

# DOJ 'Taint Teams' Pose Privilege Risks For Defendants

By **Jim Brochin** and **Pat Linehan**

To address the issues surrounding the incidental seizure of privileged communications within a broader seizure of electronic data, the U.S. Department of Justice recently created a new Special Matters Unit within the Fraud Section.

The unit will function as a specialized team to address privilege-related issues. It will oversee one of the DOJ's favorite methods of privilege review — the use of "taint teams." [1]

The timing of the creation of this unit may reflect concern over recent court decisions that have criticized the way in which the DOJ uses taint teams. In any event, the new unit will no doubt affect the DOJ's overall approach to privilege issues moving forward.

This article explores the DOJ's current approach to taint teams, courts' evolving views of them, and practical tips for attorneys facing cases involving a taint team review.

## The DOJ's Use of Taint Teams

Taint teams consist of DOJ prosecutors and FBI agents who are not part of the prosecution team and who are assigned by the DOJ itself to review potentially privileged material seized in connection with a specific investigation. The underlying rationale of taint teams is to insulate the attorneys investigating (or prosecuting) a case from becoming "tainted" by exposure to privileged materials belonging to the target or subject of an investigation.

The team determines on a document-by-document basis whether evidence seized in warrants is protected by attorney-client or work-product privilege. The concern is that if the prosecution team is exposed to such material, it could result in the exclusion of the evidence in the event of a trial or even the disqualification of the prosecutors. Once the taint team labels a document "nonprivileged," prosecutors on the case usually gets access to those documents.

The problem with this approach is immediately apparent. The taint team review process creates a conflict of interest; it permits members of the very agency prosecuting the suspect to view what would otherwise be undiscoverable documents, and to make potentially self-serving privilege determinations that are generally reserved for courts.

The risk to attorney-client privilege and the work-product doctrine that taint teams pose has led defendants to question not only the manner in which a taint team is used in a specific case, but the broader legitimacy of taint teams as well. A number of courts have recognized these flaws in the taint team approach. [2]

Nevertheless, most courts to look at the issue have focused on the manner in which the DOJ executes the taint team rather than holding that the concept is per se improper. [3] The question then arises as to what are the appropriate procedures to ensure that the privilege is respected.



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There is a dearth of DOJ guidance regarding the setup and function of taint teams, a problem that affects both prosecutors and defense counsel. For example, up until recently, any federal prosecutors or agents uninvolved in the subject investigation could work on a taint team.

The Justice Manual states only that the taint team may consist of "agents and lawyers," thus permitting nonattorneys to review documents for privilege. It does not specify who qualifies as an "agent" for purposes of the review and fails to exclude assistant U.S. attorneys in the prosecuting attorneys' district from the team.

Following the Justice Manual, federal prosecutors are supposed to establish document review procedures prior to application for a search warrant. In many cases, prosecutors include a proposed taint team protocol in their warrant applications. The government typically (though not always) determines in advance who conducts the review, which documents are sent for a secondary review, whether the subject attorney will be permitted to evaluate the documents, and how electronic evidence will be handled.

Protocols employed by U.S. attorney's offices often differ across jurisdictions, and if warrants relating to the same investigation are signed by magistrates in different jurisdictions, taint team protocols can differ even within the same investigation. With the advent of the Special Matters Unit, the hope is that this inconsistency will occur less often.

The currently applicable Justice Manual guidelines omit several key provisions. They do not, for example, require prosecutors to seek any input from the party whose documents were seized, such as the names of attorneys who might be involved in privileged communications, nor do they require prosecutors to solicit information regarding the factual bases for any potentially applicable waiver doctrine (e.g., crime-fraud, at-issue, third-party disclosure).

Even after the search and privilege review, prosecutors are under no obligation, according to DOJ guidance, to identify the seized records deemed nonprivileged (and thus disclosed to the prosecution team) to the defendant. Rather, the Justice Manual recommends forwarding the nonprivileged documents to the defendant only "where such disclosure will not impede or obstruct the investigation."

Neither the Justice Manual nor the DOJ Search and Seizure Manual stipulates that the government must allow review of discovery the taint team has deemed nonprivileged. Without access to the documents, the target of the search lacks the opportunity to dispute privilege decisions the taint team may make, and thus has little ability to prevent the prosecuting team from viewing privileged material.

### **Taint Teams in the Courts**

Especially in the early years of the practice, courts reviewing taint teams did not reach a consensus on approved practices. Although the first circuit court to consider the appropriateness of taint teams, the U.S. Court of Appeals for the Sixth Circuit, categorically rejected the practice, the DOJ continued to employ taint teams, operating on a presumption of their validity and often acting with magistrate judge approval. Only in the last couple of years have courts begun to look more skeptically at taint teams.[4]

Against the backdrop of this increasing skepticism, the U.S. Court of Appeals for the Fourth Circuit recently entered the fray.

## **The Fourth Circuit Tackles Taint Teams**

Last year, the Fourth Circuit became the second circuit court to weigh in on the use of taint teams. Its decision amounted to a warning shot for prosecutors relying on the practice. Although the government's actions in the case adhered to its own guidelines, the court outright rejected them, even expressing surprise that the government found their review process appropriate in the first place.

In *In re: Search Warrant*, the U.S. attorney's office in Maryland initiated an investigation into an attorney suspected of helping a client commit felonies. At an *ex parte* hearing before a magistrate judge, the prosecutors detailed the review procedures for seizing relevant material and was granted a search warrant for the attorney's law firm. The DOJ set up a taint team of independent agents and prosecutors to analyze the seized documents (primarily emails) and provide evidence deemed nonprivileged straight to the prosecuting team.

The law firm that was the subject of the search challenged the seizure of its privileged materials, and requested that the district court enjoin the use of the taint team. The district court denied this request but ruled that the nonprivileged documents must be sent to the subject of the investigation, as opposed to sending straight to prosecutors, to allow for possible objections.

The defendant then appealed the ruling to the Fourth Circuit. Only two days after arguments, the Fourth Circuit reversed the district court's order and within weeks, issued an opinion condemning the prosecutors' use of a taint team.

The court objected both to the planned procedure and the taint team concept itself on a number of grounds. The court's core concern, expressed in strong language, was that the government's procedures were simply inadequate to protect the attorney-client privilege. The court found that taint teams threaten these "vital" privileges, and thereby endanger defendants' Sixth Amendment right to effective assistance of counsel. The panel also found that taint teams "present 'reasonably foreseeable risks to privilege' and 'have been implicated ... in leaks of confidential information to prosecutors.'"

The court, however, went even further than the Sixth Circuit, ruling that the use of the taint team in any form was inappropriate because it delegated judicial power to the executive branch, which was particularly problematic "when the executive branch is an interested party in the pending dispute."

The Fourth Circuit found the DOJ's actions particularly egregious because nonlawyers were tapped as part of the first-level review, finding that the use of nonlawyers poses a substantial risk to vital privileges. This holding was an express repudiation of the Justice Manual's authorization of this practice.

The court also criticized the DOJ for having the taint team forward nonprivileged documents to the prosecution directly. Citing several instances where teams mistakenly produced privileged documents to prosecutors, the court attributed the errors to the inherent conflict existing when the same entity that is prosecuting a case makes the privilege assessments.

The panel ruled that failing to allow document review by the subject of the search jeopardizes the subject's attorney-client and work-product privileges. Once again, the panel's ruling directly contradicted Justice Manual guidance in this respect.

Finally, the court objected to the magistrate judge's ex parte approval of the taint team procedure prior to document collection. Leaving the subject of the search out of the process deprived him of a meaningful opportunity to challenge the government's proposed procedure.

## **Looking Forward**

It is fair to read the Fourth Circuit's Search Warrant decision to suggest that taint teams are never an appropriate way for prosecutors to review potentially privileged material seized in a search. But even if courts (and prosecutors) do not necessarily read it that way,<sup>[5]</sup> the concerns it identified extend beyond the facts of that case. Already, cases unrelated to law office seizures have relied on the Fourth Circuit's reasoning to criticize the government's use of taint teams.<sup>[6]</sup>

It is this growing skepticism of taint teams that the DOJ's new Special Matters Unit must now confront. It is as yet unclear how the DOJ practice will evolve to mitigate the risk taint teams pose to applicable privileges. Even more uncertain is the extent of courts' acceptance of these practices.

The fledgling Special Matters Unit may apply safeguards to help eliminate the risk of breaching defendants' rights, but it is still part of the DOJ and, therefore, its review of privileged documents represents an inherent conflict of interest.

## **Practical Advice**

### ***Challenge the Use of a Taint Team***

In the wake of this recent near categorical rejection of the DOJ's use of taint teams, defense attorneys who are worried about a client's privileged materials seized by the government should challenge any use of a taint team as early as possible. Once privileged material is in the hands of prosecutors, available remedies can be frustratingly limited.<sup>[7]</sup> Attorneys can challenge the process internally through the DOJ and seek alternatives to a taint team, such as the appointment of a special master, a self-review of the documents, or an ex parte review by the judge.

If these efforts with the DOJ prove unsuccessful, attorneys can apply for judicial relief by filing a motion under Rule 41 of the Federal Rules of Criminal Procedure, seeking return of all privileged documents included as part of the seizure, or a motion for a preliminary injunction to prevent review of the documents. Either motion will provide a platform on which to make arguments against the use of a taint team before a court.

Because a successful judicial challenge to a taint team will require a full factual record, it is important that defense counsel seek from prosecutors as much information as possible regarding the constitution and operation of the taint team, and that all information exchanges are well-documented.

### ***Challenge the Taint Team's Process***

Even if a categorical challenge to the use of a taint team is unsuccessful, there are ways in which defense attorneys can influence and later challenge aspects of the team's constitution and operation.

At the outset, defense attorneys should provide attorney search terms to the trial team to identify documents that are potentially privileged. Using these search terms, the defense team could also seek to put limitations on responsiveness to minimize even the filter team's exposure to potentially privileged materials.

Another option, once a case has been indicted, is to seek discovery, under Federal Rule of Criminal Procedure 16, regarding (1) the details of how the taint team is composed, (2) what search terms were used to identify potentially privileged information, (3) which documents among the seized data it identified was passed along to the prosecution team, and (4) the steps taken by the taint team to ensure that the prosecution team does not have access to the documents.

Attorneys should also request written certifications from the prosecution team that none of its members has accessed any privileged documents since the onset of the investigation, and that the taint team does not consist of any member that was involved in any way in the investigation at issue or any related investigation since inception.

Ultimately, defense attorneys must stay vigilant regarding sprawling searches and seizures of data that could infringe their client's privilege. The DOJ's new Special Matters Unit may resolve some of the concerns that courts have previously flagged, but it cannot resolve taint teams' inherent conflict of interest, and it will be only a matter of time before the practices of the special unit become the subject of a judicial challenge.

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[1] Ines Kagubare, Fraud Section to create new privilege unit, Global Investigations Review (May 13, 2020), <https://globalinvestigationsreview.com/article/jac/1226759/fraud-section-to-create-new-privilege-unit>; Adam Dobrik, DOJ fraud section sets up dedicated privilege team, Global Investigations Review (June 24, 2019), <https://globalinvestigationsreview.com/article/jac/1194421/doj-fraud-section-sets-up-dedicated-privilege-team>.

[2] See, e.g., [United States v. SDI Future Health Inc.](#), 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006); [United States v. Noriega](#), 764 F. Supp. 1480 (S.D. Fla. 1991); In re: Grand Jury Subpoenas 04-124-03 and 04-124-05, 454 F.3d 511, 523 (6th Cir. 2006); [In re: Search Warrant for Law Offices Executed on March 19, 1992](#), 153 F.R.D. 55, 59 (S.D.N.Y. 1994); [United States v. Stewart](#), 2002 WL 1300059 (S.D.N.Y. Jun. 11, 2002).

[3] See, e.g., [Heebe v. United States](#), 2012 WL 3065445 (E.D. La. July 27, 2012).

[4] See, e.g., [In re: Grand Jury Subpoenas](#), 454 F.3d 511 (6th Cir. 2006); [United States v. Gallego](#), No. CR1801537001TUCRMBPV, 2018 WL 4257967 (D. Ariz. Sept. 6, 2018); [In the Matter of Search Warrants Executed on April 9, 2018](#) (1:18-mj-03161) (S.D.N.Y April 13, 2018).

[5] See [United States v. Chavez](#), 423 F. Supp. 3d 194, 207 (W.D.N.C. 2019) (finding that the Fourth Circuit case "may" have found the taint team process generally illegal).

[6] In [United States v. Sullivan](#), for example, the court levied sanctions against the prosecution after determining that the government's taint team released privileged documents obtained from a search of the defendant's home to the prosecutors. The court noted repeated the criticism of taint teams, including those by the Fourth Circuit, but stopped short of finding the taint team improper. No. CR 17-00104 JMS-KJM, 2020 WL 1815220 (D. Haw. Apr. 9, 2020). In [United States v. Castro](#), the court took an even stronger stance, rejecting proposed taint team review of jail calls likely to contain attorney-client information. The court appointed a special master for the review instead, citing the Fourth Circuit (as well as the Sixth Circuit) decision. No. CR 19-20498, 2020 WL 241112 (E.D. Mich. Jan. 16, 2020).

[7] See Robert Anello, Richard Albert, Government Searches: The Trouble With Taint Teams, New York Law Journal, <https://www.maglaw.com/publications/articles/2016-12-06-government-searches-the-trouble-with-taint-teams/res/id=Attachments/index=0/Albert%20Anello%2012.6.16.pdf>.