

Government Taint Teams: 🎵The Times They Are A-Changin' or 🎵Same as it Ever Was—A Survey of Cases and Commentaries

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(This power point is available at my website for viewing or download)

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Taint Team Concern #1: The Fox Guards the Henhouse

The instinctive, fundamental, self-intuitive and common-sense tension with a government taint or filter team was plainly stated by the U.S. Court of Appeals for the Sixth Circuit. The Court memorably noted the "obvious flaw" is that "the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion."

See *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006); *see also* *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006) ("Federal courts have 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."); *In re Search Warrant for L. Offs. Executed on Mar. 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) (finding the use of a taint team to be "highly questionable" and "discouraged," "notwithstanding our own trust in the honor of an AUSA").



Taint Team Concern #2: Conflict Of Interest

Taint team critics argue the taint team process creates an inherent conflict of interest. It permits members of the very agency charged with prosecution to view actual or potential undiscoverable documents and to make potentially self-serving privilege determinations---determinations historically reserved for the courts.

Taint Team Concern #3:

Unilateral Discretion

- The privilege determination by the filter team is usually made within its discretion. Neither the defense team nor privilege holder participates in the process.
- For example, the filter team for the Mar-a-Lago search review had broad discretion. See Affidavit In Support of An Application Under Rule 41 For A Warrant to Search and Seize, In The Matter of the Search of Locations Within the Premises to Be Searched in Attachment A, Case 9:22-mj-08332 BER (August 26, 2022) (originally sworn August 5, 2022) at Paragraph 84 (allowing the filter team the option of applying *ex parte* for a privilege determination, or continuing to keep the documents segregated, or disclosing the documents to the "potential privilege holder," who would produce a privilege log and would seek a determination from the court).



Discussion Points

1. Department of Justice (DOJ) manual authority addressing taint team definition, composition and process
 - Judicial cases critiquing and supporting the DOJ process: *Seal* and *Korf*
 - Key taint team considerations
2. Legal taint team insights from Mar-a-Lago
3. The taint team process is just a subset of a larger process concerning ESI production

Definition of a Taint Team

A taint team, which is sometimes called a filter team, is a set of federal prosecutors and agents who are not working on, or otherwise have a connection to, the matter under investigation. The filter team members "remain isolated from the prosecution team(s) and are cautioned not to disclose information discovered during the filter process to the prosecution teams assigned to this, and the related criminal cases."

See *United States v. Fluitt* , No. CR 3:20-00196-01, 2022 WL 1633627, at *1 (W.D. La. Mar. 4, 2022), *aff'd*, No. 3:20-CR-00196-01, 2022 WL 1625170 (W.D. La. May 23, 2022).

DOJ Manual on Taint Team

DOJ Manual, §9-13.420 states as follows:

- 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.

DOJ Manual (cont'd)

- 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 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.

DOJ Manual (cont'd)

- 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.

[updated January 2021]

But, There is More Government Taint Team Process (*More Alphabet Soup!*)

- In 2020, DOJ created the Special Matters Unit, or SMU, within the Fraud Section.
- According to the DOJ, the SMU was created to focus on issues related to privilege and legal ethics, including evidence collection and processing, pre- and post-indictment litigation, and advising and assisting Fraud Section prosecutors on related matters.
- The SMU (1) conducts filter reviews to ensure that prosecutors are not exposed to potentially privileged material; (2) litigates privilege-related issues in connection with Fraud Section cases; and (3) provides training and guidance to Fraud Section prosecutors.

See DOJ Fraud Section, Year In Review: 2020, at 4, available at <https://www.justice.gov/criminal-fraud/file/1370171/download>.

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In Sum, DOJ Taint Team Processes Are Minimal According to Critics...

- The taint team must include only lawyers and agents not on the prosecution team; the team must not disclose material to the prosecution team until instructed by the attorney in charge of the taint team; and the DOJ must generally apprise the court of the procedures the DOJ intends to use to protect the privilege.

See Justice Manual § 9-13.420, available at <https://www.justice.gov/jm/jm-9-13000-obtaining-evidence>.



...And Incomplete According to Critics

- DOJ does not require any judicial involvement in making or approving privilege determinations.
- DOJ does not require securing any input, however minimal, from the putative privilege holder.

Id.



Minimal DOJ Taint Team Protections Exacerbate the Actual or Perceived Bias and Conflict of Interest Concerns

- Defense counsel and certain courts have objected strenuously to the use of taint teams over the years. They have argued, among other things, that prosecutors are naturally inclined to take a highly restrictive view of the attorney-client privilege and thus, in any situation in which the privilege is less than abundantly clear, a taint team is likely to deem the privilege inapplicable.
- Another criticism stresses the lack of any formal wall separating prosecutors on a taint team from prosecutors handling the underlying investigation — even though they often work in the same office and may be members of the same team on other cases.



The Minimal DOJ Taint Team Protections Have Resulted in Significant Judicial Criticism

U.S. v. Seal, 942 F.3d 159 (4th Cir. 2019). Criticizing the delegation of judicial function to the executive branch.

- The government executed a search warrant at a law firm's office in connection with a criminal investigation into a partner at the firm, seizing a massive quantity of potentially privileged material.
- DOJ set up a taint team and used a protocol that allowed the taint team to forward documents it deemed to be nonprivileged directly to the prosecution team.
- The protocol also required the taint team to confer with defense counsel regarding documents that were "potentially privileged" or where the privileged material could be potentially redacted, and to seek a judicial ruling on any disputes. *Id.* at 165-66.

U.S. v. Seal (cont'd)

- The Fourth Circuit determined the taint team's ability to decide that certain documents were nonprivileged, without any involvement by the defense or the court, was unlawful. According to the Court, this aspect of the protocol improperly "assign[ed] judicial functions to the executive branch" because "a court simply cannot delegate its responsibility to decide privilege issues to another government branch."
- This problem was "compound[ed]" by the fact the taint team included federal agents and paralegals, who were not lawyers. *Id.* at 176-77.

More Judicial Criticism

- Whereas the Fourth Circuit was critical of the delegation of judicial function to the executive branch, the 5th Circuit last year criticized the filter team for mishandling privileged information.
- A filter team reviewed the seized materials, after which the DOJ declined to meet with the owner or return privileged materials. The Court ordered the return of the seized materials and described the government's continued retention of privileged documents as a "callous disregard" of the owner's privilege. See *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593 (5th Cir. 2021). Cf. *Heebe v. United States*, 2012 WL 3065445, *5 (E.D. La. 2012) (another Fifth Circuit case requiring the Government to maintain a record of all Government attorneys or agents who have had access to the privileged records).



More Judicial Criticism

In December 2021, the U.S. District Court for the Northern District of Georgia modified a filter-team protocol to allow the privilege holder to object to disclosure in *In re: Search Warrants*.

See *In re Search Warrants*, No. 1:21-CV-04968-SDG, 2021 WL 5917983, at *4-6 (N.D. Ga. Dec. 15, 2021).

The Key Consideration: Privilege Holder Involvement

U.S. v. Korf, 11 F.4th 1235 (11th Cir. 2021).

- Upheld DOJ's use of a taint team to conduct a privilege review of materials seized from a suite of offices in connection with an international money laundering investigation, ***BUT***, required certain safeguards curtailing historical DOJ protocol.
- The protocol allowed for the privilege holders to conduct an initial review of all seized items and provide a privilege log to the prosecutors, but allowed the DOJ's taint team to review the underlying communications in deciding whether to challenge any privilege designations. Crucially, the protocol provided for a court or special master to rule on any disputes ***before*** the materials were shared with the prosecution team.

Id. at 1242-43.

More Korf

- Although the Eleventh Circuit rejected the argument that "government agents should never ... review documents that are designated by their possessors as ... privileged until after a court has ruled on the privilege assertion", the procedures that it upheld included far more safeguards — and gave both the court and the privilege holders a much greater role — than the DOJ has historically used and continues to use in many jurisdictions.
- Most significantly, **the protocol enabled the privilege holders to review the documents in the first instance, to designate documents as privileged, and to obtain judicial review before any such documents were disclosed to the prosecution team.**

Id. at 1249-1251.

Alternative Taint Team Approach

- “Attachment D instructed the taint team ...to review all documents to be seized to determine if they contained any privileged information. It provided that: (1) documents covered by the attorney-client privilege would not be seized; (2) documents which were arguably privileged or which were privileged but could fall within an exception to the privilege, would be sealed and delivered to a United States Magistrate Judge; (3) documents which were not privileged were to be separately sealed and delivered to the magistrate judge; (4) if the magistrate judge determined that a seized document was not privileged, it would be turned over to the agents and the prosecution team.”
 - BUT, no involvement by the privilege holder prior to production to the prosecution team.

United States v. Triumph Capital Group, Inc., 211 F.R.D. 31, 43 (D. Conn. 2002)

More Critical Cases

- The use of such teams is subject to abuse and may be particularly inappropriate where the seized documents involve an attorney's representation of a client in a criminal proceeding.
- See *United States v. Jackson*, No. 07-0035(RWR), 2007 WL 3230140, at *5-6 (D.D.C. Oct. 30, 2007) (applying four-factor test and granting criminal defendant's request for a special master to review files rather than a government "taint team");
- See also *United States v. Stewart*, No. 02 CR 396 JGK, 2002 WL 1300059, at *6-7 (S.D.N.Y. June 11, 2002) (appointing a special master to review files, rather than a privilege team as requested by the government, and reviewing cases in which ethical firewalls of privilege teams became problematic).

How Does NY Federal Authority Address Taint Teams?

The SDNY noted that “[t]o the extent that the Fourth Circuit's decision [in Seal]... can be read to categorically prohibit the use of filter teams to conduct privilege reviews in the first instance of lawfully seized materials, the Court declines to follow it.”

See *United States v. Avenatti* , No. 19 Cr. 374 (JMF), 2021 WL 4120539, at *1 (S.D.N.Y. Sept. 9, 2021).



More NY Federal Authority

The SDNY Court also noted the Second Circuit Courts "have long blessed such procedures" and stated that taint teams "adequately balance the law enforcement (and public) interest in obtaining evidence of crimes with respect for privileged communications."

Id. See also *In re Search Warrants Executed on Apr. 28, 2021*, 21 M.C. 425 (JPO), 2021 WL 2188150, at *2 n.3 (S.D.N.Y. May 28, 2021) ("[T]o the extent [the Fourth Circuit decision] suggests that the use of a filter team by a federal prosecuting office may violate the constitutional separation of powers, this Court respectfully disagrees.").

SDNY District Court Cites Insufficient DOJ Taint Team Training

- *United States v. Landji*, (S1) 18 Cr. 601 (PGG) (S.D.N.Y. Nov. 18, 2021), n. 32: “It was not until August 2021 that the Government utilized a taint paralegal to scan and reproduce to defense counsel Defendants' Documents. (Tr. 239) Instead of using a taint team during the period between November 2019 and August 2021 to review Defendants' Documents and to make a determination as to whether any documents were privileged, the Government used an agent and analyst who were part of the investigative team (see Tr. 133, 179) to scan these documents in preparation for producing them in discovery. Although in January 2020, AUSA Hellman instructed Agent Waters not to review Defendants' Documents, that warning came months after the documents had been scanned, and did not involve all of the DEA and USAO personnel working on the case. (Tr. 237) AUSA Hellman's failure to recognize the need to implement a taint team earlier, and to take appropriate steps to ensure that members of the investigative team were not exposed to privileged material, suggest a lack of appropriate training at the USAO concerning the handling of potentially privileged material.”



Taint Teams and WDNY

- My electronic Casetext research using the search terms "taint team" or "filter team" and "WDNY" within the Second Circuit database yielded no results.

Key Taint Team Considerations

Whether the....

- protocol enables the putative privilege holder to play a role in the process and assert privilege over particular documents;
- protocol requires a court or special master to approve the taint team's privilege determinations ***before*** the material is disclosed to the prosecution team;
- searched premises, accounts or devices were used by lawyers or are otherwise likely to contain large volumes of privileged material;

More Key Taint Team Considerations

- Whether there is a basis to believe that a large portion of the seized material is unrelated to the subject matter of the investigation;
- Whether the taint team is composed of prosecutors from the same office conducting the underlying investigation;
- Whether the taint team includes nonlawyers like agents or paralegals;
- Whether the protocol was adopted *ex parte* or following an adversarial process; and
- Whether the search was executed covertly, and if so, whether there was a sufficient justification for not notifying the target.

Final Taint Team Considerations

- Immediately after the search.....
 - Identify the USAO Taint team procedures
 - Evaluate them against the above factors
 - Engage the USAO in a dialogue re taint team Procedures and personnel comprising the Taint Team and coordination with Privilege Holder prior to conveying privilege material to the prosecution team
 - Bring a prompt judicial challenge, if necessary

Mar A Lago *Legal Insights Re Taint Team Processes*

- The DOJ created a filter team to inspect the documents collected during the FBI's search of Mar-a-Lago, a filter team with broad discretion — it may apply *ex parte* for a privilege determination, or continue to keep the documents segregated, or disclose the documents to the "potential privilege holder," who would produce a privilege log and would seek a determination from the court.
- The last option — disclosure followed by a court ruling — **is consistent with *Korf*, a decision binding in the Southern District of Florida.** DOJ opposed the appointment of a special master and informed the court that "the investigative team has already reviewed all of the seized materials that were not segregated by the filter team." See United States Response to Motion for Judicial Relief and Additional Oversight, Trump v. United States, Case No. 22-cv-81294-AMC (S.D.Fla.) [Doc. 48] at 30.
- The court rejected the government's arguments and granted, in part, Trump's request to appoint a special master. See Order on Plaintiff's Motion for Judicial Oversight and Additional Relief, Trump v. United States, Case No. 22-cv-81294-AMC (S.D.Fla.) [Doc. 64].

The Taint Team Process is Just a Subset of a Larger Process Concerning ESI Production

- The seizure of privileged material in the context of a white-collar investigation will not be generally secured in hardcopy documents.
- The seizure of privileged material will be generally secured thru seizure of the servers of the white-collar target(s).
- The taint team process is properly understood as only a subset of a broader evidentiary process concerning seizure of ESI.
- The seizure of ESI implicates Fourth Amendment concerns of a general warrant.

Morgan ESI Considerations

- In Morgan, the ESI protocol was not adhered to resulting in a dismissal without prejudice.
- A summary of the iterative arguments follow:
 1. The first issue: the metadata did not exist
 2. The second issue: emails were extracted from OST and PST files
 3. The third issue: NUIX was the problem.
 4. The fourth issue: the Protocol was the problem.
 5. The fifth issue: producing proper metadata consistent with the Protocol would affect the integrity of the productions.



Morgan ESI Takeaways

- **RECOGNIZE THE MULTI-LAYERED ESI ISSUES:**
 - **THE SEIZURE OF THE SERVERS**
 - **THE DETECTION OF PRIVILEGED MATERIAL (SEE ABOVE)**
 - **THE SEARCH OF THE SERVERS (WHICH OCCURS AFTER SEIZURE AND IN THE GOVT OFFICE)**
 - **THE PRODUCTION OF THE SEIZED ESI**



Morgan ESI Takeaways

- **THE TAINT TEAM PROCESS AS WELL AS THE PROCESS TO ENSURE A SEARCH BASED ON THE WARRANT—AND NOT A GENERAL WARRANT SEARCH—WILL INVOLVE SEARCH TERMS TO SOME DEGREE**
 - **AGREED OR UNILATERAL?**
 - **DO THE SEARCH TERMS CAPTURE ONLY THE AUTHORIZATION IN THE WARRANT OR DO THEY TRANSFORM THE SEARCH TO A GENERAL WARRANT?**



Morgan ESI Takeaways

- **ESI PROTOCOL**
 - **WHAT IS IT?**
 - See <https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf>.
 - **THIS SHOULD NOT BE ADVOCACY. THE ESI PROTOCOL SHOULD BE A BENIGN PROTOCOL DESIGNED TO BENEFIT EVERYONE WITH ESI PRODUCED IN A WAY THAT ENSURES ADHERENCE TO THE WARRANT AND CONTAINING ALL SIGNIFICANT METADATA**
- **ESI PROTOCOL PRODUCTION**
 - **THIS IS WHERE YOU NEED YOUR ESI TEAM**



Taint Team Conclusions

- Immediate action is necessary to avoid a mootness argument
- The key defense consideration is involvement of the privilege holder prior to transmission of materials to the prosecution team

QUESTIONS?

Thank you.

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