

Podcast: When Should Presidential Appointees Lawyer Up?

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You've worked in the trenches of the private or public sector, and now you've been granted the golden ticket, a job in the Biden Administration. Congratulations, your work has paid off, but you could find yourself opposite a subpoena in your future. What do you need to know in case of an investigation down the road?

Alfred Carry: Hi, I'm Alfred Carry, Counsel in the Government and Internal Investigations group here in Washington, DC. I'm joined today by Bob Driscoll, former Deputy Assistant Attorney General in the Justice Department and current Partner and Co-Chair of the Government and Internal Investigations group, also based in Washington, DC. Today, we're going to discuss some tips for the Presidential-appointed government neophyte.

So Bob, I read your recent article published in the Government Executive (for those who haven't, it's titled "[New Job in the Biden Administration](#)"), and in it, you offer some pragmatic advice to those stepping into leadership positions within the Biden camp, who may find themselves entangled and legal controversy. My first question to you is, most people assume that if they don't do anything wrong, that they won't come under investigation. Why is that wrong?

Bob Driscoll: Well, first, thanks for having me, Alfred. I'm happy to let our clients know about this. I think that perception you gave is most people's perception when they go into a government job, which is that, why would I create legal problems? I've lived most of my life without legal problems. Why would I be under investigation? And the answer is in government, lots of things that get investigated that aren't criminal or aren't even illegal, or don't even run afoul of the law. There are many times when agencies, or committees of Congress, Inspectors General, or other oversight bodies want to kind of dig behind the governmental decision and there can be an investigation whether or not there's illegality or wrongdoing. It doesn't mean that there won't be an investigation of a given matter. So for people who get appointed to the government, that's sometimes a surprise, and it's something they need to be ready for.

Alfred Carry: When I read your article, I was struck by some of the tone that made it seem that some of the decisions that are being made are political, but certainly it's true that not all investigations are political or partisan. So does your advice change if one political party controls all the levers of government?

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Bob Driscoll: It really doesn't. I mean, I think it's fair to say, I think we all, anyone who reads the paper knows that there are some investigations that are designed from the jump essentially to score political points. And we all kind of can see those coming. You know, frequently, if there's a Republican Congress and a Democratic White House or a Democratic Congress and a Republican White House, you know, those kinds of things happen all the time. But beyond that, there are things that are controversial that government wants to dig into that aren't necessarily partisan at all. And I think most fall into that, they may not get the same amount of press. I mean, just take a current example: I think of the blackouts and the power problems that people are having with this cold snap throughout the country now. I would imagine that there are going to be senior leadership at various governmental agencies who may get questions about the federal government's response to that. People at the Energy Department may get questions about how the government grids are set up. Just because there's not necessarily anything wrong, and I'm not suggesting anyone's done anything wrong, but members of Congress may haul those people down to have discussions about what is happening. And so there can be an investigation that's not necessarily politically motivated. It could be people just trying to get to the bottom of things. And so that's a very common occurrence for political appointees.

Alfred Carry: So what do you say to the worker who believes that her employer or government agency is going to represent them in that, when that Congress member sends out a request for information?

Bob Driscoll: And the answer is probably yes. You know, in most instances, when you work for the government, your legislative affairs team or the lawyers at your agency will deal with it, in the same way that most of the time, if you work for a company and there's a lawsuit against the company, you're not personally involved and you don't need your own lawyer. But there are occasions, particularly if you're a senior political appointee, where there can be a little bit of tension between what the department wants to do, or what the lawyers for the department want to do, and what's in your interest. And that's when you have to look into getting your own lawyer, because there can be difficult legal questions that affect you personally.

Alfred Carry: That's really good advice because I'm recalling some occasions where you and I have been on cases where, we've seen decisions where agency counsel declines to participate in some of these inquiries out of some deference to the inquiry.

Bob Driscoll: That's actually a very common occurrence now, which I think most people aren't aware of, is that the Inspectors General for the various cabinet agencies in Washington have recently been taking the position that they don't want counsel for a given agency, given cabinet agency present when they're interviewing witnesses, notwithstanding that the questioning may be about matters directly in the scope of employment. We're not talking about misconduct outside of employment. They don't want them there, and there's a feeling that somehow agency counsel will chill or make the person less forthcoming. And so you have this bizarre

circumstance where, because it's a work-related matter, the inspector general doesn't want agency counsel there. And in that instance, I think an employee ought to consider whether they should have their own counsel there.

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Alfred Carry: Which is good, because in these, at least in this particular setting, that witness should always have the right to counsel.

Bob Driscoll: Exactly.

Alfred Carry: So, which I guess leads me to my next question. How do you know when it's time to ask for help? How do you know when it's time to ask for the assistance of private counsel?

Bob Driscoll: Well, I think that that question kind of merges in with another question, which is, you know, can you pay for counsel? Which obviously on a government salary is not easy because everyone hears horror stories about how expensive lawyers are. The answer to both kind of stems from, make sure you get the insurance when you take a senior level job in government. There's insurance offered as a pay package, you can see from your HR department depending on what cabinet agency you're in, very cheap insurance for, you know, hundreds of dollars a year, probably a few hundred dollars a year, that covers you in certain circumstances. And a first call would be to that insurer to say, "hey, I'm subject to a subpoena," or "I've been asked to testify. Is this something for which I qualify for counsel?" You also could call your own counsel, if you have a relationship with somebody, or call somebody that you know is experienced with government investigations and ask, "is this something I need counsel for?" And that lawyer can have the conversation with the insurer with you as well.

But I think that anytime you sense that your position is deviating at all, either they're not going to provide you a lawyer, or your position is different. And I'll give another example you and I have both worked on. There are circumstances where an agency instructs someone not to respond to a subpoena because of executive privilege or other matters. The executive branch may have very good reasons not to want to respond and very good constitutional arguments that they shouldn't have to. However, it's the individual who's going to get held in contempt of Congress or of a grand jury or of whoever, if they don't appear when the subpoena requires them to appear. And that circumstance, I think the individual would want to be able to go through with their attorney, their own attorney, you know, what the risks are, and what they want to do, and how they want to balance being a team player for their agency with any personal liability they might risk.

Alfred Carry: If I were the, you know, the Biden appointee and I was working in the administration, and I know that I'm trained as a lawyer, I would think that if I just tell the truth, speak from the heart, and rely on my memory, that I would be okay — notwithstanding the quote from Lincoln, I think it was Lincoln who said this, you know, "show me a lawyer who represents themselves and I'll show you a bad lawyer" or something along those lines.

Bob Driscoll: "Someone who has a fool for a client," I believe is the quote.

Alfred Carry: That's right!

Bob Driscoll: Yeah, I think that's true that people think that. I also think that it's a bad idea because the huge risk for most investigations, and I think we've seen this, anyone who's kind of followed things in the paper and the history of big, high-profile government investigations. It is the conduct during the investigation, as much as the underlying facts, that get people in trouble more than anything else. And the main risk for people is a false statement. And before anyone jumps to conclusions and thinks that I'm suggesting that they would be untruthful— a "false statement" is anything that kind of deviates from what is later found to be the truth, can be alleged to be a false statement. And I think that one needs to have a lawyer to help prep to avoid some of the common problems that people have and to avoid falling into a false statement trap. As lawyers, we're familiar with verbal ticks and manners of speaking that people have that can lead them into trouble with false statements. And just, you have that ability to prep with your lawyer a little bit, go over the documents and have a few rules of the road spelled out for you.

Alfred Carry: What do you mean by verbal tick? Can you give me an example?

Bob Driscoll: Sure. One verbal tick a lot of people have is they use absolutes when they don't mean absolutes. If I ask you, "do you wear your seatbelt when you drive the car?" And you say, "I always wear my seatbelt." Well in a more sophisticated look at that, if you see that on transcript, once someone has said, "I always wear my seatbelt," and you find one instance in their life when they haven't worn their seatbelt, then that statement becomes a false statement. And so we train our witnesses to avoid using absolute statements unless they clearly mean absolute statements. And so just a little trick like that, where we'll tell our witnesses to say, "it is my practice to wear a seatbelt." That's a way of conveying that, yes, I generally wear my seatbelt, yes, I try to wear my seatbelt every time. But if there's an instance out there where you didn't wear the seatbelt, it doesn't make that prior statement false, and doesn't make you a liar. You know, that's the kind of verbal tick people have.

The other one I like to tell clients is the, "I'm sure I did something. You know, if I asked you where your notebook is, and you say, "oh, I'm sure I left it at home." When you hear me say that, everybody understands that you're not firmly committing to it being at home. You're saying, "I'm sure I did," you know, "it must be that." But it's also conveying that it's not that important. But when you see that in written transcript form, someone can say, well, Alfred testified that he was sure about that fact. And when that fact ended up not being true, they can say, well, he lied to this committee because he said, I'm sure I left it at home. And it turns out it was in the car. When, you know, in a common parlance, when we speak, you would never think that was a false statement. And all of a sudden, the cold light of day later, when you look at a transcript, it can read that way. And those are the kinds of differences we try to help clients with, which isn't, you know, an enormously lengthy period of time, but we just take an hour or two and prep with people to avoid those headaches that people have had historically.

Alfred Carry: Good. I'm going to switch gears a little bit and ask you about where the evidence might come from. And by that, I mean, what, if any advice do you have about the way people communicate versus on a phone over computer, via social media, on a personal or government-issued device? Do you have any tips there?

Once someone has said, "I always wear my seatbelt," and you find one instance in their life when they haven't worn their seatbelt, then that statement becomes a false statement.

Bob Driscoll: Yeah. This is a big issue in kind of modern government. I mean, it's been an issue for 20 years, but it's more and more important now. There are rules, particularly the Presidential Records Act and other rules that may apply to your agency, that govern where all your work information must be stored, and where all your work communications should go through. There is a temptation to work around those rules by having a personal phone and a government phone, or by using apps like Signal and other kinds of things. And I really encourage people to think twice before doing that going in, because think about the position you're getting yourself into. It's understandable, you know. What's happened with various government officials over time where, you know, they ended up having a separate channel of communication is: If there ends up being an investigation, are you really going to follow through and lie about whether or not that separate channel of communication exists? Then you've kind of compounded your problem. Because when you get a subpoena it will ask for, you know, your phone records and other records, whether it's a personal or work phone, if it has work-related communications on it.

And so your options at that point are either to admit that you have the separate channel that you've been using for communication, and produce those communications to the extent they exist, or to deny it, in which case, then you're truly in the false statement realm. And then you're into, depending on the circumstance, you know, you're into a felony type of situation if it got taken seriously. And so I think that a lot of people kind of say, "Oh God, I don't want everyone looking at my stuff." And they have an instinct to say, "I'll use Signal" or "I'll use my own phone." And I think that's something that really needs to be thought through in advance, because, unless you were really prepared to take a gigantic legal risk by not producing that kind of thing ever, it's going to create more problems than it's probably worth. You know, you don't want to end up violating the Presidential Records Act or, or doing something else. And just as a plus, in every kind of case we do, criminal, civil, everything else, what people always forget is, there's always the other end of that conversation. You can try to pretend that your Signal account doesn't exist, but guess what. Everybody you had a Signal conversation with has their end of the conversation, and unless your group of people you're communicating with are perfect, there's always a thread that is going to be discovered and it can be difficult for people. So I always advise people to avoid those kind of evasions of federal record-keeping laws if they can.

Before anyone jumps to conclusions and thinks that I'm suggesting that they would be untruthful – a "false statement" is anything that deviates from what is later found to be the truth.

Alfred Carry: Let's end on a high note, any positive? I mean, you were a former government worker and in leadership, any final remarks?

Bob Driscoll: Mainly, these are all hopefully unusual circumstances. Most people hopefully will go through their government careers and never be personally involved in something like this, never be in a front-page story. And so for most people, I think, being a political appointee is truly a great job. Because you sit atop a bunch of very competent career government employees that have expertise in the area you're managing. You're there in a policy position to kind of steer the ship of state. I mean, really, not to get too sappy about it, but it's the way our system should work, is there are elections. There are people that are appointed by the President that is elected, that get to steer this giant bureaucracy of a federal government in the direction that in some sense, at least indirectly, people have voted for. And you're part of that process by helping the government change direction. People should enjoy it. It's a wonderful opportunity to become part of the American system. There is a lot

people can learn. It can be great for your career afterward as well, and people should have fun and enjoy it. But also just keep in mind that it's not a risk-free endeavor, and if things, problems arise, it's always a great idea to call a lawyer.

Alfred Carry: Thanks Bob, for the discussion today, and thanks to our listeners for tuning in.

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