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WHEN TAINT TEAMS GO AWRY: LAUNDERING UNCONSTITUTIONAL VIOLATIONS OF THE FOURTH AMENDMENT

Edward S. Adams*
William C. Price Jr.**

INTRODUCTION

During a sunrise raid in April 2021, FBI agents executed a search warrant against attorney Rudy Giuliani's residence and office, seizing multiple phones and other electronic devices.[1] Knowing that these devices contained information protected by attorney-client privilege, prosecutors immediately sought a court-appointed special master to review the material and remove privileged documents before investigators began their work (though the prosecutors still wanted to conduct the initial search for responsive records).[2] This was a notable departure from the standard practice of using a taint team (also known as a filter team), in which a group of Department of Justice ("DOJ") investigators do an initial review of the seized materials to make privilege determinations before turning non-privileged documents over to DOJ prosecutors.[3] It was so remarkable that, in her letter requesting the special master for Giuliani's records, U.S. Attorney Audrey Strauss noted that use of a special master to make privilege determinations instead of a DOJ taint team was only appropriate in "certain exceptional circumstances" (while

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1. William K. Rashbaum et al., *F.B.I. Searches Giuliani's Home and Office, Seizing Phones and Computers*, N.Y. TIMES (May 4, 2021), [https://perma.cc/8J48-966U].

2. Josh Gerstein & Daniel Lippman, *Feds Seek Outsider to Sift Seized Giuliani Records*, POLITICO (May 4, 2021, 8:00 PM), [https://perma.cc/K7Y2-F8BQ].

3. Jim Brochin & Pat Linehan, *DOJ 'Taint Teams' Pose Privilege Risks for Defendants*, LAW360 (July 29, 2020), [https://perma.cc/R3W6-JVZ9].

also arguing that a taint team—even in this case—would adequately protect the attorney-client privilege).[4] While any case involving Mr. Giuliani would likely mean high-profile scrutiny of the prosecutors' actions, Ms. Strauss would have been correct to be concerned about a DOJ taint team conducting a privilege review *in any investigation* involving seized materials from an attorney.

Similarly, when the FBI raided attorney Michael Cohen's office, it seized documents protected under attorney-client privilege.[5] The DOJ wanted to allow Cohen and Trump's legal counsel to identify potentially privileged material and then use a taint team of DOJ prosecutors to determine which documents were actually privileged.[6] Unlike the Giuliani case, federal prosecutors forcefully argued against the use of a court-appointed third party to do the privilege review.[7] After Cohen and Trump objected, the court appointed a special master to conduct the privilege evaluation after Cohen and Trump's legal teams reviewed the documents first.[8] When the judge was dissatisfied with Cohen and Trump's leisurely progress on reviewing documents, she threatened to allow a DOJ taint team to comb through any files remaining after her deadline.[9] The fact that both the judge and Cohen and Trump saw the possibility of taint team involvement as such an effective carrot and stick, respectively, should alarm legal observers. If taint teams are truly effective at protecting attorney-client privilege, why would a federal judge threaten their use against the target[10] of an investigation in order to encourage compliance with a deadline?

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4. Letter from Audrey Strauss, U.S. Att'y, S. Dist. New York, to J. Paul Oetken, J., S. Dist. New York (Apr. 29, 2021), [https://perma.cc/Z2A8-9VZU].

5. Clare Foran, *Michael Cohen Raid and Attorney-Client Privilege: What Is a 'Taint Team'?*, CNN: POL. (Apr. 10, 2018, 5:29 PM), [https://perma.cc/6WX7-BS55].

6. *See* Alan Feuer, *Judge Orders Document Review in Cohen Case to End Next Week*, N.Y. TIMES (June 26, 2018), [https://perma.cc/HJ23-GLKQ].

7. *See* Gerstein & Lippman, s*upra* note 2.

8. *See* Feuer, *supra* note 6.

9. *See* Gerstein & Lippman, *supra* note 2.

10. In this Article, we will occasionally use the terms "target" and "defendant" more or less interchangeably. We acknowledge that they are distinct concepts—a target of an investigation may never become a defendant if she is not indicted. However, we will use both terms in this Article to refer to someone whom the federal government is investigating or has investigated.

Taint teams have received newfound publicity and skepticism in the wake of media coverage of the Giuliani and Cohen cases.[11] The government has turned to taint teams with increasing frequency in recent years, claiming that it is attempting to preserve attorney-client privilege during the execution of search warrants.[12] Taint teams are most often used when the government uses a search warrant to seize large amounts of electronically stored documents, sometimes with a secret warrant (so the target has no notice of either the investigation or the search).[13] Secret warrants and wiretaps have become popular tools for investigators of white-collar crimes,[14] though the warrants and their underlying affidavits are often constitutionally deficient.[15] In their most common iteration, taint teams and their underlying search warrants violate a myriad of constitutional rights by allowing prosecutors prejudicial access to privileged materials, often through knowingly unreasonable searches. While the primary use of a taint team is to protect underlying attorney-client privilege, the structure of these teams casts doubt on the effectiveness of this goal. Taint teams thus *launder* unconstitutional searches, giving the resulting evidence a clean bill of health. Yet, courts and commentators alike are critical of these practices, noting that their use is insufficient to protect attorney-client privilege and its attendant constitutional rights.[16]

Imagine a situation, for example, where a corporate executive sends and receives hundreds of emails from dozens of people a day, including people with whom she has an attorney-client relationship. Further assume this particular executive is

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11. Eileen H. Rumfelt, *"Taint Team" or Special Master: One Recent Analysis*, AM. BAR ASS'N (Sept. 27, 2018), [https://perma.cc/CSC6-GFHZ].

12. *See id.*

13. Robert J. Anello & Richard F. Albert, *Government Searches: The Trouble with Taint Teams*, N.Y.L.J. (Dec. 5, 2016), [https://perma.cc/V9RQ-2336].

14. *See, e.g.*, David Horan, *Breaking the Seal on White-Collar Criminal Search Warrant Materials*, 28 PEPP. L. REV. 317, 318-19 (2001).

15. *Id.* at 318.

16. Brochin & Linehan, *supra* note 3; *see also* Rashbaum et al., *supra* note 1; United States v. SDI Future Health, Inc., 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006) (stating that federal courts have often "taken a skeptical view of the Government's use of 'taint teams.'"); *In re* Grand Jury Subpoenas, 454 F.3d 511, 522 (6th Cir. 2006) (holding that taint-team procedures used "would present a great risk to the appellants' continued enjoyment of privilege protections.").

under investigation by the government, and investigators use shaky affidavits to get a secret warrant for the entirety of her corporate and personal emails. The DOJ agrees to implement a taint team to review seized materials before forwarding to prosecutors documents it considers non-privileged. Because of the secret warrant, the DOJ does not have to tell the executive about the warrant or its investigation, leaving her in the dark.[17] When prosecutors seize her email accounts, members of the DOJ gain access to privileged conversations between her and her attorneys, including communications about legal advice, legal strategy, and trial preparation. This unfettered, ongoing access to thousands of emails is clearly beyond what was contemplated when the Fourth Amendment was drafted.[18] Aside from Fourth Amendment concerns, the executive in this example has no ability to review the procedures in place to ostensibly protect her privilege, to help identify potentially privileged documents (by providing names of attorneys or keywords to search), or to challenge any of the privilege determinations of the taint team (which, since it consists of DOJ prosecutors, likely takes a narrower view of privilege than the executive and her attorney would). In the end, prosecutors would receive troves of emails (including ones wholly unrelated to the investigation), which underwent cursory privilege review conducted without any involvement from the person who owned the privilege and had incentive to protect it. In settings like this, it is not hard to understand how privileged documents wind up in the hands of the prosecution.

These concerns grow exponentially if the target of the investigation is a lawyer as opposed to a non-lawyer business executive. The DOJ could then potentially have access to the suspect's privileged communications with her legal counsel and the privileged communications between the lawyer and all of her clients. For example, her clients (who are not involved in or targets of the investigation) send emails to her asking for legal

17. *See, e.g.*, Horan, *supra* note 14, at 323 (describing the increase in sealed probable cause affidavits in white collar criminal investigations).

18. *See, e.g.*, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV 547, 550-52 (1999) (providing a brief summary of the historical understanding of the role of the Fourth Amendment).

advice, secure in the knowledge that the communications will be privileged. However, these communications may no longer be confidential since the DOJ could see them as part of the seized material. In this way, taint teams risk violating the rights of the targets of investigations *and* uninvolved third parties. Such unfettered access is an unacceptable intrusion into the attorney-client relationship and could undergird violations of constitutional rights.

In theory, taint teams are supposed to weed out privileged communications so that the prosecution team can only see non-privileged materials.[19] In practice, conflicts of interest and vague taint team procedures frequently fail to protect attorney-client privilege.[20] Emails and documents can fall through the cracks and end up in the hands of the prosecution, even if the taint team knows that the person sending or receiving the communication is a lawyer.[21] The taint team structure also lends itself to more intentional misconduct because both the taint team and prosecution team are in the same organization, report to the same leaders, and often share the same goals.[22] When the taint team passes privileged information to the prosecution, there is no clear remedy. Courts have been reluctant to suppress such evidence using the exclusionary rule, often applying the good faith exception because the prosecution used a taint team in the first place.[23] Further, courts have rarely found the requisite prejudice from disclosure of privileged communications to warrant remedies under the Fifth or Sixth Amendments, such as a new trial or dismissal of the indictment.[24] Because of this judicial reluctance, the government has little incentive to fix the myriad of problems that taint teams offer. This lack of remedies creates

19. Brochin & Linehan, *supra* note 3.

20. *Id.*

21. *Id.*

22. *See id.*

23. *See, e.g.*, United States v. Jarman, 847 F.3d 259, 265-66 (5th Cir. 2017) (applying the good faith exception to the exclusionary rule, saying that "evidence must be 'viewed in the light most favorable to the' Government.").

24. *See* United States v. SDI Future Health, Inc., 464 F. Supp. 2d 1027, 1036-37, 1047-53 (D. Nev. 2006); *see also* United States v. Elbaz, 396 F. Supp. 3d 583, 595-96 (D. Md. 2019) (holding that despite the prosecution having access to privileged materials, there was not a substantial violation of the defendant's Fifth or Sixth Amendment rights).

an unconstitutionally untenable situation in which prosecutors are free to intentionally and unintentionally disregard the rights of targets and non-targets alike, with little to no recourse. This must change.

In this Article, we examine the legal landscape in which taint teams operate, why taint teams are constitutionally problematic, and propose a solution to protect the attorney-client privilege. In Part I, we will first describe what taint teams are supposed to protect—attorney-client privilege. Next, we review how a taint team gets its documents to review, namely the doctrine surrounding (secret) search warrants. Part I ends with a non-exhaustive summary of remedies available when attorney-client privilege is violated during searches. In Part II, we explain the current policies and practices surrounding taint teams, including sources of procedure for taint teams and the use of warrants for electronic information. Part II concludes with a summary of the lopsided pre-2019 split in authority on the use of taint teams in federal criminal prosecutions. Part III is devoted to examining the constitutional and practical shortcomings of the current formulation of taint teams. Using a 2019 case that forcefully criticized the use of taint teams, we explore constitutional issues under the Bill of Rights and separation-of-powers doctrine. Part III concludes with a discussion of the federal government's proposed solution to these judicially identified deficiencies and an explanation of why that solution is wholly inadequate. In Part IV, we review a series of possible solutions already in practice in various jurisdictions and then propose a new solution to resolve the constitutional issues of taint teams and protect attorney-client privilege. Specifically, we propose a new structure that locates privilege-review teams as a function within the federal public defender's office, where judicial officers make recommended privilege determinations subject to judicial review. We explain that this solves the Fourth Circuit's constitutional criticisms while simultaneously recognizing the need to review potentially privileged materials by someone other than the target of an investigation.

I. ON A COLLISION COURSE: ATTORNEY-CLIENT PRIVILEGE AND (SECRET) SEARCH WARRANTS

The legal landscape surrounding taint teams is admittedly in flux. Before 2019, the weight of authority and legal momentum favored the use of taint teams. That began to change in 2019 when the Fourth Circuit joined the Sixth Circuit in its disapproval of taint teams. This Part will explain the aforementioned legal landscape. First, we will briefly describe the attorney-client privilege and its importance to the American legal system. We will then review the document underlying taint teams—the search warrant. After a short discussion of Fourth Amendment search doctrine, we will summarize how the use of secret warrants has increased, thereby removing the target of the investigation from any discussions around privilege. After reviewing attorney-client privilege and Fourth Amendment doctrine, this Part concludes with a brief summary of remedies available in federal criminal trials for violations of privilege or unconstitutional searches.

A. Attorney-Client Privilege Is an Integral Part of the American Legal System

Attorney-client privilege is one of the oldest recognized "privileges for confidential communications."[25] Indeed, the earliest forms of attorney-client privilege in English common law can be traced back to at least 1577.[26] Generally, this privilege protects communications between the lawyer and the client if those communications are confidential and concern legal advice.[27] The privilege itself belongs to the client, though the attorney can assert the privilege on the client's behalf and has

25. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Hunt v. Blackburn, 128 U.S. 464, 470 (1888). Attorney-work-product doctrine is a related but narrow concept covering documents and other things that reveal an attorney's thinking on a matter but do not fall under attorney-client privilege. *See, e.g.*, *Upjohn Co.*, 449 U.S. at 400-01. For the purposes of this Article, we will focus only on attorney-client privilege.

26. *See* Jason Batts, *Rethinking Attorney-Client Privilege*, 33 GEO. J. LEGAL ETHICS 1, 13-14 (2020).

27. *In re* Lindsey, 148 F.3d 1100, 1103 (D.C. Cir. 1998). Attorney-client privilege does not protect all communications with lawyers, just those concerning legal advice. *See, e.g.*, *In re* Grand Jury Subpoena (Mr. S.), 662 F.3d 65, 71 (1st Cir. 2011).

duties to maintain the confidentiality of client information.[28] Attorney-client privilege is not absolute; it may be waived, either intentionally or through inadvertent disclosure.[29] Further, the privilege does not attach to when a client gives information to the attorney for the purpose of perpetrating a fraud or committing a crime.[30] In the United States, attorney-client privilege is considered an integral part of the Sixth Amendment's promise of effective counsel[31] because it "encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice."[32] By encouraging full and frank communication, attorney-client privilege also helps to ensure competent representation of clients by attorneys.[33] Without this privilege and its incentive for full disclosure, attorneys would not be able to represent their clients competently because they would not have full information.[34] Moreover, attorney-client privilege is grounded in common law and not statute, so it has evolved to continue to protect communications between lawyers and clients and promote its underlying policies.[35]

B. Just the Bare Necessity: Search Warrants, Wire Taps, and Fourth Amendment Doctrine in White Collar Cases

Because of its central role in establishing access to the potentially privileged materials, our discussion of taint teams must consider Fourth Amendment doctrine. For a taint team to lawfully gain access to material to search, the investigators must

28. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 173 (4th Cir. 2019); *see also* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2018).

29. FED. R. EVID. 502.

30. *In re* Grand Jury Proceedings, 401 F.3d 247, 251 (4th Cir. 2005). Prosecutors and defendants may disagree over whether this crime-fraud exception to attorney-client privilege applies, and this dispute *should be* resolved by the court.

31. *See* U.S. CONST. amend. VI.

32. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

33. *See id.* (citing Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).

34. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2021) (requiring that lawyers provide competent representation of their clients).

35. *Upjohn Co.*, 449 U.S. at 389.

either get a warrant to search and seize the documents or rely on voluntary surrender of the documents.[36]

The Fourth Amendment to the United States Constitution establishes the right of the people to be free from unreasonable searches and seizures.[37] The Fourth Amendment also requires that a warrant for a search must be based on probable cause, must be supported by a sworn statement, and must describe with particularity the place of the search and the things or persons to be seized.[38] The purpose of the warrant requirement is to ensure that any searches are both necessary and as limited as possible.[39] To establish probable cause, the warrant must rely on current (i.e., not stale) information that points to a nexus between the place to be searched, the items to be seized, and the likelihood of a criminal violation of law.[40] The particularity requirement in the Fourth Amendment is to prevent searches that are so broad that the agents executing the search have "unbridled discretion to rummage at will among a person's private effects."[41] In short, the search warrant must be "carefully tailored" to only those things that there is probable cause to search because there is a nexus between the search and potential criminality—wide-ranging "exploratory searches" are prohibited.[42] If a search is deemed unconstitutional, the court may exclude the evidence at trial.[43]

Congress imposed additional requirements and allowances for when prosecutors seek access to electronically stored information ("ESI"). Specifically, the government may require providers of electronic communication services to disclose communications stored for 180 days or less only if a court of

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36. *See generally* H. MARSHALL JARRETT ET AL., SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS (3d ed. 2009); *see also infra* text accompanying notes 37-70.

37. U.S. CONST. amend. IV.

38. *Id.*

39. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

40. *See* United States v. Miller, 24 F.3d 1357, 1361 (11th Cir. 1994); United States v. Harris, 20 F.3d 445, 450 (11th Cir. 1994); United States v. Buck, 813 F.2d 588, 590-92 (2d Cir. 1987).

41. United States v. Galpin, 720 F.3d 436, 445 (2d Cir. 2013) (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)).

42. Maryland v. Garrison, 480 U.S. 79, 84 (1987).

43. *See infra* Section I.C.

competent jurisdiction issues a warrant.[44] Disclosure of communications stored longer than 180 days may be required via warrant, court order, or grand jury subpoena.[45] In either case, if a warrant is used, it may be issued *without notice* to the subscriber (i.e., the owner of the ESI).[46] If a court order or subpoena is used, notice is required.[47] However, prosecutors may delay providing notice for up to ninety days, creating a window during which the accountholder would have no idea that their service provider had turned over their ESI.[48] In totality, this scheme allows investigators to build a case while the subscriber unknowingly continues communication through the provider, which they otherwise might not do if the privacy breach were known.

Warrants for materials that will be passed through a taint team are not exempt from these requirements.[49] Valid warrants cannot overcome attorney-client privilege—in fact, privileged documents and communications receive special consideration under Fourth Amendment doctrine because such privileged communications possess an inherent, intrinsic expectation of privacy.[50] Because of this, when a court approves a search warrant that targets potentially privileged information, especially ESI, it often includes an addendum directing the government to establish a method for ensuring that "no attorney-client privileged communications will be inadvertently reviewed by the prosecution" and only requiring a DOJ taint team if an inadvertent disclosure occurs.[51]

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44. 18 U.S.C. § 2703(a). A "court of competent jurisdiction" can include both the federal district court with jurisdiction over the offense being investigated and the federal district court in the district in which the ESI is being housed. 18 U.S.C. § 2711.

45. 18 U.S.C. § 2703(b).

46. 18 U.S.C. § 2703(b)(1)(A).

47. 18 U.S.C. § 2703(b)(1)(B)(i)-(ii).

48. 18 U.S.C. §§ 2703(b)(1)(B), 2705.

49. Claudia G. Catalano, Annotation, *Criminal Defendant's Rights Under Stored Communications Act, 18 U.S.C.A. §§ 2701 et seq.*, 11 A.L.R. Fed. 3d § 1 (2016).

50. United States v. Skeddle, 989 F. Supp. 890, 894 (N.D. Ohio 1997); *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 806 (1994) (arguing that searches of attorneys' offices should be deemed constitutionally unreasonable unless extraordinary on-site measures are taken to ensure privileged material is not seized).

51. Memorandum in Support of Defendant's Motion to Suppress at 5, United States v. Adams, No. 17-CR-00064, 2017 WL 7796418 (D. Minn. Sept. 28, 2017). In this case, failure by the prosecution to establish and follow adequate procedures as outlined in the search warrant addendum led to exposure of privileged materials to the prosecution team, leading

The protections afforded to targets of investigations when a search warrant targeting potentially privileged information is directed at a third party (like an internet provider or email server host) has varied over time and jurisdiction. At its inception, a special doctrine granted the target of the investigation the ability to attempt to intervene before the search occurs. This doctrine—the *Perlman* doctrine—is "the legal principle that a discovery order aimed at a third party may be immediately appealed on the theory that the third party will not risk contempt by refusing to comply."[52] A legal privilege must be implicated for the *Perlman* doctrine to apply.[53] In essence, it provides an instant vehicle for the target of the investigation to attempt to guard his interests.[54] If the FBI sought a warrant to seize from Google a Gmail account that an attorney used, the attorney would be able to challenge the warrant under the *Perlman* doctrine by appealing the warrant before the search has occurred.

Over time, courts in various jurisdictions have cabined the *Perlman* doctrine's defendant-friendly breadth. Most notably, the trend in federal appellate courts has been to limit *Perlman* appeals only to non-parties, meaning that targets of investigations and defendants are foreclosed from *Perlman*'s protection.[55] Still, other courts decline to apply *Perlman* to criminal cases altogether outside of the grand jury context.[56] Because of this dual narrowing of *Perlman*, the doctrine is not a reliable avenue for targets of investigations to challenge demands on third parties for potentially privileged information. As such, thorough safeguards are required whenever search warrants target potentially privileged information. When warrants are secretly issued and cannot be challenged on privilege grounds through an adversarial

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to subsequent litigation. *Id.* This calls into question the actual efficacy of such addenda. *See generally* United States v. Adams, No. 17-CR-00064, 2018 WL 5311410 (D. Minn. Oct. 27, 2018).

52. *In re* Search of Elec. Commc'ns in the Acct. of chakafattah@gmail.com at Internet Serv. Provider Google, Inc., 802 F.3d 516, 526 (3d Cir. 2015).

53. *Id.*

54. *Id.*

55. *See generally* Bryan Lammon, Perlman *Appeals After* Mohawk, 84 U. CIN. L. REV. 1 (2016) (discussing how *Perlman* has been limited by federal appeals courts).

56. *See, e.g.*, United States v. Copar Pumice Co., 714 F.3d 1197, 1207 (10th Cir. 2013) (noting the circuit's narrow application of *Perlman* to only include grand jury proceedings).

process, the need for additional protections to preserve privilege becomes even more acute.

Wiretaps (i.e., electronic surveillance) constitute a special kind of Fourth Amendment search that poses unique dangers to liberty, especially privileged communications between an attorney and her client, because of the ongoing nature of the search and the lack of notice to the targets.[57] Recognizing this danger, Congress passed specific provisions limiting the use of wiretaps as part of Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 ("Title III").[58] Title III specifically authorizes ex parte issuance of a wiretap for certain enumerated offenses.[59] Title III also purports to limit the duration of wiretaps, only authorizing renewable periods of thirty days and only allowing the wiretap as long as "is necessary to achieve the objective of the authorization."[60] In order to obtain a wiretap, a district court judge must be convinced that there is probable cause a crime is being committed using the device to be monitored;[61] must be convinced that other investigative procedures are either unlikely to succeed, are too dangerous, or have already been tried and failed;[62] and must believe that the government has steps in place to avoid intercepting conversations that have nothing to do with the alleged criminal activity at issue.[63] Failure to establish these elements can result in the fruits of the wiretap being suppressed.[64] Nevertheless, challenges to federal wiretaps are usually not successful despite the legal requirements being clear.[65]

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57. *See* Berger v. New York, 388 U.S. 41, 63 (1967) ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.").

58. 18 U.S.C. § 2516; *see also* United States v. Gigante, 538 F.2d 502, 503 (2d Cir. 1976) (recognizing that Title III was included by Congress to "ensure careful judicial scrutiny of the conduct of electronic surveillance and the integrity of its fruits").

59. *See* 18 U.S.C. § 2516(1)(a)-(s).

60. 18 U.S.C. § 2518(5).

61. 18 U.S.C. § 2518(1)(b).

62. 18 U.S.C. § 2518(1)(c).

63. 18 U.S.C. § 2518(5); *see also* Scott v. United States, 436 U.S. 128, 136-40 (1978) (noting that minimization is a fact-intensive inquiry that depends on the circumstances of each case).

64. 18 U.S.C. § 2518(10)(a)(i)-(iii).

65. *See, e.g.*, United States v. Young, 822 F.2d 1234, 1237 (2d Cir. 1987) (denying a challenge to a wiretap on the grounds that the necessity requirement was not met); United States v. Goffer, 756 F. Supp. 2d 588, 597 (S.D.N.Y. 2011) (denying a challenge to a wiretap

In practice, repeated renewals can lead to wiretaps that last for many months, even though they are theoretically limited. In 2020, wiretaps authorized by federal courts ran for over forty-six days on average, with about one-third of wiretaps running longer than the initial thirty-day period.[66] The longest wiretaps ran for 270 days.[67] Further, the government does not seem to take minimization seriously. The average federal court-authorized wiretap in 2020 intercepted thousands of communications, with some wiretaps generating thousands of intercepts *per day*.[68] These long-running, expansive searches—which are initiated and approved in ex parte procedures[69]—are a particular concern to attorney-client privilege. Because of the nature of the proceedings; the target (and her attorney) have no notice of the search, cannot challenge the underlying warrant, cannot contest taint-team procedures, and cannot assert privilege claims before prosecutors receive potentially privileged information.[70] Because there is no possibility of an adversarial process during the search and document review processes, and because challenges to federal wiretaps are rarely successful, additional safeguards are necessary to protect the attorney-client privilege.

C. Violations of Attorney-Client Privilege During Investigations, the Constitution, and Available Remedies

Ideally, the target of an investigation would know about a warranted search and be able to prevent privileged documents from ever being in the government's possession, either by voluntarily turning over non-privileged responsive documents or by litigating the matter. Once the government has seized potentially privileged materials from an individual, the remedies

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on minimization grounds even though the court acknowledged that the government was deficient in minimizing the wiretap to avoid capturing privileged conversations).

66. *See* U.S. CTS., UNITED STATES DISTRICT COURTS REPORT OF COURT-AUTHORIZED INTERCEPTS OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS PURSUANT TO 18 U.S.C. 2519 FOR THE REPORTING YEAR 2020 (2020), [https://perma.cc/Y6BN-CCAP].

67. *Id.*

68. *Id.*

69. *See* 18 U.S.C. § 2516(1).

70. *See* discussion *infra* Section I.C.2.

for that individual become significantly more limited, and the potential for harm to the defendant becomes significantly greater. This Section will summarize how attorney-client privilege violations can violate constitutionally afforded rights through the lens of several remedies available when privilege is violated (with or without a taint team) in the course of a search or trial. As we will explain, these remedies are insufficient because they are rarely applied in practice.

1. Exclusion of Evidence: The Fourth Amendment Remedy Without Teeth

Under the Fourth Amendment, a defendant can seek to exclude evidence gained from an unconstitutional search using the exclusionary rule.[71] Application of the rule typically involves applying a balancing test between the cost of excluding the evidence and the deterrent effect on misconduct in future searches.[72] The fruit of the poisonous tree doctrine allows courts to extend the exclusionary rule to exclude evidence found in the chain of events resulting from an unconstitutional search.[73] For example, in *Wong Sun v. United States*, the Court held that narcotics found during defendant James Wah Toy's arrest could not be used against him because there was no legal or factual basis for a warrant, making the search unconstitutional.[74] Therefore, the Court reasoned that "the narcotics were 'come at by the exploitation of that illegality' and hence that they may not be used against Toy."[75] Because the lower court did not properly apply the exclusionary rule to exclude the evidence, the Court ordered a new trial for the *Wong Sun* defendants.[76] In practice though, courts have recognized myriad doctrinal exceptions to the

71. *See, e.g.*, United States v. Jarman, 847 F.3d 259, 264-65 (5th Cir. 2017).

72. Hudson v. Michigan, 547 U.S. 586, 591 (2006).

73. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). However, the fruit of the poisonous tree doctrine does not automatically apply. To determine whether it applies, courts must ask "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

74. *Id.* at 488.

75. *Id.*

76. *Id.* at 493.

exclusionary rule to avoid excluding evidence (which, for some reason, is viewed as an extreme remedy).[77]

One prominent exception to the exclusionary rule is *good faith*.[78] The good faith exception applies if an objectively reasonable officer could rely on the warrant used *even if* it is later found to be invalid.[79] The good faith exception gives deference to the magistrate's probable cause determination and judgment.[80] This good faith exception does not apply, however, in a situation where "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth."[81] The exception also does not apply if the magistrate "wholly abandoned his judicial role."[82] Finally, if the warrant is so deficient that officers cannot reasonably believe that it is valid, the good faith exception does not apply.[83] If, for example, the warrant gives the DOJ access to a defendant's email (inclusive of privileged conversations) for months at a time, it is not "stating with particularity" the subject of the search and is therefore facially deficient.[84]

The *independent source doctrine* is another exception to the exclusionary rule. If the police can show that the same evidence was discovered later in the course of the investigation and without a constitutional violation, then the evidence need not be excluded.[85] The Court held that the ultimate question for whether the independent source doctrine should apply "is whether the search pursuant to [the] warrant was in fact a genuinely independent source of the information and tangible evidence at

77. *See, e.g.*, United States v. Leon, 468 U.S. 897, 905, 909 (1984).

78. *Id.* at 913.

79. *Id.* at 918-22.

80. *Id.* at 921.

81. *Id.* at 923 (citing Franks v. Delaware, 438 U.S. 154 (1978)).

82. *Leon*, 468 U.S. at 923 (citing Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)).

83. *Id.*

84. *See* United States v. Pearson, No. 1:04-CR-340, 2006 WL 8442594, at *7 (N.D.N.Y. May 24, 2006).

85. *See* Murray v. United States, 487 U.S. 533, 540-41 (1988).

issue here."[86] The independent-source doctrine can apply even when the police already possess the evidence in question.[87]

The *inevitable discovery exception* to the exclusionary rule is similar to the independent source doctrine. In *Nix v. Williams*, the Court used the inevitable discovery exception to ensure it did not put the government in a worse position than if the police did not violate the law.[88] To avoid exclusion of the evidence, the prosecution had to prove an independent chain of events would have occurred in the absence of a constitutional violation and that independent chain of events could have led to discovery of the evidence.[89] If this independent chain of events would have led to the inevitable discovery of the evidence, it need not be excluded.[90]

Another exception to the exclusionary rule is *attenuation*.[91] Attenuation looks at whether the discovery of the evidence is "sufficiently distinguishable" in time, location, or means to avoid the taint of an earlier illegal search.[92] This has been used in cases such as *Wong Sun v. United States*, where the Court held that Wong Sun's confession was admissible.[93] The Court found that "[o]n the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'"[94]

As should be apparent from this discussion, the exclusion of evidence is not a sufficient remedy for taint-team violations. First, the exclusionary rule is limited to criminal trials, so it would not provide any remedy during grand jury proceedings to prevent indictment in the first place.[95] Second, the number of recognized exceptions (and often the creative application of such exceptions)

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86. *Id.* at 542.

87. *Id.* ("So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply.").

88. 467 U.S. 431, 432 (1984).

89. *Id.* at 447-50.

90. *Id.* at 447.

91. Wong Sun v. United States, 371 U.S. 471, 487 (1963).

92. *See id.* at 488 (quoting MAGUIRE, *supra* note 73, at 221).

93. *Id.* at 491.

94. *Id.* (citing Nardone v. United States, 308 U.S. 338, 341 (1939)).

95. *See* United States v. Leon, 468 U.S. 897, 909 (1984).

can render the exclusionary rule essentially toothless. Moreover, excluding certain evidence from the record would not be enough to remedy the immense strategic harm of taint teams. Improper taint-team practices can give the prosecution access to trial preparation notes, confidential attorney-client communications discussing trial strategy and the incident itself, and much more. Those insights could severely hinder or even derail a defendant's case without ever being introduced into evidence. Excluding trial preparation notes from trial evidence would do little to remedy the fact that prosecutors had already adjusted their strategies and tactics after seeing the defense's playbook.

2. A New Trial: A Sixth Amendment Issue to Remedy Prejudice

The Sixth Amendment establishes several rights to ensure fair trials for defendants in federal criminal prosecutions, including the right to effective assistance of counsel.[96] If attorney-client privilege is compromised and interferes with the defendant's right to effective assistance of counsel, the remedy for that prejudice against the defendant might be a new trial.[97] Because access to attorney-client communications can heavily influence the prosecution's trial strategy, this may be the most just remedy in that situation. For instance, the Eighth Circuit held that "effective assistance [of counsel] is denied if an accused is prevented from consulting privately with his attorney."[98] Other courts, including the Fourth Circuit, have equated effective assistance of counsel with "privacy of communication with counsel."[99] If this privacy between client and counsel is violated, or if privilege violations interfere with the defendant's trial strategy, a Sixth Amendment infringement might occur.[100]

96. *See* U.S. CONST. amend VI.

97. United States v. Coffman, 574 F. App'x 541, 565 (6th Cir. 2014).

98. Clark v. Wood, 823 F.2d 1241, 1249 (8th Cir. 1987) (holding that the accused must show that prosecutors at trial used information they gathered against him after monitoring the accused's conversations with his attorney).

99. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 174 (4th Cir. 2019) (quoting United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981)).

100. United States v. Pearson, No. 1:04-CR-340, 2006 WL 8442594, at *7 (N.D.N.Y. May 24, 2006).

Receiving a new trial after such a violation is an extremely high bar that is rarely met. Even if the government wrongfully obtained privileged materials after taint-team review, intentionally or through error, an individual is only able to obtain a new trial if they can meet the high bar of a showing of prejudice.[101] To show prejudice, a defendant must demonstrate that the government made "direct use of the privileged communications, either at trial or before the grand jury."[102] The requirement that a defendant demonstrate prejudice by "direct use of the privileged communications" is almost always impossible for defendants to meet, even after the government may have already conceded obtaining materials in violation of attorney-client privilege after taint-team review.[103] Imposing this requirement on individuals allows the government to use taint teams in ways exceeding their authority, so long as no "direct use" takes place at trial.

Courts have begun to open the door to other ways of meeting the high bar of showing prejudice other than direct use of privileged communications at trial or in grand jury testimony. Some courts have held that a defendant can also show prejudice by demonstrating that the government intentionally violated attorney-client privilege.[104] For example, if the prosecutor has access to the defendant's email server and knowingly views his emails to his attorney, that is an intentional violation of attorney-client privilege.[105] Similarly, if the defendant is an attorney and

101. *See Coffman*, 574 F. App'x at 565; *see also* United States v. White, 970 F.2d 328, 336 (7th Cir. 1992) (noting attorney-client privilege is testimonial; thus, no prejudice results unless evidence of a breach of attorney-client privilege is introduced at trial).

102. *Coffman*, 574 F. App'x at 565 (quoting United States v. Warshak, 631 F.3d 266, 294-95 (6th Cir. 2011)); *see also White*, 970 F.2d at 336.

103. *Coffman*, 574 F. App'x at 565.

104. *See Pearson*, 2006 WL 8442594, at *7 ("In determining whether there has been an intrusion into the attorney-client relationship in violation of a defendant's Sixth Amendment rights, Courts have examined the following factors: (1) whether there was an intentional intrusion into the attorney-client relationship to gather confidential privileged information, or whether the intrusion was inadvertent; (2) whether evidence to be used at trial was obtained directly or indirectly by the government intrusion; (3) whether the prosecution obtained details of the defendant's trial preparation or defense strategy; and (4) whether the government, directly or indirectly, used or will use evidence obtained as a result of the intrusion to the substantial detriment of the defendant.") (citing Weatherford v. Bursey, 429 U.S. 545 (1976)).

105. *See id.* at *8-9.

the government viewed her emails to her clients, that also intentionally violates attorney-client privilege.[106] One D.C. district court even held that "[w]hile the parties dispute whether courts have sanctioned the Department of Justice's 'taint team' procedures, it is clear that the government's affirmative decision to invoke these procedures constitutes a *per se* intentional intrusion [into attorney-client privilege]."[107] Other courts have focused on government and prosecutorial misconduct as grounds for showing prejudice and thus allowing for a new trial.[108] This includes a member of the taint team posting comments online about the case.[109] Further, pretrial publicity can sometimes be prejudicial enough to warrant a new trial.[110] The proper remedy would be a new trial if any of these scenarios happened since there would be immense prejudice stemming from the government's Sixth Amendment violation.[111]

Some cases, like *United States v. Bowen*, are so extreme that the defendant does not need to show prejudice to get a new trial.[112] In *Bowen*, the Fifth Circuit upheld the district court's grant of a new trial to the defendants, finding that the defendants had demonstrated prejudice via the government's prosecutorial misconduct.[113] *Bowen* involved a federal indictment against former New Orleans Police Department officers charging them with civil rights, firearms, conspiracy, and obstruction of justice offenses in the aftermath of a shooting incident.[114] In the course of the investigation, the district court discovered that several DOJ employees and members of the U.S. Attorney's Office had been posting comments online about the case, including the head of the DOJ's internal taint team.[115] This behavior and the DOJ's accompanying attempt to cover it up before the district court, the

106. *Id.* at 9, 12.

107. United States v. Neill, 952 F. Supp. 834, 840-41 (D.D.C. 1997).

108. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 637 n.9 (1993).

109. *See* United States v. Bowen, 799 F.3d 336, 336 (5th Cir. 2015).

110. Clark v. Wood, 823 F.2d 1241, 1244 (8th Cir. 1987) (first citing Sheppard v. Maxwell, 384 U.S. 333 (1966); and then citing Irvin v. Dowd, 366 U.S. 717 (1961)).

111. *See* United States v. Pearson, No. 1:04-CR-340, 2006 WL 8442594, at *7 (N.D.N.Y. May 24, 2006).

112. *Bowen*, 799 F.3d at 355.

113. *Id.* at 355-56.

114. *Id.* at 340.

115. *Id.* at 345-47.

Fifth Circuit noted, constituted "prejudice . . . shown both from [a] pattern of misconduct and evasion and from other abusive prosecutorial actions."[116] While rare and unusual, the Fifth Circuit held that the *Bowen* case rendered "imposition of the *Brecht* remedy [as] necessary."[117] While these cases have focused on especially egregious governmental misconduct, they demonstrate a willingness to recognize prejudice beyond showing "direct use" of privileged materials at trial.

3. Dismiss the Indictment or Reverse the Conviction: A Fifth Amendment Due Process Remedy

Another potential remedy to a violation of attorney-client privilege is for the court to dismiss the indictment or reverse an already-obtained conviction by arguing that the practice amounted to a denial of due process under the Fifth Amendment.[118] However, "[i]n order to obtain the drastic remedy of dismissing an indictment or reversing a conviction . . . 'a defendant must establish that the government engaged in outrageous behavior in connection with the alleged criminal events and that due process considerations bar the government from prosecuting.'"[119] The government's conduct must shock the conscience.[120] Intentional violations of attorney-client privilege, and especially intentional violations cloaked in the allegedly noble intent of taint teams, should shock the conscience of any judge. Aside from shocking the conscience, there is certainly a valid due process question if a secret warrant is used and the privilege holder has no notice or opportunity to review the

116. *Id.* at 351.

117. *Bowen*, 799 F.3d at 355; *see also* Brecht v. Abrahamson, 507 U.S. 619, 637 n.9 (1993) ("[A] deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.").

118. U.S. CONST. amend. V.

119. United States v. Pearson, No. 1:04-CR-340, 2006 WL 8442594, at *10 (N.D.N.Y. May 24, 2006) (quoting United States v. Cuervelo, 949 F.2d 559, 565 (2d Cir. 1991)); *see also* United States v. Russell, 411 U.S. 423, 431-32 (1973).

120. *Russell*, 411 U.S. at 432; *see also* United States v. Rahman, 189 F.3d 88, 131 (2d Cir. 1999).

documents the taint team deems "not privileged."[121] The Second Circuit, however, noted that such claims rarely succeed,[122] thus this is not a realistic remedy in practice.

4. Removing the Fox from the Hen House: Requesting an Outside Taint Team or Special Master or Seeking Disqualification of Government Counsel

If other remedies (like a new trial, dismissal of the indictment, etc.) have been tried and denied, a defendant might seek disqualification of the government's taint team or prosecutor to exclude those who have knowledge of the privileged communications from the investigation.[123] As explained further below, these seemingly commonsense remedies are better than nothing but do not adequately resolve the concerns surrounding attorney-client privilege violations.

If the target seeks to remove the privilege review from the government's taint team, she would likely request an independent taint team or a judicially supervised special master to take its place. Illustrated in *United States v. Johnson*, the defendant asked for, and the court appointed, an outside taint team consisting of members from a separate U.S. Attorney's Office than the one prosecuting her.[124] On its face, this might seem to remedy the conflicting issues endemic to taint teams (and is admittedly a step in the right direction). However, this remedy assumes that the defendant is aware there is a taint team. If the defendant is unaware that there is a warrant and thus a taint team, this remedy cannot be used, and it may be too late to remedy any constitutional violations if they arise. Further, while situating the taint team in a different U.S. Attorney's office than the one prosecuting a target is certainly an improvement, it is still troubling that federal prosecutors would be making privilege determinations. Federal prosecutors on the taint team are on the "same team" as the other

121. 2 PAUL R. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 11:19 (2021) (emphasis omitted).

122. United States v. LaPorta, 46 F.3d 152, 160 (2d Cir. 1994).

123. *See* Brochin & Linehan, *supra* note 3.

124. United States v. Johnson, 362 F. Supp. 2d 1043, 1082 (N.D. Iowa 2005).

U.S. Attorneys and report up the same chain of command, including the relevant prosecutor.[125]

If a privilege violation does occur and the prosecutor becomes privy to protected communications, some defendants have moved to disqualify the prosecutors appointed to their cases.[126] Switching prosecutors could theoretically help remedy the violation. However, this would not be enough because the breached documents could still be in the office or on the office computers, making them accessible to the next prosecutor. Further, subordinate members of the prosecution team may also know the contents of the privileged communications and be able to share them with the next prosecutor. This remedy also presupposes that the defendant discovers the privilege violation before his or her trial, which may be near impossible. If the defendant uncovers the violation after the trial, this remedy would be no use, leaving the defendant without any recourse.

II. NO RULES, JUST RIGHT: A CLOSER LOOK AT TAINT TEAMS AND THE PRE-2019 LOPSIDED CIRCUIT SPLIT

A. No Rules: Taint Teams and the Sources of Their Rules and Procedures

Taint teams are made up of allegedly neutral individuals who review seized materials to keep privileged communications away from investigators to leave attorney-client privilege intact.[127] Indeed, "the Department of Justice prefers to segregate data using taint teams composed of attorneys or agents who are not members of the prosecution team" in order to protect privileged information.[128] Oftentimes, these "neutral" individuals are

125. *Organizational Chart: Criminal Division*, U.S. DEPT. OF JUST., [https://perma.cc/MWF8-75X5] (last visited Nov. 4, 2022).

126. *See, e.g.*, United States v. Koerber, No. 2:17-CR-37, 2017 WL 3172809, at *6 (D. Utah July 25, 2017).

127. *See* United States v. Pedersen, No. 3:12-CR-00431, 2014 WL 3871197, at *29 (D. Or. Aug. 6, 2014).

128. Lily R. Robinton, *Courting Chaos: Conflicting Guidance from Courts Highlights the Need for Clearer Rules to Govern the Search and Seizure of Digital Evidence*, 12 YALE J.L. & TECH. 311, 336 (2010).

attorneys from the same government office as the prosecutors in a given case.[129] They are not required to follow any specific procedures to prevent the sharing of information.[130] Taint team members also eventually report to the same supervisor as prosecutors.[131] This potential for commingling of prosecutors and supposed neutral third parties has led some commentators and courts to view taint teams as essentially the "fox guarding the chicken coop."[132] Further, the DOJ does not even require taint team members making privilege determinations to be attorneys or have expertise in attorney-client privilege.[133] This combination of lack of expertise, close organizational and physical proximity and control, and potential for conflicts of interest creates a risk that attorney-client privilege will be wantonly disregarded.

It is often unclear what rules govern taint teams, but two sources of guidance are the DOJ Manual and parameters set by the individual judges who approve the use of taint teams.[134] Title 9 of the DOJ Manual reads:

> **Prior Consultation.** In addition to obtaining approval from the United States Attorney or the pertinent Assistant Attorney General, and before seeking judicial authorization for the search warrant, the federal prosecutor must consult with the Criminal Division through the Office of Enforcement Operations, Policy and Statutory Enforcement Unit (PSEU) . . . . NOTE: Attorneys are encouraged to consult with PSEU as early as possible regarding a possible search of an attorney's premises.
>
> To facilitate the consultation, the prosecutor should submit a form available to Department attorneys through PSEU. The prosecutor must provide relevant information about the proposed search along with a draft copy of the proposed search warrant, affidavit in support thereof, and any special instructions to the searching agents regarding search procedures and **procedures to be followed to ensure that**

129. Aaron M. Danzig, *A Tainted Practice? Department of Justice Filter Teams Under Review*, ARNALL GOLDEN GREGORY LLP (Dec. 1, 2021), [https://perma.cc/QCA3-VGXU].

130. *See* U.S. DEPT. OF JUST., JUSTICE MANUAL § 9-13.420 (2021), [https://perma.cc/WPY3-AF7V].

131. *See Organizational Chart: Criminal Division*, *supra* note 125.

132. Anello & Albert, *supra* note 13.

133. *See* Brochin & Linehan, *supra* note 3.

134. Danzig, *supra* note 129.

> **the prosecution team is not "tainted" by any privileged material inadvertently seized during the search**. This procedure does not preclude any United States Attorney or Assistant Attorney General from discussing the matter personally with the Assistant Attorney General of the Criminal Division.
>
> If exigent circumstances prevent such consultation before the warrant is presented to a court, the Criminal Division should be notified of the search as promptly as possible. In all cases, the Criminal Division should be provided as promptly as possible with a copy of the judicially authorized search warrant, search warrant affidavit, and any special instructions to the searching agents.
>
> The Criminal Division is committed to ensuring that consultation regarding attorney search warrant requests will not delay investigations. Timely processing will be assisted if the Criminal Division is provided as much information about the search as early as possible. The Criminal Division should also be informed of any deadlines.[135]

Prior to 2021, the Manual gave very little guidance on anything other than the formation of a taint team.[136] With the 2021 update, the Manual adds:

> F. **Review Procedures**. The following review procedures should be discussed prior to approval of any warrant, consistent with the practice in your district, the circumstances of the investigation and the volume of materials seized.
>
> Who will conduct the review, i.e., **a privilege team**, a judicial officer, or a special master.
>
> Whether all documents will be submitted to a judicial officer or special master or **only those which a privilege team has determined to be arguably privileged or arguably subject to an exception to the privilege**.
>
> Whether copies of all seized materials will be provided to the subject attorney (or a legal representative) in order that: a) disruption of the law firm's operation is minimized; and b) the subject is afforded an opportunity to participate in the process of submitting disputed documents to the court by

135. U.S. DEPT. OF JUST., *supra* note 130, § 9-13.420 (emphasis added).
136. *Id.*

> raising specific claims of privilege. To the extent possible, providing copies of seized records is encouraged, where such disclosure will not impede or obstruct the investigation.
>
> Whether appropriate arrangements have been made for storage and handling of electronic evidence and procedures developed for searching computer data (i.e., procedures which recognize the universal nature of computer seizure and are designed to avoid review of materials implicating the privilege of innocent clients).
>
> These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.[137]

The Manual continues:

> Procedures should be designed to ensure that **privileged materials are not improperly viewed, seized or retained during the course of the search**. While the procedures to be followed should be tailored to the facts of each case and the requirements and judicial preferences and precedents of each district, in all cases a prosecutor must employ adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized.[138]

This vague guidance might be good in spirit but not in application. For example, the Manual explicitly contemplates a team of investigators conducting a privilege review[139] but does not indicate those individuals' qualifications. Further, there is no concrete guidance on how attorney-client privilege should be protected or what precautions must be in place. Without adequate direction, prosecutors are left to their own discretion to determine what constitutes sufficient protections for attorney-client privilege and, thus, the defendant's constitutional rights.

The separation between prosecutors and taint teams is less delineated than it may appear. The taint team is part of the same

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137. *Id.* (emphasis added).
138. *Id.* (emphasis added).
139. *Id.*

government organization (the DOJ) as the prosecutors, and they sometimes even share the same physical office.[140] The taint team may even be made up of prosecutors who stumbled upon privileged evidence while working on the case and had to remove themselves from the prosecutorial role.[141] When this happens, the taint team consists of people who were already investigating the defendant, calling into question their commitment to the vigorous protection of the defendant's attorney-client privilege. Because the prosecutors and the taint teams are in such close proximity, organizationally and sometimes physically, it is difficult to assume that there is no contamination, even if best efforts are made. For example, if the prosecutors and the taint teams use the same printers in the office, the prosecutors could accidentally see a document they should not have, or the prosecutors may accidentally overhear a conversation where the taint team is discussing privileged information relating to the case. Or one taint team member might be a prosecutor in the following case—encouraging unseemly horse trading.

Even if the prosecutor does not use any privileged information they acquired from the taint team in the trial, this information could inform their theory of the case and overall trial strategy. If they saw a witness list the defendant's attorney prepared detailing the weaknesses of the State's witnesses, the prosecutor could decide not to call some of them and put more emphasis on other witnesses. These "small" adjustments to the prosecution's trial strategy based on seemingly innocuous information leaked from the taint team could make or break a defendant's case.

140. U.S. DEPT. OF JUST., *supra* note 130, § 9-13.420.

141. *See., e.g.*, United States v. Rayburn House Off. Bldg., Room 2113, Washington, D.C. 20515, 497 F.3d 654, 665-66 (D.C. Cir. 2007) (holding that FBI agents that saw privileged documents could not discuss them and could not be a part of the defendant's prosecution).

B. Just Right: The Lopsided Pre-2019 Split of Authority on Taint Teams

As explored more deeply in Part II, taint teams present unique risks for violations of constitutional rights.[142] Despite this, most courts examining them have upheld the use of taint teams, even if taint-team processes resulted in government intrusion on the attorney-client privilege. Before 2019, only one circuit looked disfavorably on taint teams. This Section will take a look at the split in authority before 2019. First, we will review cases where taint teams were upheld. We will then discuss the Sixth Circuit's approach, which struck down taint teams over fifteen years ago.

1. Outside the Sixth Circuit, Federal Courts Upheld the Use of Taint Teams and Denied Remedies to Defendants

Before 2019, most courts approved of the use of taint teams.[143] Cases from circuits across the country illustrate the varied approaches courts used to find taint teams acceptable.

The Fifth Circuit approved the use of taint teams and applied the good faith exception to avoid excluding evidence. In *United States v. Jarman*, the lawyer-defendant in a child pornography case appealed the district court's decision to not exclude evidence seized from his home.[144] Because Jarman was an attorney, the FBI began using a taint team prior to Jarman's indictment to review the data it seized from his laptop.[145] Jarman argued that the district court erred in denying his motion to suppress evidence found in his home, which he claimed was required because the affidavit underlying the warrant did not establish probable cause, the good faith exception should not apply, and because the twenty-three month delay between seizure of his computer and completion of the privilege review violated the Fourth Amendment.[146] The Fifth Circuit held that the district court

142. *See infra* Part II.
143. *See* Danzig, *supra* note 129.
144. United States v. Jarman, 847 F.3d 259, 261-64 (5th Cir. 2017).
145. *Id.* at 263.
146. *Id.* at 261.

correctly found that the defendant was not entitled to suppression because the good faith exception applied and the government's delay after the seizure was not unconstitutional.[147] The taint team, which was made up of an attorney from the DOJ and a computer expert from the FBI, screened privileged material out of the data before they passed it on to the prosecution.[148] The court found that the time it took the taint team to review the data and the prosecution to review the hard drives was "within the typical periods of delay in executing warrants that courts have permitted due to the complexity involved in searching computers."[149] The court noted that the government was actively working during this time and not simply sitting idle[150]—in essence, the use of a taint team led the court to give the government greater leeway on timing than it otherwise would have had.

United States v. Jarman is a prime example of how technology leads the court into uncharted territory when it comes to searches and privileged information. Because the court needs to evolve to deal with the "complexity involved in searching computers," prosecutors were afforded extra leeway in their searches.[151] Because search and privilege doctrine have evolved much more slowly than technology, courts occasionally deal with inevitable ambiguity by affording the government extra deference at the expense of defendants, as the Fifth Circuit did in *Jarman*.[152]

The Third Circuit also considered taint teams in the context of an investigation of a sitting congressman. That case, *In re Search of Electronic Communications in the Account of chakafattah@gmail.com at Internet Service Provider Google,*

147. *Id.*

148. *Id.* at 263.

149. *See Jarman*, 847 F.3d at 266-67.

150. *See id.* at 266.

151. *See id.* at 267.

152. *But see* United States v. Metter, 860 F. Supp. 2d 205, 212 (E.D.N.Y. 2012) ("[T]he government's more than fifteen-month delay in reviewing the seized electronic evidence, under the facts and circumstances of this case, constitutes an unreasonable seizure under the Fourth Amendment."). It is also worth noting that the court may have been more amenable to give the government special deference because this was a child pornography case. *Jarman*, 847 F.3d at 267 (quoting *Metter*, 860 F. Supp. 2d at 215 ("'[N]umerous cases hold that a delay of several months' or even years 'between the seizure of electronic evidence and the completion of the government's review of [it] . . . is reasonable' and does not render the warrant stale, especially in child-pornography cases.").

Inc., examined whether a search warrant of a congressman's Google email account would violate, inter alia, attorney-client privilege or the Fourth Amendment.[153] Congressman Fattah was under investigation for fraud, extortion, and bribery, and investigators received a warrant to seize the contents of his Gmail account from Google.[154] The government instituted a taint team to review the contents of the email account.[155] The taint team in this case had a preliminary review by a federal agent who was not an attorney and then a subsequent review by "independent attorney federal agents."[156] Congressman Fattah moved to quash the search warrant and suppress the evidence from the search.[157] After the district court declined to suppress the evidence and held that the use of a taint team properly protected his attorney-client privilege, Fattah appealed.[158]

Because the warrant was directed at a third party (Google), the court considered whether the *Perlman* doctrine applied in this case.[159] The court found that the *Perlman* doctrine did apply in the instances where attorney-client privilege claims were implicated (but not, as Fattah had argued, where Speech or Debate Clause claims were implicated).[160] This is because the attorney-client privilege is based on non-disclosure, and allowing disclosure while the privilege claims were being litigated would defeat the purpose of the privilege.[161] In contrast, the Speech or Debate Clause privilege was not so expansive as to prevent the disclosure of documents to government officials in the course of an investigation.[162] Fattah argued further that the taint team the government used violated these privileges.[163] The court, however, generally approved of the use of a taint team to protect

153. *In re* Search of Elec. Commc'ns in the Acct. of chakafattah@gmail.com at Internet Serv. Provider Google, Inc., 802 F.3d 516, 522 (3d Cir. 2015).
154. *Id.* at 517, 522.
155. *Id.* at 522.
156. *Id.* at 530.
157. *Id.* at 522.
158. *In re Search of Elec. Commc'ns*, 802 F.3d at 522.
159. *Id.* at 526.
160. *Id.* at 529.
161. *See id.*
162. *Id.* at 528.
163. *In re Search of Elec. Commc'ns*, 802 F.3d at 530.

privilege.[164] In a small victory for Fattah, the court disapproved of the use of a non-attorney to conduct the first privilege review, holding that the initial privilege determination should be conducted by an attorney since it is a legal determination.[165] The court remanded Fattah's request for further reforms of the taint team's procedures, but clearly approved of the taint team's presence in the investigation.[166]

In addition to highlighting the general acceptance of taint teams by courts, this case highlights another troubling aspect of the current use of taint teams: the lack of any uniform practices or standards to follow to ensure the protection of constitutional interests.[167] Relying on case-by-case procedure creation results in a dizzying array of procedures with varying efficacy and propriety across the country. This creates a constitutional morass and makes it difficult to trust that taint teams across the country are acting in constitutionally permissible ways. For example, when the court orders a third party to produce an attorney's email communications, the risk is high that some confidential attorney-client communications will be uncovered. Allowing DOJ investigators—even those on a taint team—to violate attorney-client privilege as they comb through these documents will unconstitutionally harm the attorney and/or her clients. More courts should make clear that in situations where a warrant to a third party covers attorney-client communication, the *Perlman* doctrine applies and enables the targeted attorney to challenge the warrant before any potentially privileged materials are turned over.[168] This clear legal recognition would establish a right for the holders of attorney-client privilege to challenge these warrants to third parties in order to assert their privilege claims and demand that any privilege review not be conducted by a DOJ taint team.

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164. *Id.*

165. *Id.*

166. *See id.*

167. *See id.*

168. *In re Search of Elec. Commc'ns*, 802 F.3d at 526 (holding that *Perlman* "established an exception when the traditional contempt route is unavailable because the privileged information is controlled by a disinterested third party who is likely to comply with the request rather than be held in contempt for the sake of an immediate appeal. In these circumstances, a litigant asserting a legally cognizable privilege may timely appeal an adverse disclosure order.") (citing Perlman v. United States, 247 U.S. 7, 13 (1918)).

In the Second Circuit, a district court confoundingly found that no Sixth Amendment violation occurred when an investigator read the defendant's trial preparation notes.[169] *United States v. Pearson* concerned communications between the defendant and another witness, and the defendant and his father.[170] The defendant's father was an attorney, but at the time of the search, there was no evidence his father represented him (and his father attested that he was not representing his son in this matter).[171]

During the review of seized evidence (without a taint team), an investigator viewed the defense's trial preparation notes and then alerted their supervisor, who subsequently requested a taint team and sealed the trial notes in order to prevent further access by investigators.[172] The subsequent taint team included two officials who were removed from the prosecution team because of their exposure to the privileged materials (i.e., the special agent who viewed the privileged materials and the Assistant U.S. Attorney overseeing the case).[173] In a letter to the judge explaining the creation of the taint team and change in the prosecution team, that same Assistant U.S. Attorney asserted that the reassignment was "not required under the law inasmuch as there was no intentional review of privileged material and no inappropriate use of any such material."[174]

The court found that even if the government did violate the defendant's rights under the Sixth Amendment, "there is no per se rule requiring dismissal of the indictment."[175] The court held that merely showing that the government was exposed to the privileged materials was not enough to warrant relief.[176] The defendant instead must show that the government used the privileged material in a way to his detriment, such as having a witness testify about it or using it to find evidence (i.e., a showing

169. United States v. Pearson, No. 1:04-CR-340, 2006 WL 8442594, at *9 (N.D.N.Y. May 24, 2006) (citing United States v. Weissman, No. S2-94-CR-760, 1996 WL 751386, at *12 (S.D.N.Y. Dec. 26, 1996)).

170. *Id.* at *4-6.

171. *Id.* at *8.

172. *Id.* at *5.

173. *Id.* at *6.

174. *Pearson*, 2006 WL 8442594, at *7.

175. *Id.* at *9.

176. *Id.*

of direct prejudice).[177] The court found that this was not the case here because a taint team was formed and the notes were sealed, showing that the government worked to protect the defendant from any resulting prejudice.[178]

The *Pearson* court also ordered an in-camera review of allegedly lost exculpatory material that the prosecution seized and allowed the taint team to be present for that review (even though their presence would expose potentially privileged materials to taint team members, who were also former members of the same prosecution team).[179] If the review showed the evidence to be exculpatory, the government's taint team would have a chance to argue it was not exculpatory before the judge made a final decision.[180] The taint team would not be allowed to tell the trial team about any exculpatory material.[181] The court further rejected the defendant's claim that turning over an encrypted password violated attorney-client privilege, finding that because the pre-trial hearing would only be between the defendant and the taint team, the court would have an opportunity to find a remedy if the hearing uncovered privileged information.[182]

Through this combination of personnel shifts (albeit to just another role on the government's team), explaining away any prejudice, and in-camera review of potentially exculpatory materials, the trial court dismissed the very real constitutional concerns stemming from the invasion of a defendant's attorney-client privilege.[183] This case shows both the general presumption that taint teams are unproblematic panaceas to privilege concerns and how difficult it is for defendants to win even modest relief when privilege has been violated. The court's reasoning in *Pearson* is flawed because requiring the defendant to show that the government used the privileged material to the detriment of the defendant is nearly impossible to do.[184] It is incredibly hard to prove how much the privileged information influenced the

177. *Id.*
178. *Id.* at *9.
179. *Pearson*, 2006 WL 8442594, at *10.
180. *Id.*
181. *Id.*
182. *Id.* at *18.
183. *See id.* at *6, *10, *18.
184. *See Pearson*, 2006 WL 844259, at *9.

defense's trial strategy. Influence is not always overt or explicit—it may be subtle or even unconscious. It is not difficult to imagine how knowledge of a defendant's trial strategy or confidential legal consultations could shape the prosecution's strategy in large and small ways, leading to a trial that is less than fair to the defendant. Courts should not reward the government for slashing through attorney-client privilege (intentionally or through reckless disregard) and then trying to reassemble it with rubber bands and chewing gum.

Pearson's framing of the privilege determination in relation to the attorney-client relationship is also problematic. The *Pearson* court found that because there was no evidence of the attorney-client relationship at the time of the search, the evidence did not implicate the privilege.[185] That is, however, the incorrect standard. As detailed in Part I, attorney-client privilege protects communications between a lawyer and her client that are confidential and concern legal advice.[186] The relevant inquiry is *not* whether an attorney-client relationship existed at the time of the search but rather, whether an attorney-client relationship existed at the time of the communication.[187] Just because Pearson's father was not representing him in *this* case did not eliminate the privilege of communications that took place between Pearson and his father on prior legal matters.[188] Pearson was still owed this attorney-client privilege, but the court cavalierly disregarded it.[189] Further, if a question of law exists, like whether there was an attorney-client relationship, the proper decisionmaker is the court, not DOJ investigators. Investigators should not be able to use taint teams as a shortcut to avoid dealing with thorny privilege questions. Even assuming taint teams were an effective way to siphon out privileged information (which we would challenge), automatically granting the DOJ access to potentially privileged information just because they are not sure an attorney-client relationship exists reeks of unconstitutional overreach.

185. *Id.* at *8.
186. *See supra* Section I.A.
187. *Id.*
188. *Id.*
189. *See id.*

2. The Sixth Circuit Has Viewed Taint Teams Suspiciously for over Fifteen Years

In a 2006 case, the Sixth Circuit Court of Appeals considered taint-team discretion in the context of the government's proposed taint-team procedure.[190] Specifically, the court of appeals addressed the question of which party "ha[d] the right to conduct a review for privilege of documents" that were subject to a grand jury subpoena but in the possession of a third party.[191] The lower court ruled in favor of the government and allowed a taint team over the objections of the subjects of the grand jury investigation who had potential privilege rights implicated in the documents.[192]

The government's taint-team procedure allowed government attorneys not involved in the grand jury investigation to access the seized materials for the purpose of separating privileged documents from non-privileged documents.[193] Any privileged documents would be returned to their owner and the team would provide any documents or materials it determined to be potentially privileged to the owner and the district court for a final determination.[194] In discussing the lower court's ruling, the Sixth Circuit noted that by approving this taint-team procedure, the district court "held that the public policy underlying grand jury secrecy and the effective investigation of criminal activity outweighed the appellants' privilege claims."[195]

Reversing the district court, the Sixth Circuit found that this taint-team procedure, when the documents were not already in the possession of the government, presented "a great risk to the appellants' continued enjoyment of privilege protections."[196] The Sixth Circuit noted that taint teams are typically used in "limited, exigent circumstances in which government officials have already obtained the physical control of potentially-privileged documents through . . . a search warrant."[197] Under these

190. *In re* Grand Jury Subpoenas, 454 F.3d 511, 512 (6th Cir. 2006).
191. *Id.*
192. *Id.* at 513.
193. *Id.* at 515.
194. *Id.*
195. *In re Grand Jury Subpoenas*, 454 F.3d at 518.
196. *Id.* at 522.
197. *Id.*

circumstances, where the government is already in possession of the potentially privileged documents, the court recognized the use of a taint team to "sift the wheat from the chaff" as an "action respectful of, rather than injurious to, the protection of privilege."[198]

When used beyond the confines of documents already in the government's possession, the Sixth Circuit stated that taint teams "present inevitable, and reasonably foreseeable, risks to privilege."[199] The Sixth Circuit explained taint teams present conflicting interests to their members who may be interested in preserving privilege but also in furthering the investigation.[200] Seemingly most troubling to the court was the problem presented by differing interpretations and views of what constitutes privilege.[201] In the context of the procedure approved in *In re Grand Jury Subpoenas*, however, the private individual's attorney would only have an "opportunity to assert privilege . . . over those documents which *the taint team has identified* as being clearly or possibly privileged."[202] This left no "check" against the government taint team making "false negative conclusions, finding validly privileged documents to be otherwise."[203] Ultimately, the Sixth Circuit held that the use of a taint team was inappropriate under the government's procedure and that "appellants themselves must be given an opportunity to conduct their own privilege review."[204]

In re Grand Jury Subpoenas highlights the problems that taint teams can create when privilege determinations are left to the discretion of government attorneys. In the context of a grand jury investigation, even supposed "neutral" government attorneys who are members of the taint team possess conflicting interests between preserving privilege and furthering the investigation. Courts have continued to express concern over this issue in the

198. *Id.* 522-23 (citing United States v. Abbell, 914 F. Supp. 519 (S.D. Fla. 1995)).

199. *Id.* at 523.

200. *In re Grand Jury Subpoenas*, 454 F.3d at 523.

201. *Id.* ("It is reasonable to presume that the government's taint team might have a more restrictive view of privilege than appellants' attorneys.").

202. *Id.*

203. *Id.*

204. *Id.*

wake of the Sixth Circuit's decision in *In re Grand Jury Subpoenas*.[205]

Allowing government attorneys to make privilege determinations at their discretion risks false-negative conclusions relating to what constitutes privileged material, as well as simple human error.[206] Current taint-team procedures allow documents that taint teams do not highlight as possibly privileged to slip through the cracks with the defendant having no recourse. Thus, taint-team procedures present valid and concerning threats to existing attorney-client privilege, especially when left unchecked. This risk exists even with the presence of a valid warrant, as a warrant does not negate the protection of attorney-client privilege.[207]

III. THE COLLISION: EXPLORING THE PROBLEMS OF TAINT TEAMS

This Part will explore the constitutional and ethical issues endemic to taint teams. As discussed in Part I, courts have largely approved the use of taint teams, but in 2019 the tides began to turn when the Fourth Circuit (joining the Sixth Circuit) broadly invalidated their use. This Part will first discuss that case, *In re Search Warrant*. This discussion will include a detailed account of the procedures used by the taint team in that case, followed by an explanation of the court's wide-ranging analysis supporting its holding. Next, we will turn to a summary of the many constitutional and practical problems of taint teams as they are

205. *See* United States v. Gallego, No. CR-18-01537-001, 2018 WL 4257967, at *2 (D. Ariz. Sept. 6, 2018) (quoting United States v. SDI Future Health, Inc., 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006)) ("[F]ederal courts have generally 'taken a skeptical view of the Government's use of "taint teams" as an appropriate method for determining whether seized or subpoenaed records are protected by the attorney-client privilege.'"); United States v. Castro, No. 19-20498, 2020 WL 241112, at *2 (E.D. Mich. Jan. 16, 2020) (refusing the government's request to use a taint team to screen prisoner's calls with his attorney, citing and incorporating the holding of *In re* Grand Jury Subpoenas, 454 F.3d 511, 523 (6th Cir. 2006)).

206. *In re Grand Jury Subpoenas*, 454 F.3d at 523 (citing United States v. Noriega, 764 F. Supp. 1480 (S.D. Fla. 1991)) ("[T]he government's taint team missed a document obviously protected by attorney-client privilege, by turning over tapes of attorney-client conversations to members of the investigating team.").

207. *See id.* at 522-23.

currently formulated, including but not limited to those relied on by the Fourth Circuit. Finally, we will review the government's recent response to the concerns around taint teams and explain why this response is wholly inadequate.

A. Seven Strikes, You're Out!: The Fourth Circuit Strikes Down Taint Teams

As mentioned above, the Fourth Circuit struck down the use of a taint team in 2019.[208] In its wide-ranging opinion, the court relied on at least seven independent rationales for its decision.[209] This Section will explain the context of the case, including the process used to get the warrant and the composition of the taint team. This case represents a common formulation of the taint-team procedure and represents taint teams as a whole. Then, we will explain the court's analysis, enumerating each of the seven identified problems.

This case arose out of a challenge to a search warrant and its related taint-team procedure.[210] The warrant allowed for a wide-ranging search of a law firm and its files, including privileged attorney-client documents, in an investigation targeting a single client of a single attorney at the firm.[211] The investigation concerned the client's alleged involvement in assisting drug dealers with money laundering and obstruction of justice.[212] When a magistrate judge approved the search warrant in ex parte proceedings, the judge also contemporaneously adopted the investigator's proposed "Filter Team Practices and Procedures."[213]

The taint-team procedures called for the team to consist of lawyers from the U.S. Attorney's office, agents from the Drug Enforcement Agency and IRS, and paralegals.[214] The taint team operated out of the Greenbelt, Maryland U.S. Attorney's Office, while the prosecution team was to remain in the Baltimore office

208. *See In re* Search Warrant Issued June 13, 2019, 942 F.3d 159 (4th Cir. 2019).
209. *Id.* at 175-81.
210. *Id.* at 160.
211. *Id.* at 165.
212. *Id.*
213. *In re Search Warrant*, 942 F.3d at 165.
214. *Id.*

(minimizing the chance of physical overlap).[215] Members of the prosecution team were excluded from being members of the taint team, and they were not involved in any other investigations of the lawyer and his client.[216]

In conducting its privilege review, the taint team was to sort the documents into three categories: non-privileged, potentially privileged, and privileged.[217] Documents deemed to be non-privileged were to be forwarded to the prosecution team without further review from investigators, the target of the investigation, or the court.[218] The taint team then reviewed the privileged and potentially privileged documents to determine if the materials were "responsive to the search warrant."[219] If the materials were responsive to the warrant, they were categorized into three further designations:[220]

Privileged and Could Not Be Redacted: These documents were returned to the target of the search.

Privileged but Could Be Redacted: The taint team provided copies of these documents to counsel, seeking an agreement on whether the documents could be forwarded to prosecutors. If no agreement could be reached, the materials would be submitted to the court for a determination of privilege and appropriate redaction.

Potentially Privileged: This category involved documents in which privilege was questionable (i.e., the crime-fraud exception might apply). The taint team followed the same procedures as those for documents that were privileged but could be redacted, namely seeking an agreement with counsel and resorting to the court if no agreement could be reached.[221]

The protocol also allowed taint team members to contact the law firm's clients directly to attempt to obtain a waiver of privilege from the owner of the privilege (the client).[222] If the

215. *Id.*
216. *Id.*
217. *Id.* at 165-66.
218. *In re Search Warrant*, 942 F.3d at 166.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*

client waived the privilege, the taint team would pass the documents on to the prosecutors with no further review.[223]

Five days after the search warrant and taint-team procedures were approved ex parte, fifteen agents, who were members of the taint team, executed the warrant in a six-hour search of the law firm's office.[224] The agents made copies of the entirety of the targeted lawyer's phone and computer and seized all of his correspondence.[225] This included 37,000 received emails and 15,000 sent emails covering multiple clients (not just the client the government was investigating).[226] Only 116 emails were from or concerned the client under investigation.[227] While the search was taking place, other lawyers at the firm raised objections to the sheer breadth of the search and seizures on attorney-client privilege grounds, claiming the agents were violating the attorney-client privilege of other clients who were not the target of the search warrant.[228] Some of those clients who were not targets of the search warrant at issue were actually being investigated or prosecuted by the same U.S Attorney's Office in unrelated matters.[229] When lawyers at the firm requested that the agents only seize materials relevant to the client who was the target of the search warrant, the agents refused.[230]

After the search, a client of the firm and the law firm itself challenged the taint-team procedures and sought a temporary restraining order and preliminary injunction.[231] The firm argued that it had no chance to conduct a privilege review, as it would have been able to do if the government had sought the information using a subpoena instead of a search warrant.[232] It also pointed to the breadth of the seizure compared to the relevance of the documents to the investigation (noting only 116 emails out of the

223. *In re Search Warrant*, 942 F.3d at 166.
224. *Id.* at 165-66.
225. *Id.* at 166-67.
226. *Id.*
227. *Id.* at 168.
228. *In re Search Warrant*, 942 F.3d at 167.
229. *Id.*
230. *Id.*
231. *Id.* at 168.
232. *Id.*

52,000 seized were relevant to the search warrant).[233] Finally, the firm characterized the taint-team procedures as "fatally flawed," pointing out that investigators on the taint team would have access to privileged documents of clients unrelated to this investigation, and that those taint team members may already be investigating (or then decide to investigate) those clients.[234] The district court denied the law firm's motion, deciding that the firm "had not established that it would suffer irreparable harm absent injunctive relief."[235]

On appeal, the Fourth Circuit reversed the district court's denial of the law firm's motion.[236] It relied on at least seven independent grounds, showing the breadth of the issues with the taint-team search and procedures in this case.

Attorney-Client Privilege: The Fourth Circuit noted that an adverse party's review of privileged materials seriously injures the privilege holder in ways that are not easily remedied, taking attorney-client privilege and violations thereof more seriously than the lower court.[237] In this case, the court said that the taint team's review of the seized materials was injurious to the law firm and its clients and could not be undone.[238] The court refused to approve of procedures that cavalierly disregarded the harm of privilege violations.[239]

Breadth of Warrant: The court characterized the search and taint-team procedures as an impermissible greenlight for agents to "rummage" through attorney-client communications.[240] To make its point, the court noted that less than one percent of the seized communications were related to the investigation at issue.[241] This kind of wide-ranging, capacious search was not reasonable.[242]

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233. *In re Search Warrant*, 942 F.3d at 168.
234. *Id.* at 168-69.
235. *Id.* at 169.
236. *Id.* at 170.
237. *Id.* at 175.
238. *In re Search Warrant*, 942 F.3d at 175.
239. *Id.*
240. *Id.* at 179.
241. *Id.* at 172.
242. *Id.* at 179-80.

Nondelegation: The Fourth Circuit held that allowing a U.S. Attorney taint team to make privilege determinations violated the nondelegation doctrine because it assigned a judicial function to the executive branch.[243] Such a delegation violates separation of powers, especially when the executive branch is one of the parties interested in the pending dispute.[244] The district court itself must be the one to evaluate and decide claims of privilege.[245]

Participation of Non-Lawyers: The court criticized the approved taint-team procedures because—in addition to delegating judicial functions to the executive branch—the procedures allowed non-lawyers to make privilege determinations.[246] Participation of non-lawyers increased the likelihood of mistake or neglect, leading to privilege violations.[247] While natural differences of opinion regarding the scope and applicability of attorney-client privilege were to be expected between a team of prosecutors and the target of an investigation, those differences should not be allowed to be worsened by the participation of non-lawyers.[248]

Timing of Taint-Team Procedure Approval: The Fourth Circuit also took issue with the contemporaneous approval of the search warrant and taint-team procedures.[249] It noted that at the time, there was no way for the magistrate judge to know what was actually seized, including the full breadth of unrelated emails.[250] Approving taint-team procedures without knowing what was seized was inappropriate.[251] The Fourth Circuit said that the magistrate should have waited until after the search, and then conducted adversarial procedures on whether to authorize a taint team and what those procedures should be.[252] Doing so would

243. *In re Search Warrant*, 942 F.3d at 176.

244. *Id.*

245. *Id.* at 176-77; *see also In re* City of New York, 607 F.3d 923, 947 (2d Cir. 2010) (noting that privilege determinations are always a judicial function); NLRB v. Interbake Foods, LLC, 637 F.3d 492, 498, 500 (4th Cir. 2011) (holding that a court cannot delegate in-camera review of documents to an agency for a determination of privilege).

246. *In re Search Warrant*, 942 F.3d at 177.

247. *See id.*

248. *Id.*

249. *Id.* at 178.

250. *Id.*

251. *See In re Search Warrant*, 942 F.3d at 178-79.

252. *Id.* at 179.

have allowed the judge to be fully informed of the materials that were seized in order to ensure that the procedures adequately protected attorney-client privilege.[253]

Contact with Represented Parties: In allowing the taint team members to contact the law firm's clients directly to seek a waiver, the taint team's procedures violate Model Rule of Professional Conduct 4.2, which bars attorneys from communicating with a represented party about the subject of the representation without the prior consent of the represented party's attorney.[254] The court noted that exceptions to this rule may be made, but that any exception should be evaluated on an individualized basis after evaluating the attorney-client relationship at issue.[255] Such broad approval of contact with represented parties showed that the investigators and the lower court did not afford adequate respect for the attorney-client privilege and the law firm's duty of confidentiality to its clients.[256]

Public Interest: The court noted that taint teams create an appearance of unfairness in the administration of justice, creating an untenable risk to public confidence in the courts.[257] Specifically, the Fourth Circuit took issue with the inclusion on the taint team of prosecutors employed in the same judicial district where the law firm's clients were being investigated and prosecuted.[258] Allowing prosecutors in the same district to rummage through clients' privileged communications, especially under the guise of an unrelated search warrant, created valid concerns about public perceptions of the fairness of investigations and prosecutions.[259]

After detailing its seven issues with the search and taint-team procedures in this case, the Fourth Circuit turned to the appropriate remedy.[260] To ensure that attorney-client privilege

253. *Id.*

254. *Id.* at 180; MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2020).

255. *In re Search Warrant*, 942 F.3d at 180; *see also* United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993).

256. *In re Search Warrant*, 942 F.3d at 180.

257. *Id.* at 182.

258. *Id.*

259. *Id.* at 182-83.

260. *See id.* at 181.

was adequately respected and protected, the court ordered that either the magistrate judge or a judicially appointed special master must perform the privilege review.[261] The court ended its opinion by noting that prosecutors must both see that justice is done and ensure that justice *appears* to be done.[262] The taint-team procedures at issue failed on both counts, and the court struck them down.[263]

In a short concurrence, Judge Rushing opined that a modification to the taint team procedures would solve the nondelegation issue.[264] She said that a provision that "no documents—including those the Filter Team considers nonprivileged—can be sent to the Prosecution Team without either the consent of the Law Firm or a court order" would not violate nondelegation doctrine.[265] We note that this provision would not solve other concerns, like prosecutors roaming through privileged documents.

B. The Dog that Shouldn't Hunt: Summarizing Why Taint Teams Are Constitutionally, Ethically, and Practically Problematic

This Section will provide a brief summary of the issues with taint teams, including those relied on in the Fourth Circuit's *In re Search Warrant* decision. In sum, the combination of conflicts of interest, lack of consistent procedures, and involvement of non-lawyers creates an untenable system that regularly disregards constitutional rights. By showing how drastically out of step current taint teams are with a constitutionally valid structure, this Section will establish that taint teams must be immediately reformed to protect the rights of defendants and non-target third parties.

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261. *In re Search Warrant*, 942 F.3d at 181.

262. *Id.* at 183; *see also In re* Search Warrant for L. Offs. Executed on March 19, 1992, 153 F.R.D. 55, 59 (S.D.N.Y. 1994).

263. *In re Search Warrant*, 942 F.3d at 183.

264. *Id.* at 183-84 (Rushing, J., concurring).

265. *Id.*

1. Fourth Amendment and Search Violations

From the beginning of the process, taint teams are implicated in unconstitutionally unreasonable searches and seizures. As detailed in Part I, warrants must be based on probable cause and be narrowly tailored to only those items for which there is probable cause to search.[266] The government has consistently attempted to use taint teams to avoid the particularity requirement of warrants.[267] Further, the underlying affidavits are often shaky and vague, but magistrate judges overlook these deficiencies and find probable cause anyway.[268] Thus, taint teams cannot remedy unconstitutional searches.

Similarly, courts are impermissibly lenient with wiretap applications. The necessity requirement discussed in Part I is rarely scrutinized by approving courts, and challenges are rarely successful.[269] In fact, courts almost invariably grant wiretap requests. From 2010 to 2020, state and federal courts denied a total of nine requests for wiretaps.[270] With 36,128 wiretaps requested, courts approved wiretap requests 99.975% of the time.[271] This kind of blanket approval indicates that the requirements intended to protect people from unreasonable searches and wiretaps are not being taken seriously.

Additionally, searches and seizures of knowingly privileged information can never be reasonable under the Fourth Amendment.[272] A search warrant or wiretap, even if completely valid, does not overcome attorney-client privilege.[273] If the government believes that certain materials should not be

266. *See supra* Section I.B.

267. *See, e.g.*, *In re Search Warrant*, 942 F.3d at 165-66, 178.

268. *See, e.g.*, Franks v. Delaware, 438 U.S. 154, 165-67 (1978) (discussing remedies when underlying affidavits omit or misstate material information).

269. *See* Robert H. Hotz, Jr. & Harry Sandick, *Unconventional Investigative Techniques in White Collar Cases: Wiretaps, Search Warrants, and Sting Operations*, AKIN GUMP, [https://perma.cc/9KQR-W5VF] (last visited Nov. 4, 2022).

270. *See* U.S. CTS., *supra* note 66.

271. *Id.*

272. *Cf.* United States v. Skeddle, 989 F. Supp. 890, 894 (N.D. Ohio 1997) (noting that privileged materials are entitled to special protection under Fourth Amendment jurisprudence);50 Amar, *supra* note 50, at 806 (arguing that searches of attorneys' offices should be deemed constitutionally unreasonable unless extraordinary on-site measures are taken to ensure that privileged material is not seized).

273. *See* Amar, *supra* note 50, at 806; *see also supra* note 50 and accompanying text.

protected by privilege, the solution is not to seize them and search them anyway, even with a taint team in place. Instead, the government must convince a court that an applicable exception to attorney-client privilege exists.[274] When the government knowingly searches privileged materials without seeking any such determination, that is per se unreasonable.

2. Sixth Amendment Violations

Taint teams implicate the Sixth Amendment by regularly (intentionally or erroneously) giving prosecutors access to confidential communications, violating attorney-client privilege and risking the effective assistance of counsel. Sixth Amendment protections generally attach whenever a defendant learns of charges against him and has his liberty subject to restriction.[275] However, the Sixth Amendment can also attach before a formal charge, when the defendant "finds himself faced with the prosecutorial forces of organized society" and "the intricacies of substantive and procedural criminal law."[276] The timing of the indictment and the privilege violation may be of little consequence if the ultimate effect of the constitutional violation occurs during trial or trial preparation.[277]

As noted above, taint teams are a vehicle through which investigative actors (the members of the government taint team) regularly access privileged information.[278] In many cases, this privileged information is inappropriately disclosed to prosecutors, either intentionally or inadvertently.[279] The lack of taint-team oversight and consistent processes amplifies the inherent potential for prejudice against defendants by members of investigative and prosecutorial bodies. This is further

274. 2930*See supra* notes 29-30 and accompanying text.

275. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 194 (2008).

276. United States v. Gouveia, 467 U.S. 180, 189 (1984).

277. *See* United States v. Stein, 435 F. Supp. 2d 330, 366 (S.D.N.Y. 2006) ("The fact that events were set in motion prior to indictment with the object of having, or with knowledge that they were likely to have, an unconstitutional effect upon indictment cannot save the government. This conduct, unless justified, violated the Sixth Amendment.").

278. See generally *supra* Section III.B.2 for a discussion on how taint teams access privileged information.

279. *See* Brochin & Linehan, *supra* note 3.

exacerbated when taint teams allow non-lawyers to make privilege determinations. By using ad-hoc processes and involving those without expertise in privilege matters, taint teams create unacceptable risks that privileged materials will be improperly forwarded to the prosecution.

The widespread use of taint teams poses serious threats to defendants' Sixth Amendment rights, whether through intentionally violating attorney-client privilege or serious governmental misconduct resulting from a lack of oversight. When prosecutors have access to privileged documents, it can chill the free and full disclosure between client and attorney, calling into question the attorney's ability to adequately and zealously defend his client. Further, when prosecutors gain access to trial preparation communications and litigation strategy, the prosecutors gain an unfair advantage to the detriment of the defendant, even if those documents are never entered into evidence. All of this creates the inevitable conclusion that a system that tolerates or even tacitly encourages such disclosures violates the Sixth Amendment's promise of a fair trial and effective assistance of counsel.

3. Nondelegation and Separation of Powers

As discussed in the coverage of *In re Search Warrant* above, the use of DOJ or FBI taint teams constitutes an unconstitutional delegation of judicial functions to the executive branch.[280] This strikes at the heart of current taint-team structure and recognizes that separation of powers must be respected. By allowing investigators to conduct the search, make privilege determinations, and prosecute alleged offenders, courts have abdicated their responsibilities to ensure justice is done impartially. In fact, it shows a level of partiality towards prosecutors that is suspect. The upshot of this issue is that any taint team in the executive branch making any privilege determinations from seized materials is a per se unconstitutional violation of the separation of powers.

280. *See supra* text accompanying notes 243-45.

This issue is especially egregious when taint team procedures are approved ex parte or as part of secret searches. In those scenarios, not only is the target of the investigation excluded from any notice or opportunity to challenge procedures or warrants, but the court also delegates its own judicial functions to the same agency conducting the prosecution.[281] This concentrates far too much power in the hands of investigators and prosecutors, who are definitionally adversaries of targets of investigations and defendants. The courts must jealously guard their role in fair, impartial justice.

4. Violations of the Rules of Professional Conduct for Lawyers

The use of taint teams also violates the spirit (and, in some cases, the letter) of ethical rules lawyers are expected to follow. For example, the court in *In re Search Warrant* made a point to note that the taint-team procedures failed to respect lawyers' ethical duties to maintain client confidentiality.[282] When a taint-team protocol grants widespread approval for investigators to contact represented parties without the consent of their attorneys, the protocol encourages violations of the rules meant to prevent such communications.[283]

The special ethical rules applicable to prosecutors are also violated by the use of taint teams in their current iteration. These actions may technically comply with a narrow reading of the rule but certainly violate the spirit of these ethics standards.

First, Model Rule 3.8(a) directs that a prosecutor shall not prosecute when he knows the action is not supported by probable cause.[284] As noted above, warrants and wiretaps underlying the use of taint teams are often based on extremely shaky affidavits that cannot reasonably be said to give rise to probable cause.[285] Prosecutors should not seek searches in such circumstances.

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281. *See supra* text accompanying note 244.

282. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 180-81 (4th Cir. 2019); MODEL RULES PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2020).

283. *See In re Search Warrant*, 942 F.3d at 180; *see also* MODEL RULES PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2020).

284. MODEL RULES PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2020).

285. *See supra* notes 266-271 and accompanying text.

Second, Model Rule 3.8(b) directs prosecutors to ensure defendants are informed of their right to obtain counsel and are given that right.[286] The spirit of this rule is that the adversaries of the prosecutor should have the effective assistance of counsel, in line with the Sixth Amendment.[287] As detailed above, the use of taint teams can interfere with this relationship.[288] Thus, the use of taint teams can violate the spirit of Rule 3.8(b) because while the defendant may have access to her attorney, the relationship between them may be compromised by the actions of the taint team and prosecutors.

Third, Rule 3.8(d) requires prosecutors to disclose to the defendant evidence *and information* that could negate her guilt or mitigate the offense.[289] If information was obtained through an unconstitutional search or if prosecutors improperly viewed privileged information that then informed the prosecution, the prosecutors must disclose this to the defendant to keep within the spirit of this rule.[290] These kinds of disclosures are rare, and prosecutors often decline to even describe the searches used when defendants request them.[291] By refusing to volunteer this information, prosecutors are straying out of the bounds of the spirit of Rule 3.8(d).

Finally, Rule 3.8(e) prohibits prosecutors from subpoenaing a lawyer to give evidence in a criminal proceeding if the prosecutor believes that any applicable privilege applies.[292] We readily acknowledge that this rule is written to only include subpoenas (and not search warrants or wiretaps) and would argue that this is perhaps too narrow in light of modern practice. However, this rule is meant to prevent prosecutors from compelling lawyers to disclose privileged information.[293] Taint

286. MODEL RULES PRO. CONDUCT r. 3.8(b) (AM. BAR ASS'N 2020).

287. *See* MODEL RULES PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2020).

288. *See supra* Section III.B.2.

289. MODEL RULES PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020).

290. *See supra* text accompanying note 138.

291. *See, e.g.*, Memorandum in Support of Defendant's Motion to Suppress Exhibit #11 at 2-3, 7-8, United States v. Adams, No. 17-CR-00064, 2017 WL 7796418 (D. Minn. Sept. 28, 2017).

292. MODEL RULES PRO. CONDUCT, r. 3.8(e) (AM. BAR ASS'N 2020).

293. *See* Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 446-47 (2009).

teams should not be a ready work-around to these ethics restrictions.

5. Practical Issues and Public Policy

Throughout this Article, we have alluded to the issue of using other prosecutors to conduct privilege review, especially when those reviews are conducted without set procedures and with the involvement of non-lawyers. All of these issues lead to concerns both of the practicality of an effective privilege review and the perception of fairness of the investigations and prosecutions. As such, these practical issues and public-perception issues will be discussed together.

As an initial matter, it makes little sense for the appearance of justice to have prosecutors in the same office and chain of command conduct privilege determinations as members of a taint team, even if they are not involved in the instant investigation. Organizationally, these people are all members of the same team and chain of command, with common goals and a shared organizational culture.[294] They may even share offices.[295] This kind of organizational proximity can create incentives and pressures that may not fully respect the rights of the targets of the investigation. Further, senior officials in the DOJ, who have oversight over both investigations and taint teams, can exert their influence to encourage taint teams to be less protective of privilege (especially since courts have regularly approved of taint teams and rarely granted remedial actions to defendants).[296] Because they report to these senior officials, DOJ employees who wind up on taint teams may intentionally violate attorney-client privilege to attempt to please their bosses.

On a personal level, the common interests of prosecutors and their shared jobs may mean that they are acquaintances or even friends. These personal connections can also create incentives to

294. *See* Brochin & Linehan, *supra* note 279; *see also supra* text accompanying note 125.

295. Daniel Suleiman & Molly Doggett, *Despite Inherent Risks to the Attorney-Client Relationship, Taint Teams Are Here to Stay (For Now)*, AM. BAR ASS'N WHITE COLLAR CRIME COMM. NEWSL., Winter/Spring 2022, at 1, 4.

296. *See supra* note 124 and accompanying text; *see also supra* text accompanying note 24.

try to help each other be successful. These conflicts of interest create real risks to defendants and amplify the natural difference in opinion on privilege matters between defendants and prosecutors.

The lack of common processes or strict requirements for taint team members also creates issues. When poor process development meets unspecialized taint team members, the situation is ripe for attorney-client privilege violations. For example, many taint teams consist of lawyers and others without a law degree or specialized training in attorney-client privilege.[297] Taint-team procedures often rely on an initial search of seized materials to identify potentially privileged materials.[298] If a piece of evidence is not flagged as privileged in this initial search, then a taint team often does not evaluate whether it is privileged and might send it directly to the prosecution team.[299] The risk of these erroneous designations rises when ad hoc, untested procedures are used, and non-attorneys are involved. Because the taint team failed to properly identify privileged information, the prosecution gains access to it. Oftentimes, the defendant has little to no recourse once the document is in the hands of the prosecution.[300] This leads to prosecutions that seem unfair, creating doubt and distrust of our legal system, investigative agencies, and judicial institutions.

Additionally, the public's interest regarding efficiency is also implicated. Taint teams often take a lot of time, lead to more debate over privilege, and make investigations and trials generally less efficient.[301] For example, if a taint team is implemented in ex parte proceedings with the judge, the defendant might seek to challenge taint-team protocols after executing the search warrant. After those motions, the taint team conducts its work, which might take months. Then, the defendant might challenge the actual determinations of the taint team's

297. Suleiman & Doggett, *supra* note 295, at 1-2, 4.

298. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 165 (4th Cir. 2019).

299. *See id.* at 166.

300. *See id.* at 166-68 ("[T]he [l]aw [f]irm asked the government to immediately submit the seized materials to the magistrate judge or the district court for *in camera* inspection. The government never responded . . . .").

301. *See* RICE ET AL., *supra* note 121, § 11:19 (stating that some courts are concerned with the delays that taint teams cause).

process. These motions could consume additional months of briefing and argument. Add in appeals and the possibility for a defendant to challenge a verdict on similar grounds, and it is easy to understand how taint teams might add many months or years of litigation to an investigation and prosecution. This kind of avoidable inefficiency must be corrected.

C. Feeling Inadequate: Why the Government's Solution Solves Nothing

Recognizing that the current state of taint teams is untenable, especially in light of *In re Search Warrant*, the government proposed to reform taint teams. In response to increased litigation of privilege issues and the Fourth Circuit's *In re Search Warrant* decision, the DOJ created a "Special Matters Unit" (SMU) within its Fraud Section.[302] This unit is tasked with establishing uniform privilege-review services and working *with* investigatory teams.[303] Notably, this unit is still within the organization that investigates and prosecutes fraud.[304] In fact, a job posting for the Chief of the Special Matters Unit disclosed that this person would also be the Deputy Chief of the Fraud Section.[305] The posting requested that applicants for the Chief job have at least four years of experience as a federal prosecutor.[306] Experience litigating privacy claims or white-collar cases was preferred but not required.[307]

It should be obvious that this will not solve the constitutional issues of taint teams. While there may be some additional safeguards for defendants if a single team developed uniform, specialized procedures and expertise in privilege reviews, it still does not solve the nondelegation and inherent conflict-of-interest

302. Ines Kagubare, *Fraud Section to Create New Privilege Unit*, GLOB. INVESTIGATIONS REV. (May 13, 2020), [https://perma.cc/HG3A-DTMC]; Adam Dobrik, *DOJ Fraud Section Sets Up Dedicated Privilege Team*, GLOB. INVESTIGATIONS REV. (June 24, 2019), [https://perma.cc/5JS6-6JPF].

303. *See* Brochin & Linehan, *supra* note 279.

304. *See id.*

305. *Supervisory Trial Attorney (Chief, Special Matters Unit)*, U.S. DEP'T OF JUST., [https://perma.cc/37SM-PRCM] (last visited Nov. 4, 2022).

306. *Id.*

307. *Id.*

issues. First, this is still an executive branch team making privilege determinations.[308] Second, the Chief of this matter is one of the leaders of the investigatory and prosecution organization for fraud crimes.[309] Instead of creating organizational space to attempt to mitigate conflicts of interest, this "solution" places the leader of the privilege-review process as second-in-command of prosecutions. Third, by tasking the team to work "with" investigatory teams, this plan disposes of any appearances that the taint team is making neutral decisions. All of these possibilities for conflicts give rise to an unacceptable risk of numerous opportunities for attorney-client privilege (and its attendant constitutional rights) to be undermined, even with the best of intentions. A real solution is needed.

IV. SOLUTIONS

A. Return to Rigorous Evaluation of Search Warrants and Wiretap Requests

As we discussed in Parts I and III, requests for search warrants and wiretaps require certain elements to be approved.[310] However, courts often approve the requests without rigorous scrutiny.[311] Warrants may be supported only by unreliable or vague affidavits and seek overly broad searches.[312] Wiretaps may not be necessary because other investigative techniques can be effective. Nevertheless, courts regularly approve these, leading to searches and wiretaps that sweep up far too much privileged information, including that of uninvolved third parties.[313] Our first reform focuses on ensuring that the realm of potentially privileged information that the government seizes is as limited as it is reasonable.

To do this, we call on district courts and magistrate judges to begin to apply the requirements for search warrants and wiretap

308. *In re* Seach Warrant Issued June 13, 2019, 942 F.3d 159, 176 (4th Cir. 2019).
309. *See Supervisory Trial Attoney (Chief, Special Matters Unit)*, *supra* note 305.
310. *See supra* Parts I & III.
311. *See* discussion *supra* Section III.B.1.
312. *See supra* text accompanying note 268.
313. *See* discussion *supra* Section III.B.1.

authorizations more rigorously. Courts should create an expectation that probable cause will be supported and approach executive-branch investigators with a healthy amount of skepticism. These judges should also reign in the scope of the requested warrants. The particularity requirement means nothing if it is not enforced. Allowing the government to search and seize tomes of privileged information unrelated to the case at hand is unconstitutional and creates perceptions of unfairness. Courts should also take a stronger view of the necessity requirement in wiretaps and force the government to create better techniques that only capture those communications relevant to the crimes for which there is probable cause.

Further, courts should intentionally narrow the breadth of the allowed exceptions to the exclusionary rule to keep the exclusionary rule intact. As it stands today, there are so many loopholes in the exclusionary rule that it is often rendered obsolete.[314] In order to provide adequate recognition for the strictures of the Fourth Amendment, the existing exceptions must be narrowly defined to avoid allowing egregious misconduct to prejudice defendants.

These "reforms" are just asking the judiciary to use the tools that are already available. Should courts fail to take this up on their own, Congress should get involved and pass legislation to tighten the requirements for search warrants and wiretaps. The best way to prevent investigators from improperly violating attorney-client privilege is to limit their access to privileged documents in the first place.

B. A New Order Protocol of Privilege-Review Methods: Interlocking Reforms for Attorney-Client Privilege Evaluation and Determination

1. Defendant's Counsel Creates a Privilege Log and Hands over Only the Nonprivileged Documents

One remedy that some scholars have suggested is to allow the defendant's counsel to create privilege logs and hand over

314. *See* discussion *supra* Section I.C.1.

only the non-privileged documents.[315] This amounts to the gold standard of privilege protection because it allows the defendant to retain all privileged documents without granting access to prosecutors and should be the default mode of privilege review wherever possible.[316] This method is common in the civil litigation context,[317] so it is a little shocking that it is so rare in criminal contests (where defendants have higher stakes, including their own liberty). This defendant-first process would conserve time and resources in litigation because defendant's counsel would be able to quickly search and identify privileged documents, and there would be no litigation concerning taint-team procedures or determinations.

In order to protect the propriety of the privilege review, the defendant's counsel would submit a privilege log to the prosecution and court, and the prosecution could raise objections, including asserting any exceptions to attorney-client privilege. The judge would then rule on these objections. That would preserve the attorney-client privilege while ensuring the prosecution has access to the documents it needs. Although the defendant's counsel probably has a broader view of privilege than the prosecution, the privilege log and subsequent hearings would be able to adequately address the gap and lead to a balanced approach. In short, the court would reach better, fairer decisions because it would be assessing arguments from both sides in adversarial proceedings (which often does not happen in the current taint-team protocols, since taint teams often turn over documents based on their unilateral, narrow view of the defendant's privilege.)[318]

Again, this is only a viable alternative if the defendant knows that the government has access to their documents. This is a variation of the general default rule we favor above. One way around this problem is to notify the defendant when the taint team is about to begin its search and give her immediate access to the

315. *See* Stephen Dettelbak & S. Jeanine Conley, *Knock, Knock!: The Rep. William Jefferson Search Case and Its Implications in the Attorney-Client Context*, ANDREWS LITIG. REP., June 2008, at 1, 5.

316. *Id.*

317. *Id.*

318. *Id.*

documents.[319] The defendant could then identify the privileged documents and submit a privilege log to the taint team, mitigating delays and adversarial proceedings.[320] The taint team would only need to review those documents that are potentially privileged. However, this would not solve the issue of delegation of judicial functions to a taint team, nor would it provide the target of the search warrant with an opportunity to challenge the underlying warrant or wiretap or the use of and procedures for the taint team.

2. Situate Privilege Review as a Function of the Federal Public Defender's Office

We propose that—in any situation where the defendant cannot do the privilege review—the privilege review be conducted by a specialized team situated in the federal public defender's office.[321] We will refer to this as the Privilege Review Team, or "PRT." This solution is especially important where the defendant has no notice of the search, like when a secret warrant or wiretap is used. This solution can solve all of the issues identified with the current iteration of taint teams, as we explain further below.

As a function of the federal courts, the public defender's office is part of the judiciary.[322] While these are not "judicial actors," they are certainly not members of the executive branch and especially not members of the prosecution team. Delegating privilege review to these actors, especially with the supervision of the court, solves the nondelegation issue created by allowing an executive-branch taint team to make privilege determinations. Removing the privilege-review function to an actor directly

319. RICE ET AL., *supra* note 121, §11:19.

320. *Id.*

321. Federal public defenders date back to the Criminal Justice Act of 1964, which established compensation for public defense attorneys. *See* 18 U.S.C. § 3006A. Now, public defense in federal cases is handled by a combination of federal defender organizations, whose chief is appointed by the Court of Appeals of each circuit, and community defender organizations, which are incorporated under state law. *Defender Services*, U.S. CTS., [https://perma.cc/9JUT-TMEG] (last visited Nov. 4, 2022). There are also 12,000 private panel attorneys who accept these "CJA assignments" and are paid $148 per hour. *Id.* This robust network of public defenders creates ample opportunity to solve the problem of taint teams.

322. *See Defender Services*, *supra* note 321.

supervised by the judiciary ensures that judicial power stays within its branch of government. Further, by removing the privilege reviewer from the same organization and chain of command as the investigators, the PRT mitigates the conflicts of interest issues identified above.

The PRT would also consist of only attorneys and would be charged with developing uniform procedures for privilege review. By creating a dedicated team of specialized expertise, we hope to eliminate erroneous privilege determinations. We envision that these procedures would require, wherever possible, that the defendant is involved in crafting the search terms used to identify privileged documents and that the defendant have ample notice and opportunity to raise challenges to privilege determinations prior to materials being turned over to prosecutors. The procedures would also include provisions for judicial review at each step, as necessary to protect privilege while ensuring efficiency of the courts.

This solution is also flexible. In normal investigations, where the defendant has notice of the search, the PRT can act as an extension of the court's function as a neutral between two adversarial parties. But, in investigations involving secret warrants, when the defendant has no notice of the search and thus cannot be involved, the PRT could be tasked to act as a stand-in for the defendant in privilege evaluations. In this role, we envision the PRT going through the documents and creating a privilege log that is then submitted to the investigators and the court. At this point, the prosecution could object to the privilege determinations, and the court would make the ultimate decision after in-camera review of the materials. While this may not provide exactly the same level of advocacy as a defendant herself might, a PRT consisting of public defenders would be an infinite improvement over the current state of taint teams. It would also ensure a firewall between investigators and those making the privilege determinations.

From a resource perspective, we envision that this solution would require no incremental government funding. Since the executive branch is already paying for inefficient taint teams, those funds could be repurposed to the judiciary to support the PRT and related privilege-review activities. Through uniform

processes and the development of specialized experience, the PRT would likely become much more efficient than the current ad hoc teams. Further, by mitigating the legal concerns of taint teams, the PRT would likely make courts and criminal prosecution as a whole speedier, less costly, and more efficient.

3. Review by a Judicial Actor

In its 2006 opinion striking down taint teams, the Sixth Circuit held that "a government taint team's review of documents is far riskier to . . . privilege than is a judge's *in camera* review. . . . [T]aint teams present inevitable, and reasonably foreseeable, risks to privilege . . . . [H]uman nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations."[323] Similarly, the Fourth Circuit has held that disputes that arise relating to whether materials are protected by attorney-client privilege cannot be delegated to other branches or agencies.[324] Instead, the Fourth Circuit has suggested that these disputes must be resolved by judicial officers themselves and judicial officers are unable to delegate in-camera review.[325] Further, the District of Oregon also took a similar position in *United States v. Pedersen*, going so far as to recommend that if a taint team is to be used, it should "forbid the intentional review of any presumptively privileged materials . . . [which includes] any private communication between a defendant and members of his or her current or former legal teams."[326] We agree.

If a defendant is not going to be afforded a first pass at the privilege review or the benefit of the Privilege Review Team we propose, then the court must assume responsibility for the review itself, most likely through a special master or the magistrate

323. *In re* Grand Jury Subpoenas, 454 F.3d 511, 520, 523 (6th Cir. 2006).

324. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 176 (4th Cir. 2019) (citing NLRB v. Interbake Foods, LLC, 637 F.3d 492, 498, 500 (4th Cir. 2011)) ("concluding that . . . a court 'cannot delegate' an *in camera* review of documents to an agency, but must itself decide a claim of privilege"); *id.* (citing *In re* Grand Jury Proceedings, 401 F.3d 247, 256 (4th Cir. 2005)) ("remanding to district court for *in camera* review concerning privileged communications and applicability of crime-fraud exception").

325. *In re Search Warrant*, 942 F.3d at 176.

326. No. 3:12-CR-00431, 2014 WL 3871197, at *31 (D. Or. Aug. 6, 2014).

judge. In our formulation, the special master or magistrate would receive the fruits of the search. At that point, both the prosecution and defendant could offer search terms that could be used to identify potentially privileged documents. The judicial officer would conduct the search and review the documents to make privilege determinations. At each step, both sides would be involved, but prosecutors would not have access to anything that was potentially privileged until a conclusive judicial determination that the material was not privileged. Nevertheless, this may not be a viable solution except in extreme circumstances due to the cost and inefficiencies of using a special master and the current caseload for both district court and magistrate judges.

CONCLUSION

Difficult questions of privilege (and its exceptions) arise in almost every white-collar investigation. Taint teams, however, are not the answer to these questions. The "fox guarding the chicken coop" model is not working.[327] Taint teams have seen unprecedented growth in their use over the last two decades, punctuating dramatic images of pre-dawn raids and stacks of servers being carried out of offices.[328] As the use of taint teams has increased, so has the criticism of taint teams as unconstitutional violations of attorney-client privilege.[329] Courts increasingly trend toward the inevitable conclusion that taint teams as currently formulated—with their risks of prejudice, unreasonable searches, conflicts of interest, and delegations of judicial power—cannot be a part of any constitutional criminal prosecution.[330] In light of this impending shift in judicial attitude toward taint teams, we offer a set of solutions for preserving appropriate privilege review of validly seized materials while mitigating the risks endemic to the current state of taint teams.

To start, courts must become much more rigorous in their protection of Fourth Amendment rights. By enforcing the

327. *See* Anello & Albert, *supra* note 13.

328. *See* Rashbaum et al., *supra* note 1.

329. *See* Elliot S. Rosenwald et al., *United States: Fifth Circuit Latest to Cry Taint on DOJ Taint Team*, MONDAQ (Oct. 4, 2021), [https://perma.cc/CD5C-K5KQ].

330. *See* discussion *supra* Part III.

probable cause and particularity requirements for search warrants and the necessary requirements of wiretaps, courts can limit the scope of privileged information that the government inappropriately seizes, thereby limiting the scope of potential damage from inadvertent privilege violation.[331]

Next, courts and Congress must embrace a new protocol for privilege determinations for lawfully seized materials. First, courts should default to allowing the targets of investigations to do the first privilege review by withholding privileged documents and submitting a privilege log, as is done in civil contexts. Litigation arising from the privilege log would test the veracity of those privilege claims, but the privileged documents would not be given to investigators until a judicial determination of privilege has been made. If that is not feasible given the circumstances, the alternative is a new specialized unit within the federal public defender's office. As a specialized unit within the judiciary and outside the chain of command of investigators, this Privilege Review Team would ensure respect for the defendant's attorney-client privilege while expediting privilege determinations. This PRT is a great solution when secret warrants or wiretaps are employed because the PRT can flexibly stand in for the defendant until the defendant is notified of the search. Finally, if the defendant is unable to either conduct her own privilege review or enjoy the benefits of a Privilege Review Team, then the potentially privileged materials must be reviewed by a judicial actor, like a judge, magistrate, or special master.

Across its three branches, our government should advocate for the protection of attorney-client privilege and its attendant constitutional rights. This benefits not only the targets of investigations and criminal defendants, but also society as a whole: showing principled constraints on government power, driven by constitutional ideals of fairness and separation of powers, will inspire the confidence of the American people in our system of justice. Taint teams, in their current iteration, risk the integrity of some of our most important institutions (including our federal courts and the Department of Justice) at a time when that

331. *See* Riley v. California, 573 U.S. 373 (2014).

trust is already low.[332] By adopting these reforms, we can help preserve and rebuild these institutions as bastions of justice and ensure fair and constitutional outcomes for all.

332. *See Confidence in Institutions*, GALLUP, [https://perma.cc/FXB8-5PV5] (last visited Nov. 4, 2022) (showing a general downward trend in confidence in American institutions since the 1970s).