

Private Airplanes & Politicians: Complex Issues, Complex Rules

March 2015

The use of private aircraft by elected officials and political figures attracts the media spotlight. Think Rep. Aaron Schock (R-IL) who recently announced his resignation from the House following press stories that (among other alleged conduct) he improperly flew on private aircraft for travel in his home state. The press-and government watchdog groups-pounce on allegations that an official has improperly used taxpayer dollars or campaign funds to pay for private aircraft flights or has impermissibly accepted a flight as a gift, or that a candidate has improperly accepted a flight as an in-kind contribution to his or her campaign. And these stories may focus on more than just the passenger on the private flight: news reports and a complaint by a watchdog group to the Office of Congressional Ethics (and copied to the U.S. Department of Justice (DOJ)) identified by name the private aircraft owners on whose aircraft Rep. Schock flew. Clearly, once the plane has taken off, dealing with allegations of improper use of private aircraft by a public official or candidate can be time consuming and costly, both for the passenger and for the aircraft owner. That's why, if a public official or candidate is on the passenger list for a private aircraft flight, it's important to know in advance how such flights can encounter legal turbulence and even, if necessary, when the most compliant path may just be to keep the plane in the hangar.

With the 2016 campaign season already underway, private aircraft use by individuals or groups involved in politics and government will increase. This raises the risk that the owners and operators of the private aircraft on which these individuals and groups may want to fly could find themselves in violation of the hodgepodge of federal, state and local ethics, campaign finance, and aviation laws, regulations,

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and rules that govern aircraft use by politically-involved persons. These laws, regulations, and rules are complex, vary from jurisdiction to jurisdiction and from political office to political office, and sometimes conflict with each other. This article provides a brief overview of these complex requirements, but in any individual case it is essential to analyze carefully how these rules specifically apply.

Ethics and Campaign Federal Rules Determine Who May Fly for Free, Who Must Reimburse, and Who May Not Fly at All

Generally, ethics rules limit the circumstances under which certain individuals involved in politics or government may travel on private aircraft. The individuals covered by these rules can, depending on the jurisdiction, include (i) officials, officers, or employees of a U.S. or foreign federal, state or local government or agency or government-owned or -controlled entity or company, (ii) candidates for elective office, (iii) political party officials, (iv) members of the military, (v) employees of a public international organization, (vi) persons acting in an official capacity for any of the foregoing, and (vii) staff, family members, or others traveling with them.

Campaign finance laws regulate the in-kind contribution of private air transportation to a political campaign. Persons subject to campaign finance laws include those who are traveling on private aircraft either (i) for purposes related to his or her campaign, or (ii) on behalf of or for the purpose of another person's campaign (such as campaign staff, family members campaigning for the candidate, authorized political party or political action committee representatives, and security or media personnel traveling with candidates in connection with a political campaign). In some instances, campaign finance laws and regulations may also apply to someone who is not yet a candidate, but is "testing the waters" for a potential campaign, and to someone traveling on behalf of a political action committee (including a "Super PAC") or political party, even though they may not be traveling for purposes of a campaign.

Taken together, ethics rules and campaign finance laws and regulations may prohibit an individual from taking a flight on a private aircraft, impose blackout periods on flights, require that the individual reimburse the aircraft's owner for a flight, and set specific rules for valuing a flight or for the reportability of the travel. Congressional rules, for instance, permit members of the United States Senate to pay for a flight on private aircraft either from personal funds, official funds (if it is travel for official purposes), or campaign funds. But, under the applicable valuation formula, such flights do not come cheap: for example, a Senator travelling alone, or with other non-congressional individuals, on such a flight must pay the owner of the aircraft the full cost of chartering a similar aircraft for the trip.

The relevant ethics rules and campaign finance laws may be contradictory. Even though the rules of the U.S. House permit a sitting member's campaign funds to be used to reimburse his or her flight on private aircraft when the flight is in furtherance of the member's official duties, federal campaign finance law prohibits payment for any flight on private aircraft from the funds of an "authorized committee [or] leadership PAC" of a candidate for election (or re-election) to the House. Because almost all sitting members of the House are also candidates for re-election to the House, campaign finance law trumps the House rule and, essentially, prohibits a House member from using campaign funds to pay for travel on private aircraft for any purpose,

whether campaign or official. House members running for the Senate or for President are, on the other hand, subject to the campaign finance rules for those elections, which differ from the House candidate rules.

Aviation Rules also Affect Who May Fly

In addition to the above campaign finance and ethics rules, aviation laws and regulations apply to owners and operators of aircraft and to passengers on such aircraft. Part 91 of the Federal Aviation Regulations (FARs), which regulates non-commercial aircraft operations, generally limits the receipt of compensation (including cost reimbursement) for flights operated under that section, including flights on which guests are on board. FAR Part 91 provides that if the carriage of a guest on an aircraft is within the scope of, and incidental to, the business of the aircraft operator, the operator may charge up to the cost (allocated to that flight) of owning, operating or maintaining the aircraft. If, however, the carriage of a guest on an aircraft is not within the scope of, and incidental to, the business of the aircraft operator, no charge of any kind may be made for the carriage of the guest.

FAR Part 91 provides an exception for political candidates, their agents or any persons traveling on behalf of a political candidate to the extent that such persons are required by applicable federal, state or local campaign finance law to pay for the flights. In that case, the aircraft operator under FAR Part 91 may receive compensation for the flights in an amount not to exceed what is required to be paid under applicable campaign finance law. However, this exception does not apply to former or current political officials or anyone traveling on behalf of a political action committee (including a Super PAC) or political party, even though they may be required by law or ethics rules to reimburse the aircraft operator for the flight, unless they are specifically traveling for purposes or on behalf of a campaign. Moreover, the exception does not apply to certain persons subject to laws that prohibit campaign travel on another person's private aircraft even if they are traveling for purposes or on behalf of a campaign. Among these persons are candidates for the U.S. House or persons traveling in connection with their campaigns as discussed above.

In sum, there may be circumstances in which an aircraft operator under FAR Part 91 may not accept any payment for the carriage of a guest, but the guest (for example, an elected official or a representative of a political action committee or political party) is subject to laws or regulations that prohibit the guest from traveling on a private aircraft unless he or she pays a specific amount for such travel. It is therefore important to seek legal counsel to determine how to navigate these circumstances to avoid violations of the aviation laws and regulations and the unwanted scrutiny that accompanies alleged violations of the ethics and campaign finance laws.

Wiley Rein regularly counsels clients on, and is particularly knowledgeable about, the intersection of these disparate laws and regulations. Our multidisciplinary capabilities give us unique insight to navigate the arduous rules and regulations that govern aircraft use by politically-involved persons.

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