

The Role Government Filter Teams Play in Criminal Investigations

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Former President Donald Trump’s request for appointment of a third-party Special Master to review documents seized from Mar-a-Lago shines light on the role that government filter teams play in criminal investigations. While the search of Mar-a-Lago was extraordinary in many respects, the creation of a “filter team” with protocols approved by a magistrate judge was routine. Taking away the bombastic rhetoric in his filing, Mr. Trump’s stated concern about the prosecution team having access to privileged materials is also typical.

When the government executes a search warrant and seizes documents that may include materials protected by the attorney-client privilege or the work product doctrine, the government typically forms a “taint team” or “filter team” to prevent the prosecution team from gaining access to privileged material. The team, which includes attorneys and others, does not play a role in the investigation. The filter team reviews the documents, determines what documents should be screened out as potentially privileged, and may litigate whether those potentially privileged documents are entitled to protection or should instead be turned over to the prosecution team.

Although use of filter teams may be routine, they have come under significant scrutiny and criticism when they sideline defense counsel and the courts.

Filter Teams – The Risks

Mistakes by filter teams can be disastrous. The prosecution team may have access to sensitive, and potentially damaging, candid communications with counsel that the privilege is designed to protect. Materials may be widely disseminated, among federal and state prosecutors when there are parallel investigations, or through public filings, before the privilege holder has notice and can act to prevent the harm. In addition, the government’s use of privileged material—even inadvertently—can lead to disqualifications, mistrials, dismissals of indictments, and other complications that can hinder the prosecution’s case.

Government reviewers may construe privileges more narrowly than the courts, which would give prosecutors access to more information than they should receive. As experienced practitioners know, making privilege calls can be complex and often requires factual investigation to determine

the proper application and scope of the attorney-client privilege and work product protection in a specific case. Only defense counsel has access to the facts necessary to make these difficult—and potentially critical—decisions on privilege before the documents are turned over to the prosecution team.

Without robust protections, legitimate privileges and protections can be vitiated.

The Legal Framework

While most federal appellate courts have blessed the government’s use of filter teams as a general practice, several have signaled that only filter team protocols with significant safeguards will survive judicial scrutiny.

The Sixth Circuit in 2006, the Fourth Circuit in 2019, and the Eleventh Circuit in 2021 each rejected protocols that allowed the government filter team to provide documents directly to the prosecution team without first being reviewed by defense counsel. The Fourth Circuit, for instance, found this approach amounted to an impermissible “review of client communications and lawyer discussions by government agents and prosecutors... made in disregard of the attorney-client privilege, the work-product doctrine, and the Sixth Amendment.”

Courts have taken it upon themselves to modify filter team protocols to ensure the defense and the court can play their essential roles in protecting legitimate assertions of privilege. In 2021, the Eleventh Circuit upheld a district court’s modified filter team protocol that allowed the privilege holders to conduct “an initial privilege review of all seized items [and] provide a privilege log to the government’s filter team”—a component that did not exist in the original protocol. The court explained that that the protocol, as modified, “did not assign judicial functions to the executive branch” and gave privilege holders the first opportunity to identify potentially privileged materials.

Earlier this summer in *United States v. Ritchey*, the court threw out the government’s protocol and barred further review until the court approved a new filter team protocol. The court, while noting that filter teams are appropriate when they provide adequate protections, found they present “inevitable, and reasonably foreseeable, risks to privilege.” In this case, the risk of invading privilege was too great because the government had neither sought court preapproval of the protocol nor engaged in good faith informal negotiations with the defense, and the protocol failed to provide defense counsel with an objection period before documents were disclosed to the prosecution team.

The courts have made it clear that to survive judicial scrutiny, DOJ filter team protocols must allow the party’s attorneys to review the seized documents and assert objections *before* they are provided to the prosecution team; and they may not usurp the court’s authority to rule on privilege disputes, with or without the assistance of a special master. Despite this clear guidance, the DOJ occasionally continues to implement protocols that deny the defense the ability to prevent the government from improperly invading privilege.

Use of Special Masters

Privilege holders doubting that their interests will be protected may request that the court appoint a special master—a neutral third-party who has the time and resources to focus on complex privilege issues and provide recommendations to the court. Special masters have recently been appointed to review documents seized from attorneys in particularly sensitive matters, including documents seized from Mr. Trump’s counsel, Michael Cohen and Rudy Giuliani.

Courts have spoken favorably about such appointments, acknowledging the potential benefit of delegating the privilege review to an individual appointed by the court rather than to lawyers employed by DOJ. As the Fourth Circuit explained in *In re Search Warrant Issued June 13, 2019*, “a magistrate judge and a special master are judicial officers and neutral arbiters that have no stake in the outcome of the privilege decisions.” Appointing a special master may be necessary to avoid the appearance of unfairness.

Some courts have found use of special masters to be impractical in certain circumstances, for example, when documents are voluminous or there are significant restrictions on access to the documents.

The government will likely be reluctant to give up its control of the process, bear the potentially substantial expense of a special master, and create a precedent that could make such appointments more common. As a result, the government may only agree to special masters in front page, politically charged cases.

Final Considerations

In order to protect privilege following seizure of documents, it is of paramount importance to act quickly. Counsel should contact the investigation team immediately and identify specific concerns regarding privileged information that may have been seized. If the government fails to agree to adequate protocols, it may be necessary to seek relief from the court. Even if the court does not grant relief immediately, the prosecution team will be on notice of particular concerns and the prejudice that could result from it receiving tainted material, and it will be more difficult for the prosecution team to claim that its access to privileged material was an innocent mistake.

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