate employees, businesses also prefer to hold back such data from shareholders who could glean merger and acquisition information from the flight patterns and ultimately affect stock prices with their behavior.\textsuperscript{237} Not only does this create volatility in the stock market, it is also a serious crime in the SEC's eyes.\textsuperscript{238} Additionally, the release of too much corporate information triggers shareholder disputes, as shareholders have different views on how certain matters within a business should be treated.\textsuperscript{239} Shareholders will begin to disagree on matters, such as corporate spending and compensation, that are sometimes better left to those involved in the day-to-day operations of a business. Ultimately, the arguments may become ones not just between shareholders and corporations, but among shareholders themselves. Further, companies, to some extent, prefer to leave some matters to executives or officers to make decisions as they see fit. SEC rules require companies to disclose compensation information anyway, so the information is not being withheld from investors completely.\textsuperscript{240} Are these public filings insufficient to keep the investors in the loop? If shareholders are really in an uproar over the actions of a company, they always have the option of cutting ties and selling their stock. Many companies are not willing to give up their luxurious jets just yet; they stress that corporate jets are "vital business tools" that allow executives to attend multiple meetings in different locations, all in the course of a day, without dealing with the hassles and delays of airport security, often at a more efficient cost.\textsuperscript{241}

Although the proposed BARR change in early 2011 did not take away the program completely, forcing businesses to prove a "valid security concern" placed them in an even more difficult position.\textsuperscript{242} They would have had to wait for a death threat, harmful threat, or a recent terrorist act before they could re-

\textsuperscript{236} Murphy, \textit{supra} note 47.
\textsuperscript{237} Maremont & McGinty, \textit{Departure, supra} note 1.
\textsuperscript{238} NEWKIRK \& ROBERTSON, \textit{supra} note 191.
\textsuperscript{239} Maremont & McGinty, \textit{Departure, supra} note 1.
\textsuperscript{240} Ekblom, \textit{supra} note 157.
\textsuperscript{241} Maremont & McGinty, \textit{Jet Set, supra} note 146.
\textsuperscript{242} Murphy, \textit{supra} note 47.
quest that aircraft movements be blocked. This would be problematic as explained below:

Put more simply, only individuals and companies whose enemies have telegraphed their intentions in advance and in a “verifiable” way will qualify for the BARR Program, unless they have otherwise satisfied the IRS that the value of certain security measures paid for by an employer can be excluded from the income of the employee who is actually flying—a requirement that appears to have no nexus whatsoever to the “verifiability” of the threat.

Ultimately, even slight restrictions to the BARR Program are not enough of a compromise to satisfy the greatest concern of safety.

Shareholders and executives are in for a long fight. An improving economy will likely bring times of less scrutiny and allow big business to be left alone; but in a tough economy, Americans will always want to know what big business is up to and, more importantly, if investor money is put to good use. Regardless, Congress showed in its actions in November 2011 that it was not yet willing to put such strict restrictions on the BARR Program, and that privacy and safety concerns outweigh the concerns of groups that promote transparency and openness.

This does not come as much of a surprise in a country built upon a core freedom such as privacy, and one that understands the importance of safety, particularly relating to air travel after September 11, 2001.

B. THE IMPLICATIONS OF A CHANGE

If Congress changes the BARR Program, it must be prepared for the effects of change. Once one change is implemented, it will be difficult to stop further changes and limit their scope. The publication of ASDI data has implications far beyond the use of private aircraft by corporations. For example, private jets are used by celebrities, government officials and agencies, professional athletic teams, universities, and self-made millionaires, to name a few. They are used for good and bad, for business and leisure, for extravagance and efficiency. Nonetheless, the accessibility of information about them to the general public can sometimes involve a positive or negative implication.

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243 Shane & Carneal, supra note 20, at 14.
244 Id. at 15.
245 See Lynch, supra note 134.
246 Grabell & Jones, supra note 44; Maremont & McGinty, Highest Fliers, supra note 94.
1. Private Jet Use Beyond Businesses

Many celebrities, such as John Travolta, Oprah Winfrey, and Steven Spielberg, own private jets for personal use. Some of these planes are registered under different names; yet for others, regulatory filings easily reveal the operators. Therefore, if flight tracking is made completely public, should there be an exception for celebrities? They, of course, should have just as valid of a security reason as many well-known CEOs. Some may argue that they have an even more valid security threat compared to corporate executives. With the recent slew of celebrity stalkers and intruders, it is easy to see why there would be concern. However, if the FAA or Congress begins to play favorites and create exceptions, excluded groups will only retaliate, sparking further debate and controversy.

For avid sports fans, public flight tracking serves as a tool in obtaining pre-released information on potential coach or player changes. Just as businesses give their executives the privilege of traveling around in a luxurious, private jet, some universities do the same for their head coaches. Urban Meyer, the current football coach at Ohio State, was given personal use of a private jet as part of his compensation package. But private jets are also used by universities to fly potential coaches for negotiation talks. Usually at this stage, fans and students may only have suspicions of who the new coach may be, but flight tracking data can often confirm such talks. For example, when Penn State was on the prowl for a new football coach this year, the school used its private jet to fly in the prospect. As a result, speculation ensued far before any official announcement was made.

247 Maremont & McGinty, Highest Fliers, supra note 94.
248 Id.
251 Keh, supra note 250.
253 Id.
254 Id.
Universities are similar to corporations in the sense that they run day-to-day business and are likely to have similar concerns of privacy and security pertaining to public flight data. The insistence of privacy by businesses may inspire others with similar concerns to join in on the fight.

Although ASDI data is filtered out to exclude governmental and military operations, not all present and potential future government personnel hold the same privilege, as was the case in 2010, when then-Governor of South Dakota Mike Rounds was questioned about his personal use of a state plane. Will the BARR Program create further exceptions for government officials? Even more so, what should the rule be for political campaigners? Many candidates are likely using private jets along the campaign trail, but if they were using these jets for personal travel on the side, campaign donors would probably want to know. In the case of Governor Rick Perry, data from Flightwise.com, a flight tracker website, revealed suspicious information regarding a campaign contribution from Brian Pardo, a Texas businessman. Pardo gave Perry a hefty campaign contribution when he allowed Perry to use his corporate jet for two full days of flight travel. The campaign reimbursed Pardo $21,000, in compliance with campaign regulations, yet chartering the same plane would have cost three times that amount, leaving questions whether the reimbursement was too low. Private jets are useful for those running in a presidential campaign, allowing them to "arrive at events quicker [and] socialize with the crowd more," and providing them greater flexibility. Overall, making the flight data of government officials and those campaigning for government office public not only has positive implications for campaign donors and taxpayers, but also for regulatory agencies, which are better able to track suspicious contributions.

255 Access to Aircraft Situation Display (ASDI) and National Airspace System Status Information (NASSI), 76 Fed. Reg. 32,258–59 (June 3, 2011); Grabell & Jones, supra note 44.
257 Id.
258 Id.
2. An Aid in Catching Crime?

Public tracking data can also provide assistance in catching crime and fraud.\(^{260}\) One of Transportation Secretary Ray LaHood’s reasons in pushing for stricter restrictions on the BARR Program was that many private jet fliers, including drug dealers, were taking advantage of the easy path to secrecy through the block list.\(^{261}\) These are not the type of people Congress wishes to give such privileges. In fact, public flight tracking may help others track suspicious flights and prevent the transportation of illegal drugs across state and country borders. However, drug trafficking is not the only crime where private jets play a role.\(^{262}\) For those hiding money in an offshore account, a private jet with flight movements blocked from public view may seem like the perfect choice. The United States has a substantial interest in preventing tax evasion, and public flight records may assist in tracking some criminals and confirming suspicions.

On the other hand, with terrorism as great of a concern as it is today, public flight data may only end up assisting those who wish to commit acts of terrorism on the United States. On the tenth anniversary of 9/11, U.S. officials warned Americans of possible plans by terrorists to use small private planes in committing acts of terrorism.\(^{263}\) Even with heightened security at public airports, this possibility still exists today as private planes would allow terrorists to bypass security and create massive attacks, as long as they are able to find “sympathetic Westerners” to help with flight training.\(^{264}\) This strategy has been considered by al-Qaeda members as a way of easily carrying explosives across state lines and country borders, but officials insist there is no specific threat thus far, just a general warning to all people to remain vigilant.\(^{265}\) Although having public flight data in such an instance would not necessarily prevent a terrorist act in progress, it

\(^{260}\) Hughes, supra note 115.

\(^{261}\) Id.


\(^{265}\) Id.
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could still provide useful information and help officials target such terrorists by tracking test runs. Additionally, terrorists could try to plot against large American corporations as a way of hindering the economy. One way for them to target these companies is to aim for their CEOs. Public flight data thus places CEOs at an even greater risk of death or harm.\footnote{Murphy, supra note 47.} Regardless of the assistance that public data may provide, the threat indicates that private flying is still an area that safety officials cannot ignore.

3. Worldwide Applicability

New BARR changes may also cause some legislators to extend the policy of openness beyond aircraft movements. Imagine if every American’s license plate number was registered on an online database, and anyone could access a website that would publish real-time movements of the car no matter where the person went.\footnote{Id.} It is clear that much controversy would arise from a change like this. Americans would feel not only that their privacy was being invaded, but also that their safety was being compromised. Is this possibly the world of transparency that some legislators are aiming for? For now, government agencies are working together to keep GPS data safe by preventing electronic tolling and smartphone applications from selling or publishing real-time tracking data.\footnote{Shane & Carneal, supra note 20, at 8-9.} Others may argue that this is the price drivers pay by trading privacy for a “load of convenience.”\footnote{See, e.g., Christopher Caldwell, A Pass on Privacy?, N.Y. TIMES MAG., July 17, 2005, at 13.} With the reliance on technology that exists today, anything is possible, and Americans must be prepared for changes, whether that means complying with them or fighting back.

Another issue is to what extent public flight tracking should apply to international flights and public companies headquartered in foreign countries. Currently, the BARR Program applies to U.S. businesses and individuals; therefore, those planes registered in the United States are eligible for the program.\footnote{See, e.g., Christopher Caldwell, A Pass on Privacy?, N.Y. TIMES MAG., July 17, 2005, at 13.} But some businesses may question whether international flights should fall within the same scope. Additionally, investors of foreign corporations would have to check to see what flight track-
ing guidelines are in place for their respective countries. With business becoming more international, perhaps more uniform guidelines would make sense.

C. Future Projections for the BARR Program

Although the FAA announced in December 2011 that it would be curtailing its most recent change to the BARR Program, it also stated that a more “permanent policy” would be posted sometime in early 2012.\textsuperscript{271} As of the date of this comment, a new policy has not yet been announced. The FAA has made it clear that it will not be going back to the “valid security” concern restrictions implemented earlier in 2011.\textsuperscript{272} The 2012 Appropriations Bill proved that Congress is not yet ready to sacrifice the privacy of executives for the policy of openness.\textsuperscript{273}

Prior to the 2011 changes, the BARR Program remained untouched since its implementation in 2000 and continued to attract private jet owners with its simple process and privacy benefits.\textsuperscript{274} It is easy to see why the recent changes did not go over well with many. So, what is in store for the BARR Program? It appears that businesses can expect a stricter program, possibly one with a more formal process, as the one now does not require those requesting the block list to include any formal reasons for their request.\textsuperscript{275} Perhaps private jet owners will have to supply the FAA with at least some reason for their request, thereby separating the businesses and executives with legitimate reasons of privacy and safety from drug dealers, con-artists, and other criminals using the block list to the dismay of others. The FAA should be forewarned that a policy with too many exceptions will only cause further uproar, as no group feels they are in a lesser position to be protected than any other group. A more formal process could possibly be the first step in achieving the appropriate balance between the right to privacy and the policy of transparency.\textsuperscript{276}

\textsuperscript{271} FAA Press Release, supra note 129.
\textsuperscript{272} Lynch, supra note 134.
\textsuperscript{273} See id.
\textsuperscript{274} See Block Aircraft Registration Request (BARR) Program, supra note 16.
\textsuperscript{275} Grabell & Jones, supra note 44.
\textsuperscript{276} See Halstuk & Chamberlin, supra note 78, at 511.
V. CONCLUSION

The development of ASDI data and the emergence of flight tracker websites assist in the safety and upkeep of the air-traffic system but, unfortunately, at the cost of privacy to others.\textsuperscript{277} BARR Program advocates continue to fear that a process that was once so simple will be changed to a lengthy and difficult application process, all in an effort to prove to the FAA that those who wish to have their airplane movements blocked have earned that special privilege.\textsuperscript{278} To those who have used the BARR Program since its early inception, the potential changes come as a shock, as they fear for the compromise of the safety and privacy of company business dealings.\textsuperscript{279} The arguments leave many wondering which is more important: the freedom to see what others, particularly government officials and agencies, are doing, or the right to privacy for all.\textsuperscript{280} Regardless, the implications are plentiful and affect a class beyond corporate jet owners. Today the FAA may be taking away the privacy of executives and businesses, but tomorrow it may be your privacy. At the very least, the FAA should implement an updated program that addresses the concerns of private jet owners, but places restrictions on those who abuse the system. The right balance between privacy and government transparency is not an easy one to find, but it is one that provides oversight while allowing Americans to maintain the rights important to them.

\textsuperscript{277} Access to Aircraft Situation Display (ASDI) and National Airspace System Status Information (NASSI), 76 Fed. Reg. 32,258–59 (June 3, 2011).
\textsuperscript{278} Grabell & Jones, supra note 44.
\textsuperscript{279} Maremont & McGinty, \textit{Highest Fliers}, supra note 94.
\textsuperscript{280} Halstuk & Chamberlin, supra note 78, at 512.