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### **Special Matters: Filtering Privileged Materials in Federal Prosecutions**

Christina Frohock

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# Article

## SPECIAL MATTERS: FILTERING PRIVILEGED MATERIALS IN FEDERAL PROSECUTIONS

Christina M. Frohock\*

*This Article reviews the U.S. Department of Justice’s toolbox for handling potentially privileged materials, with close attention to the evolution from filter teams to the Special Matters Unit in fraud prosecutions. Significant case opinions from the U.S. Courts of Appeals for the Fourth, Sixth, and Eleventh Circuits reveal the judiciary’s diverse views on filter teams. The recent case of United States v. Esformes in the U.S. District Court for the Southern District of Florida, now on appeal to the Eleventh Circuit, illustrates how a filter team can fall short and draw unflattering attention to the Department of Justice. In the wake of Esformes and other filter team criticisms, the Department introduced the Special Matters Unit to usher in a new, improved, and centralized team. Underlying all these privilege strategies is a view of criminal justice as quasi-adversarial. The special role for prosecutors to seek justice rather than convictions implies that a criminal prosecution is not purely competitive. This quasi-adversarial view is the invisible side to privilege, justifying and animating the Department of Justice’s privilege strategies.*

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## INTRODUCTION

An emerging theory in physics posits the existence of an invisible side to the universe: a combination of dark matter and dark energy that explains observed motions lacking any apparent cause.<sup>1</sup> Dark matter is nearly impossible to detect because it does not absorb or emit light, yet it interacts gravitationally with visible matter.<sup>2</sup> It also outweighs visible matter roughly six to one.<sup>3</sup> Dark matter makes up approximately 25% of the mass in the known universe, while visible matter accounts for approximately 4%.<sup>4</sup> Most of the rest, approximately 70%, comprises the even more mystifying “energy of empty space” called dark energy.<sup>5</sup> Dark matter and dark energy are pervasive and powerful, playing a mysterious role that scientists can detect only indirectly. The dark side exerts a strong but invisible force, pushing and pulling visible matter and bending light.<sup>6</sup> Dark matter glues galaxies together, while dark energy rips the universe apart.<sup>7</sup>

An analogous phenomenon to the “big cosmic mystery” of the universe’s invisible side emerges in federal criminal law, specifically when the government reviews potentially privileged documents.<sup>8</sup> There is an invisible side to privilege that plays a powerful role, supplying normative force to the visible side. We can detect privilege’s invisible side indirectly, by examining its influence on aspects of privilege that we can see. Issues of attorney-client privilege and work product protection arise often in criminal prosecutions, especially when materials are seized from attorneys’ offices. The U.S. Department of Justice may assign a filter team to sift out potentially privileged materials. Alternatively, a court may appoint a Special Master to make privilege determinations. Recently, the Department of Justice created the Special Matters Unit to oversee privilege reviews.

This Article reviews the Department of Justice’s toolbox for handling potentially privileged materials, with close attention to the evolution from filter teams to the Special Matters Unit in fraud prosecutions. Significant case opinions from the U.S. Courts of Appeals for the Fourth, Sixth, and Eleventh

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<sup>1</sup> FRANK WILCZEK, *FUNDAMENTALS: TEN KEYS TO REALITY* 188, 193 (2021).

<sup>2</sup> JIM AL-KHALILI, *THE WORLD ACCORDING TO PHYSICS* 194 (2020) (“[A] better name for it would have been invisible matter.”); *see id.* at 199 (“It is a growing source of frustration in astrophysics that, in parallel with the accumulation of evidence in support of dark matter, we have failed to find out what it actually is.”); WILCZEK, *supra* note 1, at 193.

<sup>3</sup> WILCZEK, *supra* note 1, at 196 (“The dark matter halo, when you add it all up, weighs about six times more than the visible impurity.”).

<sup>4</sup> *Id.* at 197; *see* MICHIO KAKU, *THE GOD EQUATION* 164 (2021) (stating that dark matter makes up 26.8% of the universe).

<sup>5</sup> WILCZEK, *supra* note 1, at 199; *see* KAKU, *supra* note 4, at 137–38, 164 (stating that dark energy makes up 68.3% of the universe); AL-KHALILI, *supra* note 2, at 9 (noting that, together, dark matter and dark energy “make up most of the stuff of the universe”).

<sup>6</sup> WILCZEK, *supra* note 1, at 196–97.

<sup>7</sup> KAKU, *supra* note 4, at 164; AL-KHALILI, *supra* note 2, at 7, 202 (describing dark energy as the “mysterious repulsive substance acting against gravity and stretching space ever more quickly”).

<sup>8</sup> WILCZEK, *supra* note 1, at 199.

Circuits reveal the judiciary's diverse views on filter teams. The recent case of *United States v. Esformes* in the U.S. District Court for the Southern District of Florida, now on appeal to the Eleventh Circuit, illustrates how a filter team can fall short and draw unflattering attention to the Department of Justice. In the wake of *Esformes* and other filter team criticisms, the Department introduced the Special Matters Unit to usher in a new, improved, and centralized team.

Underlying all these privilege strategies is a view of criminal justice as quasi-adversarial. The special role for prosecutors to seek justice rather than convictions implies that a criminal prosecution is not purely competitive. This quasi-adversarial view is the invisible side to privilege, justifying and animating the Department of Justice's privilege strategies.

## I. FILTER TEAMS

The Department of Justice has several tools to handle privilege issues in federal prosecutions, especially prosecutions of white-collar fraud. The execution of a search warrant often leads to the seizure of many thousands of pages of documents.<sup>9</sup> A sizeable subset of those pages may be unavailable to prosecutors under attorney-client privilege, work product protection, or other privileges and doctrines.<sup>10</sup> Concerns arise, in particular, when the government seizes documents from a law office, a corporation with in-house counsel on site, or a business or home that stores its own legal records.<sup>11</sup> Government searches of electronic devices are expanding to keep pace with technological advances.<sup>12</sup> As electronic data storage becomes ubiquitous, privileged documents become less readily identifiable.<sup>13</sup> Computer hard

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<sup>9</sup> See, e.g., *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, No. 20-03278-MJ, 2020 WL 6689045, at \*1 (S.D. Fla. Nov. 2, 2020) (“During the execution of the search warrant, the government seized 7,688 pages out of over 125,000 pages that are potentially privileged.”).

<sup>10</sup> See FED. R. CIV. P. 26(b)(3); FED. R. CRIM. P. 16(a)(2), (b)(2); cf. *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1184 (10th Cir. 2006) (“Technically the work-product doctrine is distinguishable from the testimonial ‘true’ privileges.”).

<sup>11</sup> See Richard F. Albert, *Attorney Subpoenas, Searches and Taint Teams*, 20181004P NYCBAR 88 (Oct. 4, 2018).

<sup>12</sup> See FED. R. CRIM. P. 41 (giving “a magistrate judge with authority in any district where activities related to a crime may have occurred . . . authority to issue a warrant”); Congressional Research Service, *Digital Searches and Seizures: Overview of Proposed Amendments to Rule 41 of the Rules of Criminal Procedure at Summary* (Sept. 8, 2016), <https://fas.org/sgp/crs/misc/R44547.pdf> (noting that amended Federal Rule of Criminal Procedure 41 “would permit the government to remotely access electronic devices” and “would permit DOJ to search multiple computers in numerous districts”); Letters from Chief Justice John G. Roberts to Paul D. Ryan and Joseph R. Biden, Jr. (Apr. 28, 2016) (transmitting rule amendments adopted by Supreme Court).

<sup>13</sup> See Criminal Division, Computer Crime and Intellectual Property Section, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, at ix, <https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf> (“Electronic records such as computer network logs, email, word processing files, and image files increasingly provide the government with important (and sometimes essential) evidence in criminal cases.”); Richard F. Albert, *Attorney Subpoenas, Searches and Taint Teams*, 20181004P NYCBAR 88 (Oct. 4, 2018).

drives contain everything. Emails are voluminous. Privilege stamps are hidden in databases. The moment of seizure offers little in the way of sit-down time to inspect every page carefully for privilege. But such careful inspection is necessary, lest prosecutors receive unauthorized access to privileged materials and risk violating the Sixth Amendment.<sup>14</sup>

The stakes are high. Both attorney-client privilege and work product protection enjoy noble pedigrees. English courts in the sixteenth century recognized the privacy of legal counsel,<sup>15</sup> and the attorney-client privilege stands today as “the oldest of the privileges for confidential communications known to the common law.”<sup>16</sup> While the privilege does not share the lofty status of a constitutional right, it is “key to the constitutional guarantees of the right to effective assistance of counsel and a fair trial.”<sup>17</sup> One federal appellate court identified private communications as the very “essence of the Sixth Amendment right to effective assistance of counsel.”<sup>18</sup> Both the client and the community benefit.<sup>19</sup> Work product protection is broader than attorney-client privilege, reaching documents prepared in anticipation of litigation.<sup>20</sup> It is also younger, but still claims seventy-five years of Supreme Court recognition as a qualified privilege crucial to the “[p]roper preparation

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<sup>14</sup> *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 174 (4th Cir. 2019) (“Notably, the attorney-client privilege and the work-product doctrine jointly support the Sixth Amendment’s guarantee of effective assistance of counsel.”).

<sup>15</sup> *Dennis v. Codrington*, 21 Eng. Rep. 53 (Ch. 1580) (considering a motion to examine and noting that, “touching a matter in variance, wherein he hath been of Counsel, it is ordered he shall not be compelled by subpoena or otherwise to be examined upon any matter concerning the same, wherein he . . . was of counsel”).

<sup>16</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>17</sup> *United States v. Neill*, 952 F. Supp. 834, 839 (D.D.C. 1997); *see United States v. Morrison*, 449 U.S. 361, 364 (1981) (“Our cases have accordingly been responsive to proved claims that governmental conduct has rendered counsel’s assistance to the defendant ineffective.”); *United States v. Stewart*, No. 02 CR. 396 JGK, 2002 WL 1300059, at \*5 (S.D.N.Y. June 11, 2002) (observing that “the privilege is itself based in policy, rather than in the Constitution”).

<sup>18</sup> *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981); *see U.S. CONST. amend. VI* (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”); *Williams v. Woodford*, 384 F.3d 567, 584–85 (9th Cir. 2004) (“When the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, that interference violates the Sixth Amendment right to counsel if it substantially prejudices the criminal defendant.”); *United States v. Noriega*, 752 F. Supp. 1032, 1033 (S.D. Fla. 1990) (“The attorney-client privilege is not *per se* a constitutional right; however, the privilege takes on a constitutional aspect when, as here, it serves to protect a criminal defendant’s Sixth Amendment right to effective assistance of counsel by ensuring unimpeded communication and disclosure by the defendant to his attorney.”).

<sup>19</sup> *Upjohn Co.*, 449 U.S. at 389 (“Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”).

<sup>20</sup> *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975) (noting that work product protection “is distinct from and broader than the attorney-client privilege”); *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986) (“Where only confidential communications are protected by the attorney-client privilege, the work product doctrine protects any document prepared in anticipation of litigation by or for the attorney.”).

of a client's case."<sup>21</sup> Work product protection, too, underlies the Sixth Amendment right to counsel.<sup>22</sup>

The Department of Justice has various strategies to protect privilege, treading lightly in the rare extreme: a search warrant for the office of an attorney actively engaged in the practice of law, placing attorney-client privilege and work product protection squarely in the crosshairs. Attorneys often represent many clients and share office space with other attorneys. A seizure of materials from an attorney's office will likely sweep up—or “rampage” through—privileged materials related to the named attorney and client, as well as attorneys and clients outside the proceeding at hand.<sup>23</sup> The risk is ever-present, but acute when the attorney practices criminal law.<sup>24</sup> Government attorneys assigned to review documents may become, or may currently be, prosecutors in criminal actions against other clients.<sup>25</sup>

Accordingly, the Department of Justice has published guidance in its *Justice Manual* for federal prosecutors to take extra care to avoid viewing privileged documents seized from the premises of an attorney who is a suspect, subject, or target of a criminal investigation.<sup>26</sup> Given the inevitable Sixth Amendment concerns, the Department advises that “close control be

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<sup>21</sup> *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); see *Nobles*, 422 U.S. at 239 (describing work product protection as qualified privilege).

<sup>22</sup> *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 174 (4th Cir. 2019).

<sup>23</sup> *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 961 (3d Cir. 1984) (criticizing seizure of materials from law firm where “this government rampage potentially or actually invaded the privacy of every client of the firm”); see *United States v. Stewart*, No. 02 CR. 396 JGK, 2002 WL 1300059, at \*4 (S.D.N.Y. June 11, 2002) (noting that “the materials seized—and, in particular, the computer materials—are likely to contain privileged materials relating to the representation of criminal defendants who are unrelated to this case, some of whom have been or are currently clients of attorneys other than the defendant”).

<sup>24</sup> See, e.g., *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 164, 168, 182–83 (rejecting filter team after search of a law firm engaged “in a vast amount of criminal and civil litigation and related legal services” and noting that “[i]t would be difficult for reasonable members of the public to believe that Filter Team AUSAs would disregard information . . . that might be relevant to other criminal inquiries”); *Stewart*, 2002 WL 1300059, at \*4, \*10 (rejecting filter team after “search of the office of a criminal defense attorney who represents defendants unrelated to any of the allegations in this case” and who shares office space with four other criminal defense attorneys); see also *United States v. Kaplan*, No. 02 CR. 883 (DAB), 2003 WL 22880914, at \*11 (S.D.N.Y. Dec. 5, 2003) (stating that “a search of the law offices of a criminal defense attorney raises Sixth Amendment concerns not otherwise present in the search of the offices of a civil litigation attorney”).

<sup>25</sup> See *In re Sealed Search Warrant & Application for a Warrant*, No. 20-MJ-03278, 2020 WL 5658721, at \*5, \*10 (S.D. Fla. Sept. 23, 2020), *aff'd sub nom.* *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, No. 20-03278-MJ, 2020 WL 6689045 (S.D. Fla. Nov. 2, 2020) (allowing civil attorneys to conduct initial privilege review and filter team to review any items on privilege log in part because concern for criminal defense attorneys—“that members of the filter team might have been involved in or could later become involved in the criminal investigation and or prosecution of other clients—is simply not present here”); *United States v. Esformes*, No. 16-20549-CR, 2018 WL 5919517, at \*23 (S.D. Fla. Nov. 13, 2018) (criticizing government for using agents in search “who had participated in other health care fraud cases that bear some relationship to the Esformes case or who were later used in the underlying Esformes investigation”).

<sup>26</sup> See JUST. MANUAL § 9-13.420: SEARCHES OF PREMISES OF SUBJECT ATTORNEYS (Jan. 2021), <https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.420>.

exercised over this type of search.”<sup>27</sup> These close controls are layered, including exploring less intrusive alternatives to search warrants, such as seeking information from other sources or issuing a subpoena; obtaining authorization from the United States Attorney or Assistant Attorney General; and consulting with the Criminal Division in advance.<sup>28</sup> If the search proceeds, then “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.”<sup>29</sup>

A key precaution is designation of a filter team—also called a privilege team or a taint team—comprising attorneys and agents separate from the criminal investigation.<sup>30</sup> The filter team must have specific instructions going in and must “not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team.”<sup>31</sup> The team conducts a page-by-page review and sifts out privileged materials, shielding those materials from prosecutors’ eyes.<sup>32</sup> Documents that are clearly privileged go into the “no” pile, while documents that raise close calls may warrant *in camera* review.<sup>33</sup> *In camera* review may also be appropriate for documents that raise a privilege exception, for example, the crime-fraud exception for attorney-client communications and attorney work product in furtherance of illegal activity.<sup>34</sup>

If all goes smoothly and the review screen holds, then the filter team performs a vital task: enforcing the privileges of a defendant or third party and insulating the case from contamination that may result in, for example,

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; see, e.g., In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means, No. 20-03278-MJ, 2020 WL 6689045, at \*1 (S.D. Fla. Nov. 2, 2020) (noting that “search warrant contained a review protocol that allowed for a ‘filter team of government attorneys and agents’”).

<sup>31</sup> JUST. MANUAL § 9-13.420: SEARCHES OF PREMISES OF SUBJECT ATTORNEYS (Jan. 2021), <https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.420>.

<sup>32</sup> See In re Grand Jury Subpoenas, 454 F.3d 511, 520 (6th Cir. 2006) (describing government’s “taint team procedure, whereby its lawyers, behind a protective screen or ‘Chinese wall,’ would sift the documents for privilege”); United States v. Abbell, 914 F. Supp. 519, 520 (S.D. Fla. 1995) (noting that privilege review required “a detailed analysis”).

<sup>33</sup> See Hicks v. Bush, 452 F. Supp. 2d 88, 101 (D.D.C. 2006).

<sup>34</sup> See United States v. Zolin, 491 U.S. 554, 554, 572 (1989) (requiring moving party to show “a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish that the crime-fraud exception applies”) (quotation and citation omitted); In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir. 1987) (describing two-part test to determine application of crime-fraud exception); In re Antitrust Grand Jury, 805 F.2d 155, 162 (6th Cir. 1986) (“All reasons for the attorney-client privilege are completely eviscerated when a client consults an attorney not for advice on past misconduct, but for legal assistance in carrying out a contemplated or ongoing crime or fraud.”); see also In re Sealed Search Warrant & Application for a Warrant, No. 20-MJ-03278, 2020 WL 5658721, at \*9 (S.D. Fla. Sept. 23, 2020), *aff’d sub nom.* In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means, No. 20-03278-MJ, 2020 WL 6689045 (S.D. Fla. Nov. 2, 2020) (noting that “the government’s filter team may not be able to effectively raise the crime-fraud exception without reviewing the underlying item”).

suppression of evidence, disqualification of counsel, or dismissal of the indictment.<sup>35</sup> The Department's goal is to "ensure that the prosecution team is not 'tainted' by any privileged material inadvertently seized during the search."<sup>36</sup>

The Department of Justice has been advising the use of filter teams for decades. In 1995, the Deputy Attorney General created a new section in the *United States Attorneys' Manual* (precursor to the *Justice Manual*) that offered much the same guidance as exists today: "[T]o protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a 'privilege team' should be designated, consisting of agents and lawyers not involved in the underlying investigation."<sup>37</sup> A less formal practice of "walling off" reviewers was already in place.<sup>38</sup> The Department codified the walls into teams.

Now, years later, filter teams have become routine.<sup>39</sup> They stand in stark contrast to the relatively low-key discovery procedure in civil matters, where one party serves a request for production, the party claiming privilege reviews its own documents and produces a privilege log, and a court resolves disputes.<sup>40</sup> Filter teams are nowhere to be found in civil law, yet pervasive in white-collar investigations and prosecutions. The careful treatment focused on attorney office searches now stretches far and wide, as filter teams are deployed in conjunction with any number of search warrants and subpoenas. Not surprisingly, given its long history and development in the delicate context of attorney office searches, the Department of Justice's privilege

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<sup>35</sup> See *United States v. Morrison*, 449 U.S. 361, 364 (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests."); *United States v. Esformes*, No. 16-20549-CR, 2018 WL 5919517, at \*35 (S.D. Fla. Nov. 13, 2018) (considering remedies of suppression, disqualification, and dismissal).

<sup>36</sup> JUST. MANUAL § 9-13.420: SEARCHES OF PREMISES OF SUBJECT ATTORNEYS (Jan. 2021), <https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.420>.

<sup>37</sup> Mem. from Jamie Gorelick, Office of Deputy Attorney General to Holders of United States Attorneys' Manual Title 9, at 3 (Oct. 11, 1995).

<sup>38</sup> See *In re Search Warrant for L. Offs. Executed on Mar. 19, 1992*, 153 F.R.D. 55, 58–59 (S.D.N.Y. 1994) (describing case as "a garden variety tax fraud of mammoth proportions" and stating that "reliance on the implementation of a Chinese Wall, especially in the context of a criminal prosecution, is highly questionable, and should be discouraged"); *United States v. Noriega*, 764 F. Supp. 1480, 1483, 1489 (S.D. Fla. 1991) (finding no Sixth Amendment violation where tape-recorded conversations "were to be screened first by an 'outside' Spanish-speaking DEA agent unconnected with the case to ensure that no attorney-client conversations were on the tapes").

<sup>39</sup> See *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, No. 20-03278-MJ, 2020 WL 6689045, at \*2 (S.D. Fla. Nov. 2, 2020) ("[I]t is well-established that filter teams—also called 'taint teams'—are routinely employed to conduct privilege reviews. . . . [F]ilter teams are designed to protect, rather than infringe upon, the privilege protections afforded to parties."); see also *In re Ingram*, 915 F. Supp. 2d 761, 764 (E.D. La. 2012) ("Several district courts . . . have approved the use of government filter team.").

<sup>40</sup> See generally PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 11:19: GRAND JURY INVESTIGATIONS AND PRIVILEGED DOCUMENTS IN THE POSSESSION OF THE GOVERNMENT (2020–21).



review protocol has attracted both champions and critics. Many courts have praised filter teams as expeditious, deferential, fair, and careful.<sup>41</sup> The government is clearly in favor, describing filter teams as “standard, considered practice” and “a time-tested solution.”<sup>42</sup>

Other solutions are on the table. The *Justice Manual* lists a judicial officer or a Special Master as alternatives to a filter team. Resources are limited, and there is a finite supply of judges and Special Masters to review thousands or hundreds of thousands of documents.<sup>43</sup> When available, a judge or Special Master provides the advantage, at least on optics, of a knowledgeable and neutral eye, bringing independence from outside the executive branch.

In *United States v. Abbell*, for example, the U.S. District Court for the Southern District of Florida rejected a filter team in favor of a Special Master, finding “exceptional” issues concerning privilege and responsiveness in more than forty boxes of materials.<sup>44</sup> The government had seized the materials from the offices of the defendant’s law firm and investigator and had assigned a filter team to conduct a privilege review.<sup>45</sup> The review was underway, as the team was “in the process of deciding which, if any,

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<sup>41</sup> See *In re Search of 5444 Westheimer Rd. Suite 1570, Houston, Texas*, on May 4, 2006, No. H-06-238, 2006 WL 1881370, at \*3 (S.D. Tex. July 6, 2006) (finding taint team “will allow expeditious review of all seized documents, will allow the Government to continue with its investigations, and will nevertheless allow the Court . . . to resolve ultimate privilege disputes”); *In re Ingram*, 915 F. Supp. 2d at 765 (“The Court finds that the government’s proposed filter team protocol shows proper deference to any attorney-client or work product privileges while allowing the government’s investigation to proceed.”); *United States v. Triumph Cap. Grp., Inc.*, 211 F.R.D. 31, 43 (D. Conn. 2002) (“The use of a taint team is a proper, fair and acceptable method of protecting privileged communications when a search involves property of an attorney.”); *Sec. & Exch. Comm’n v. Lek Sec. Corp.*, No. 17CV1789(DLC), 2018 WL 417596, at \*4 (S.D.N.Y. Jan. 16, 2018) (finding that SEC’s handling of documents “has neither violated the principles that underlie our system’s respect for the attorney client privilege nor infringed on the integrity of the judicial process” because, when SEC “spotted a document that had escaped a filter review, it returned the entire set of documents for re-screening,” and “[t]his careful approach reflects respect for the privilege”); see also *United States v. Kallen-Zury*, 710 F. App’x 365, 373 (11th Cir. 2017) (finding no basis for evidentiary hearing to review government’s conduct where it employed a filter team to review hundreds of emails); *United States v. DeLuca*, 663 F. App’x 875, 877 (11th Cir. 2016) (finding no prejudice where government used filter team for electronic records); *United States v. Jimenez*, No. CR 16-00153-CG-N, 2017 WL 3568670, at \*2 (S.D. Ala. Aug. 17, 2017) (finding “no deficiency with the United States Attorney’s Office taint/filter team process which was utilized to isolate potentially privileged communications”).

<sup>42</sup> *In re Sealed Search Warrant & Application for a Warrant*, No. 20-MJ-03278, 2020 WL 5658721, at \*4 (S.D. Fla. Sept. 23, 2020), *aff’d sub nom. In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, No. 20-03278-MJ, 2020 WL 6689045 (S.D. Fla. Nov. 2, 2020) (quoting government’s Response to motion to prohibit privilege team); see *United States v. Gallego*, No. CR1801537001TUCRMBPV, 2018 WL 4257967, at \*2 (D. Ariz. Sept. 6, 2018) (“According to the Government, the use of a filter team—also known as a taint team—is a common, accepted, and approved practice.”).

<sup>43</sup> See Guy Singer et al., *Third-Party Privilege Reviews Could Solve an Enduring Problem at DOJ*, GLOBAL INVESTIGATIONS REV. (July 17, 2020), <https://globalinvestigationsreview.com/just-anti-corruption/privilege/third-party-privilege-reviews-could-solve-enduring-problem-the-doj>.

<sup>44</sup> *United States v. Abbell*, 914 F. Supp. 519, 519 (S.D. Fla. 1995).

<sup>45</sup> *Id.* at 519–20.

documents should be turned over to the prosecution team.”<sup>46</sup> The court cut it short. Explaining that the review would require “a detailed analysis of the contents of each item seized in relation to a complex underlying investigation that alleges crimes of narcotics trafficking, money laundering and obstruction of justice, as well as highly complex and sensitive privilege issues,” the court appointed a Special Master whose “background and knowledge will . . . expedite the review process.”<sup>47</sup> Attorneys and agents on the filter team are, by design, removed from the prosecuting attorneys with intimate knowledge of the case. One can never be too careful with competence. For good measure, the court ordered the government to foot the bill for the Special Master.<sup>48</sup>

Special Masters made bold-type headlines recently, on the optics of fairness rather than competence. Federal agents searched the New York City offices of two attorneys for former President Donald Trump: Michael Cohen and Rudolph Giuliani.<sup>49</sup> For Cohen, the government sought to use the filter teams described in its search warrants; for Giuliani, the government requested appointment of a Special Master.<sup>50</sup> In both cases, the courts appointed a Special Master to make independent privilege determinations in order “to ensure the perception of fairness.”<sup>51</sup>

When a filter team does proceed, it may enjoy considerable latitude. Even questionable conduct need not spoil the team’s value. In *United States v.*

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<sup>46</sup> *Id.* at 520.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; see Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955, 962 (3d Cir. 1984) (suggesting that “the court could appoint a master to examine *in camera* any material that the law firm objects to producing,” which “would vindicate both the interests of the government in investigating and prosecuting crimes and the confidentiality interests of the law office”); *United States v. Stewart*, No. 02 CR. 396 JGK, 2002 WL 1300059, at \*7, \*10 (S.D.N.Y. June 11, 2002) (finding “a number of extraordinary circumstances” favored appointment of a Special Master, including fact that documents seized “are likely to contain privileged materials relating not only to unrelated criminal defendants but also to the clients of attorneys other than the defendant, for whom there has been no showing of probable cause of criminal conduct”); *United States v. Gallego*, No. CR1801537001TUCRMBPV, 2018 WL 4257967, at \*3 (D. Ariz. Sept. 6, 2018) (appointing magistrate judge as Special Master where “materials at issue were seized from a criminal defense attorney’s office, and given the importance of protecting both the interests and appearance of fairness and justice”).

<sup>49</sup> *United States v. Cohen*, No. 18CR602, 2019 WL 3226988, at \*1 (S.D.N.Y. July 17, 2019); *In re Search Warrants Executed on Apr. 28, 2021*, No. 21-MC-425 (JPO), 2021 WL 2188150, at \*1 (S.D.N.Y. May 28, 2021).

<sup>50</sup> Government’s Opp’n to Michael Cohen’s Mot. for a Temp. Restraining Order at 4, *Cohen v. United States*, No. 1:18-mj-03161, 2018 WL 1772209 (S.D.N.Y. Apr. 13, 2018); *In re Search Warrants Executed on Apr. 28, 2021*, 2021 WL 2188150, at \*1; see Tom McParland, *US Prosecutors Confirm Request for Special Master Amid Attorney-Client Privilege Fight Triggered by Giuliani Raid*, N.Y.L.J. (May 5, 2021), <https://www.law.com/newyorklawjournal/2021/05/05/u-s-prosecutors-confirm-request-for-special-master-amid-attorney-client-privilege-fight-triggered-by-giuliani-raid/> (discussing both cases).

<sup>51</sup> *In re Search Warrants Executed on Apr. 28, 2021*, 2021 WL 2188150, at \*4; Brendan Pierson, *Few Documents Seized from Michael Cohen Deemed Privileged in First Review*, REUTERS (June 4, 2018), <https://www.reuters.com/article/us-usa-trump-cohen/few-documents-seized-from-michael-cohen-deemed-privileged-in-first-review-idUSKCN1J0330>; Larry Neumeister, *Prosecutors Seek ‘Special Master’ to Review Rudy Giuliani Items*, ASSOCIATED PRESS NEWS (May 5, 2021) (quoting prosecutors’ letter to judge that Special Master was warranted due to “the overt and public nature of these warrants”), <https://apnews.com/article/my-state-wire-trump-investigations-europe-f9053bc8b4397c316212734db86ffab4>.

*DeLuca*, the U.S. Court of Appeals for the Eleventh Circuit heard an appeal from an oil and gas company president who was found guilty of defrauding financial institutions.<sup>52</sup> There, the Federal Bureau of Investigation had searched the defendant's offices and seized computers and hard drives, which stored communications with attorneys.<sup>53</sup> The parties stipulated that the FBI would segregate attorney-client communications and send those documents to a filter team for review.<sup>54</sup> A former Assistant U.S. Attorney on the team then "unilaterally decided that the stipulation was not in effect for various reasons" and, without notifying the defendant, gave prosecutors several documents including at least one attorney-client email.<sup>55</sup> The defendant moved to dismiss the indictment, but the district court denied the motion.<sup>56</sup> The court found a violation of the attorney-client privilege, but no prejudice.<sup>57</sup> Specifically, the one attorney-client email "did not impact the trial strategy and was not introduced as evidence at trial."<sup>58</sup>

On appeal, the Eleventh Circuit affirmed denial of the motion, noting that the defendant did not challenge the district court's finding of lack of prejudice.<sup>59</sup> The appellate court rejected the defendant's argument that, especially in the digital age, it is difficult if not impossible for a search target or defendant to know "whether the government has accessed information and what it has done with that information."<sup>60</sup> True, but "not a new concern."<sup>61</sup> Apparently taking the age of the concern as a weakness, the Eleventh Circuit agreed that "showing how the government used certain information within its control as part of a criminal investigation has always been an uphill battle."<sup>62</sup> Forty-five years ago, the Supreme Court in *Weatherford v. Bursey* made clear that not every intrusion into the attorney-client privilege offends the Constitution.<sup>63</sup> Without a showing of prejudice from the privilege violation, the convictions in *DeLuca* would stand.<sup>64</sup>

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<sup>52</sup> *United States v. DeLuca*, 663 F. App'x 875, 876 (11th Cir. 2016).

<sup>53</sup> *Id.* at 876–77.

<sup>54</sup> *Id.* at 877.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 877–78.

<sup>57</sup> *Id.* at 878.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 879; *see id.* at 880 ("[O]ur precedent requires a showing of demonstrable prejudice in order to obtain dismissal of the indictment as a sanction for the government's violation of the defendant's attorney-client privilege.").

<sup>60</sup> *Id.* at 880.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 881.

<sup>63</sup> *See Weatherford v. Bursey*, 429 U.S. 545, 558 (1977) (finding no Sixth Amendment violation where there was "no tainted evidence . . . , no communication of defense strategy to the prosecution, and no purposeful intrusion" by state's undercover agent); *see also United States v. Neill*, 952 F. Supp. 834, 840 (D.D.C. 1997).

<sup>64</sup> *DeLuca*, 663 F. App'x at 881; *see United States v. Elbaz*, 396 F. Supp. 3d 583, 595 (D. Md. 2019) (finding no prejudice where prosecutor viewed attorney emails but could not remember reading them).

Toward the end of its opinion in *DeLuca*, the Eleventh Circuit noted that the defendant had quoted Justice Thurgood Marshall in his dissent in *Kastigar v. United States*.<sup>65</sup> There, the Supreme Court upheld as constitutional “use and derivative use” immunity for compelled testimony.<sup>66</sup> Justice Marshall dissented from the Court’s holding that, in his words, “the United States may compel a witness to give incriminating testimony, and subsequently prosecute him for crimes to which that testimony relates.”<sup>67</sup> Writing for the 5-2 majority,<sup>68</sup> Justice Lewis F. Powell, Jr., saw little risk, as the federal witness immunity statute “imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.”<sup>69</sup> Time would tell.<sup>70</sup> For the moment, Justice Marshall took the majority to task with a biting observation: “The good faith of the prosecuting authorities is thus the sole safeguard of the witness’ rights.”<sup>71</sup>

The Eleventh Circuit took a pass. Courts more critical of filter teams agree with Justice Marshall. The worry lies in plain sight. A state-sanctioned policy of obtaining potentially privileged materials and conducting an in-house review to enforce another party’s privilege claim will, no doubt, raise a few eyebrows.<sup>72</sup> Echoes of *Brady v. Maryland* and *Giglio v. United States* ring loudly, as the privilege review protocol “is based upon the expectation and presumption that the Government’s privilege team and the trial prosecutors will conduct themselves with integrity.”<sup>73</sup> Also with

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<sup>65</sup> *DeLuca*, 663 F. App’x at 880–81; *Kastigar v. United States*, 406 U.S. 441 (1972).

<sup>66</sup> *Kastigar*, 406 U.S. at 453 (“We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.”).

<sup>67</sup> *Id.* at 467 (Marshall, J., dissenting).

<sup>68</sup> Justices Brennan and Rehnquist took no part in the consideration or decision of the case. *Id.* at 462.

<sup>69</sup> *Id.* at 460; see 18 U.S.C. § 6002 (providing that “no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case”).

<sup>70</sup> See, e.g., *United States v. Apfelbaum*, 445 U.S. 115, 122 (1980) (citing *Kastigar* and stating that “[t]he legislative history of § 6002 shows that Congress intended the perjury and false-declarations exception to be interpreted as broadly as constitutionally permissible”); see also R.S. Ghio, *The Iran-Contra Prosecutions and the Failure of Use Immunity*, 45 STAN. L. REV. 229, 243–46 (1992) (describing the progeny of *Kastigar*).

<sup>71</sup> *Kastigar*, 406 U.S. at 469 (Marshall, J., dissenting).

<sup>72</sup> See *United States v. Neill*, 952 F. Supp. 834, 840–41 (D.D.C. 1997) (stating 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, and thus the government “bears the burden to rebut the presumption that tainted material was provided to the prosecution team”).

<sup>73</sup> *United States v. Grant*, No. 04 CR 207BSJ, 2004 WL 1171258, at \*3 (S.D.N.Y. May 25, 2004); In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means, No. 20-03278-MJ-O’SULLIVAN, 2020 WL 6689045, at \*3 (S.D. Fla. Nov. 2, 2020) (“The Court will not presume the Government’s purported lack of integrity in abiding by the Court’s Order and the law.”); see *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963) (holding that suppression of an accomplice’s confession violated due process); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (reversing conviction based on the prosecution’s failure to disclose material evidence regarding witness credibility); see also Jack Queen,

competence.<sup>74</sup> Of course, unlike a prosecutor's identification of material exculpatory and impeachment evidence under *Brady* and *Giglio*, the identification of privileged materials rests, critically, with attorneys and agents outside the prosecution team.<sup>75</sup> The further removed, the easier the balance between morality and self-interest. As the Supreme Court cautioned long ago, and as philosophers have pondered for centuries, we do well to "refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity."<sup>76</sup>

Mistakes are made, on occasion egregious.<sup>77</sup> Judgment calls may raise the ire of judges, as when the government refuses to destroy or return privileged materials.<sup>78</sup> Still, even when all members of the filter team, the investigation team, and the prosecution team conduct themselves with integrity, structural weaknesses linger. The appearance of fairness matters along with the fact of fairness, and many judges are understandably skeptical

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*'Bury It': Inside A Hidden Evidence Scandal That Rocked SDNY*, LAW360 (Mar. 15, 2021), <https://www.law360.com/articles/1364454> (describing eleventh-hour *Brady* violation as part of "cascading revelations of undisclosed evidence and falsehoods before the court [that] culminated in the U.S. Attorney's Office for the Southern District of New York taking the rare step of asking a judge to toss its own trial win"); Samuel R. Wiseman, *Brady, Trust, and Error*, 13 LOY. J. PUB. INT. L. 447, 454 (2012) ("Brady violations are difficult to discover—the only one with proof of the violation is often the violator. As a result, many are never revealed."). See generally *Brady material*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Information or evidence that is favorable to a criminal defendant's case and that the prosecution has a duty to disclose."); *Giglio material*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Information relating to or suggesting any agreement between the prosecution and any of its own witnesses—evidence that must be disclosed to the defense.").

<sup>74</sup> See *In re Search of Elec. Commc'ns in the Acct. of chakafattah@gmail.com at Internet Serv. Provider Google, Inc.*, 802 F.3d 516, 530 (3d Cir. 2015) (rejecting taint team structure where a non-attorney federal agent would conduct the first level of review and stating, "[b]ecause of the legal nature of the privilege issues involved, we agree that the first level of privilege review should be conducted by an independent DOJ attorney").

<sup>75</sup> See JUST. MANUAL § 9-5.001: POLICY REGARDING DISCLOSURE OF EXCULPATORY AND IMPEACHMENT INFORMATION (Jan. 2020), <https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings> ("It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team.").

<sup>76</sup> See *Michoud v. Girod*, 45 U.S. 503, 552–55 (1846) (setting aside trustees' sale of land where third-party purchaser conveyed land back to trustees, even though sale was made for a fair price); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, book I, ch. 8 (1762) ("The passage from the state of nature to the civil state produces a very remarkable change in man, by substituting justice, for instinct in his conduct, and giving his actions the morality they had formerly lacked."); *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) (observing that "the government taint team may have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation").

<sup>77</sup> See, e.g., *United States v. Elbaz*, 396 F. Supp. 3d 583, 589, 596 (D. Md. 2019) (finding no prejudice even though the "Prosecution Team had access to these thousands of potentially privileged materials"); Brief of Former High-Ranking Dep't of Just. Officials as *Amici Curiae* in Support of Appellant at 11, *United States v. Esformes*, No. 19-14874 (S.D. Fla. Sept. 11, 2020) ("[T]he district court found the taint protocol in this case was 'sloppy,' 'inadequate,' 'ineffective,' and 'border-line incompetent'—and those are charitable characterizations.").

<sup>78</sup> See *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 599 (5th Cir. 2021) ("A taint team serves no practical effect if the government refuses to destroy or return the copies of documents that the taint team has identified as privileged. The government has thus conceded that it has no intent to respect [defendant's] interest in the privacy of its privileged materials as the investigation unfolds.").

of filter teams.<sup>79</sup> A root cause of unease is that the government controls the materials. The U.S. Court of Appeals for the Fourth Circuit put the point bluntly, if a bit over the top: “Federal agents and prosecutors rummaging through law firm materials that are protected by attorney-client privilege and the work-product doctrine is at odds with the appearance of justice.”<sup>80</sup> A seminal case from the U.S. Court of Appeals for the Sixth Circuit raises this concern with more subtlety, outside the hot-button context of attorney office searches.

In the 2006 case of *In re Grand Jury Subpoenas*, the Sixth Circuit rejected the government’s proposal of a filter team to review potentially privileged documents.<sup>81</sup> There, a federal grand jury had issued two subpoenas *duces tecum* to a third-party company.<sup>82</sup> The company’s former executive and his affiliates moved to intervene and demanded to conduct their own privilege review of the subpoenaed documents, specifically to search for names including lawyers and law firms.<sup>83</sup> The government requested that its filter team conduct the privilege review.<sup>84</sup> The district court approved the government’s use of a filter team, and the executive and affiliates appealed.<sup>85</sup>

The Sixth Circuit reversed, finding that “the taint team procedure would present a great risk to the appellants’ continued enjoyment of privilege protections.”<sup>86</sup> The court recognized that in exigent circumstances, when the government already possesses potentially privileged documents, “the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege.”<sup>87</sup> In the case at bar, however, the third party still had possession.<sup>88</sup> No exigency there. Moreover,

<sup>79</sup> See *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.”); see also *United States v. Renzi*, 722 F. Supp. 2d 1100, 1112 (D. Ariz. 2010) (agreeing “that liberal use of taint teams should be discouraged”).

<sup>80</sup> *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 183 (4th Cir. 2019); see *In re Grand Jury Subpoenas*, 454 F.3d 511, 524 (6th Cir. 2006) (“Furthermore, taint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors.”); *In re Search Warrant for L. Offs. Executed on Mar. 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) (“It is a great leap of faith to expect that members of the general public would believe any such Chinese wall would be impenetrable; this notwithstanding our own trust in the honor of an AUSA.”).

<sup>81</sup> *In re Grand Jury Subpoenas*, 454 F.3d at 524.

<sup>82</sup> *Id.* at 513.

<sup>83</sup> *Id.* at 513, 522.

<sup>84</sup> *Id.* at 513.

<sup>85</sup> *Id.* at 515–16 (“The only question before us is whether the district court erred in preferring the government’s proposed taint team to the appellants’ own attorneys to make initial privilege determinations with respect to documents in the third-party subpoena recipient’s possession.”).

<sup>86</sup> *Id.* at 522. See generally PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 11:19: GRAND JURY INVESTIGATIONS AND PRIVILEGED DOCUMENTS IN THE POSSESSION OF THE GOVERNMENT (2020–21) (describing structural flaws in taint teams).

<sup>87</sup> *In re Grand Jury Subpoenas*, 454 F.3d at 522–23.

<sup>88</sup> *Id.* at 523.

the government's view of privilege might conflict with the privilege holder's view.<sup>89</sup> Yet the filter team's decisions would restrict the privilege scope to only "those documents which *the taint team has identified* as being clearly or possibly privileged."<sup>90</sup> The holder is unable to check the team's conclusions that other documents are *not* privileged.<sup>91</sup> Perhaps the most glaring and fundamental flaw lies in the composition of the team: human beings. The court observed that, "human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations."<sup>92</sup> Interests clash between preserving the privilege and pursuing the prosecution.<sup>93</sup>

Overall, the court rejected the filter team procedure because "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."<sup>94</sup> Instead of a filter team, the court appointed a Special Master for a timely, independent first cut of document review.<sup>95</sup> The appellants could then review the documents given to them.<sup>96</sup>

The Sixth Circuit in *In re Grand Jury Subpoenas* found filter teams to be structurally unsound. The court rejected a filter team on precise, narrow facts: a third-party corporation under grand jury subpoena maintained possession of its documents. The court's reasoning applies more generally. The metaphor of a fox in the henhouse applies to filter teams en masse, especially when a search warrant targets a law firm and after the government has documents in hand. The government is always the fox and the target always the henhouse. Exigency may typically underlie filter teams, but a desire for swift justice goes only so far in blunting the force of the metaphor.<sup>97</sup> *In re Grand Jury Subpoenas* tees up whichever decision a judge favors: distinguish

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 524.

<sup>96</sup> *Id.*

<sup>97</sup> *See id.* at 523 (noting that "the exigency typically underlying the use of taint teams is not present"). Compare *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 181–82 (4th Cir. 2019) (finding that "delay in the government's investigations here does not outweigh the harm to the Law Firm and its clients caused by the Filter Team's review"), with *In re Search of 5444 Westheimer Rd. Suite 1570, Houston, Texas*, on May 4, 2006, No. H-06-238, 2006 WL 1881370, at \*3 (S.D. Tex. July 6, 2006) (allowing taint team to proceed in part because "such procedure will allow expeditious review of all seized documents"). See generally Roland Behm et al., "*Trust Us*": *Taint Teams and the Government's Peek at Your Company's Privileged Documents*, ACC DOCKET at 74, 83 (June 2010) ("If courts have serious policy reservations about the use of taint teams, then why have they permitted the practice? The answer appears to center around judicial deference to—or at least after-the-fact sympathy for—prosecutors' expediency concerns.").

the narrow facts and permit a filter team to proceed,<sup>98</sup> or apply the metaphor universally and choose a less intrusive protocol.<sup>99</sup> Whatever the predicate facts, a filter team requires that we trust the fox. Like filter team members, judges are also human beings. Human nature being what it is, judges may interpret precedent as they see fit.<sup>100</sup>

In 2019, the U.S. Court of Appeals for the Fourth Circuit in *In re Search Warrant Issued June 13, 2019* took the Sixth Circuit's precedent and ran with it.<sup>101</sup> There, agents from the Internal Revenue Service and the Drug Enforcement Administration had seized thousands of paper and electronic documents from a law firm during execution of a search warrant.<sup>102</sup> The magistrate judge who issued the search warrant also *ex parte* authorized a filter team to review the documents for attorney-client privilege and work product protection.<sup>103</sup> The law firm moved to enjoin the filter team, but the district court denied the motion.<sup>104</sup> On appeal, the Fourth Circuit reversed.<sup>105</sup>

Following the Sixth Circuit in barring “the government’s fox [from] guarding the Law Firm’s henhouse,” the Fourth Circuit went further.<sup>106</sup> The whole concept of a filter team is constitutionally flawed because it “assign[s] judicial functions to the executive branch.”<sup>107</sup> When a dispute regarding attorney-client privilege and work product protection arises, “the resolution of that dispute is a judicial function.”<sup>108</sup> Article III of the Constitution confers “judicial Power” on the judicial branch.<sup>109</sup> A court may not delegate its dispute-resolution power to members of the executive branch—“especially when the executive branch is an interested party in the pending dispute.”<sup>110</sup>

<sup>98</sup> See, e.g., *In re Ingram*, 915 F. Supp. 2d 761, 764–65 (E.D. La. 2012) (discussing arguments for and against filter teams before ultimately allowing a team to proceed); *Hicks v. Bush*, 452 F. Supp. 2d 88, 102–04 (D.D.C. 2006) (same).

<sup>99</sup> See, e.g., *United States v. Gallego*, No. CR1801537001TUCRMBPV, 2018 WL 4257967, at \*2–\*3 (D. Ariz. Sept. 6, 2018) (discussing arguments for and against filter teams before ultimately appointing a Special Master); *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 177–78 (explaining reasoning for reversing the district court’s approval of a taint team to review documents seized from a law firm).

<sup>100</sup> See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 854–55 (1992) (explaining that “when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case”); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110–11 (1990) (Scalia, J., dissenting) (“[O]ne is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice, then all reluctance ought to disappear.”). See generally Wilson R. Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 444–45 (2001) (describing legal arguments based on precedent).

<sup>101</sup> See *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 181–82.

<sup>102</sup> *Id.* at 165–66.

<sup>103</sup> *Id.* at 165.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 177–79.

<sup>107</sup> *Id.* at 176.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*; U.S. CONST. art. III § 1.

<sup>110</sup> *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 176.



The Fourth Circuit found the filter team at hand particularly offensive and worthy of italics because the magistrate judge had “delegated judicial functions to *non-lawyer* members of the Filter Team.”<sup>111</sup> (Agents and paralegals . . . *no disrespect*.) In truth, even a team “composed entirely of trained lawyers” may make errors or fall prey to unethical temptations.<sup>112</sup> The court concluded that, given both “the appearance of unfairness” and “other problems associated with the Filter Team,” injunctive relief for the law firm was appropriate.<sup>113</sup>

The Fourth Circuit’s opinion in *In re Search Warrant Issued June 13, 2019* could have ended after the discussion of unconstitutional delegation. If the court’s view is correct, then the composition and conduct of any given filter team are irrelevant. While the court took the opportunity to criticize the details of the specific filter protocol before it, that criticism is essentially dicta.<sup>114</sup> No amount of de facto integrity could overcome the separation of powers issue.<sup>115</sup> Yet, despite the sweeping force of the Fourth Circuit’s opinion, federal courts continue to authorize filter teams.<sup>116</sup>

At the end of the day, there is no clear rule governing the strategies to handle privilege. Filter teams are created ad hoc and disputed in court. The Department of Justice obtains documents through a search warrant or a subpoena and decides for itself whether to form a filter team; guidance from the *Justice Manual* is nonbinding.<sup>117</sup> Defendants and third parties seek control over their documents and move for their own privilege review or a Special Master. And courts decide the propriety of the privilege team protocol on a case-by-case basis.<sup>118</sup> There is no privilege protocol equivalent to *Miranda* warnings, presenting a bright-line test to identify constitutional

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<sup>111</sup> *Id.* at 177.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 183.

<sup>114</sup> *Id.* at 177–80 (also criticizing magistrate judge for prematurely authorizing the filter team without full information from the search and without adversarial proceedings).

<sup>115</sup> *See, e.g.,* *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.”); *United States v. Johnson*, 48 F.3d 806, 808–09 (4th Cir. 1995) (stating that “the type of duty that the court may so delegate is limited by Art. III”).

<sup>116</sup> *See, e.g.,* *In re Search Warrants Executed on Apr. 28, 2021*, No. 21-MC-425 (JPO), 2021 WL 2188150, at \*2 (S.D.N.Y. May 28, 2021) (“The use of a filter team is a common procedure in this District and has been deemed adequate in numerous cases to protect attorney-client communications.”); *In re Sealed Search Warrant & Application for a Warrant*, No. 20-MJ-03278-O’SULLIVAN, 2020 WL 5658721, at \*5, \*10 (S.D. Fla. Sept. 23, 2020), *aff’d sub nom.* *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, No. 20-03278-MJ-O’SULLIVAN, 2020 WL 6689045 (S.D. Fla. Nov. 2, 2020) (modifying and approving the government’s request to use a filter team).

<sup>117</sup> *See* JUST. MANUAL § 1-1.200: AUTHORITY (Apr. 2018), <https://www.justice.gov/jm/jm-1-1000-introduction> (stating that *Justice Manual* does not place “any limitations . . . on otherwise lawful litigation prerogatives of DOJ”).

<sup>118</sup> *See In re Sealed Search Warrant & Application for a Warrant*, 2020 WL 5658721, at \*4 (“At the outset, the Court rejects the movant’s argument that the use of government filter teams to conduct privilege reviews is *per se* legally flawed.”).

violations.<sup>119</sup> Federal agents executing a search warrant do not have a taint-team card to recite prophylactic warnings.<sup>120</sup> Reciting a *Miranda* card may veer into performance art, an incantation for constitutional protection. But at least the spell is black and white. Sixth Amendment attorney-client privacy is messier than Fifth Amendment self-incrimination. The Supreme Court has not weighed in to sweep up the mess, and lower federal court opinions are all over the map.<sup>121</sup>

The specific method of privilege review must fit the specific facts, and in any new case a filter team may be appropriate or inappropriate for screening documents.<sup>122</sup> Sometimes the privilege review is uneventful, the government has plenty of other evidence to convict, and borderline documents fall neatly into the “no” pile.<sup>123</sup> And, sometimes, what is appropriate and mundane at the outset quickly goes south.

## II. SPECIAL MATTERS UNIT

### A. *United States v. Esformes*

Philip Esformes was apparently a successful health care executive, owning a network of eighteen assisted living facilities and skilled nursing facilities in South Florida.<sup>124</sup> For more than two decades, Esformes lived a

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<sup>119</sup> See *Moran v. Burbine*, 475 U.S. 412, 413 (1986) (noting “the ease and clarity of *Miranda*’s application”); see also *J.D.B. v. N. Carolina*, 564 U.S. 261, 282 (2011) (Alito, J., dissenting) (conceding that “the *Miranda* Court set down rigid standards that often require courts to ignore personal characteristics that may be highly relevant to a particular suspect’s actual susceptibility to police pressure”).

<sup>120</sup> See W.E. RINGEL ET AL., *SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS* § 26:3: *MIRANDA WARNINGS* (2d ed. 2021) (noting that “most *Miranda* ‘cards’ used by officers to recite the warnings to suspects, as well as most waiver of *Miranda* rights forms, track the language used by the Supreme Court in enunciating the required warnings”).

<sup>121</sup> See Roland Behm et al., “*Trust Us*”: *Taint Teams and the Government’s Peek at Your Company’s Privileged Documents*, ACC DOCKET at 74, 83 (June 2010) (noting that “[w]hile the Supreme Court has never directly confronted the practice of government taint teams, lower courts have relied upon *Weatherford* . . . to uphold the constitutionality of the practice,” and arguing “such reliance seems misplaced”).

<sup>122</sup> See, e.g., *Hicks v. Bush*, 452 F. Supp. 2d 88, 103 (D.D.C. 2006) (considering matter of first impression, where government proposed filter team to review documents in Guantánamo Bay habeas cases that investigated detainee suicides, and concluding that “[n]o practical and effective alternative to the Filter Team has been proposed” and “[n]either review by special masters nor pre-screening by counsel for the detainees could be accomplished in a reasonable amount of time”).

<sup>123</sup> Cf. *United States v. Esformes*, No. 16-20549-CR, 2018 WL 5919517, at \*32 (S.D. Fla. Nov. 13, 2018) (noting that, after the fact, prosecution attorneys realized that privileged documents in dispute “were a drop of water in the sea of evidence” against the defendant).

<sup>124</sup> See Press Release, Dep’t of Just., South Florida Health Care Facility Owner Sentenced to 20 Years in Prison for Role in Largest Health Care Fraud Scheme Ever Charged by the Department of Justice (Sept. 12, 2019), <https://www.justice.gov/opa/pr/south-florida-health-care-facility-owner-sentenced-20-years-prison-role-largest-health-care>; Indictment at 5, *United States v. Esformes*, No. 16-20549-CR (S.D. Fla. July 21, 2016); *Florida Businessman Gets 20 years in \$1B Medicare Fraud*, TAMPA BAY TIMES (Sept.

life of affluence. He owned a condominium in Chicago and mansions in Miami Beach and Los Angeles, wore a \$360,000 Swiss watch, drove a \$1.6 million Ferrari, and traveled by private jet.<sup>125</sup> Whether motivated by greed or other impulse, his lavish lifestyle eventually hit a snag.<sup>126</sup>

On July 22, 2016, federal agents arrested Esformes in his Miami Beach home and took him into custody.<sup>127</sup> Esformes was charged with more than twenty counts of conspiracy to commit health care fraud and wire fraud, health care fraud, false statements, receipt of kickbacks, payment of kickbacks, money laundering, and obstruction of justice.<sup>128</sup> According to the government, from January 1998 until the time of his arrest, Esformes was the main player in an extensive health care fraud conspiracy: bribing doctors to admit patients to his assisted living facilities and skilled nursing facilities, cycling those patients through the facilities, and failing to provide medically appropriate or necessary services.<sup>129</sup> He then billed Medicare and Medicaid for millions of dollars in fraudulent claims.<sup>130</sup> Esformes concealed his conduct “by bribing an employee of a Florida state regulator for advance

13, 2019), <https://www.tampabay.com/news/florida/2019/09/13/florida-businessman-gets-20-years-in-1b-medicare-fraud/>.

<sup>125</sup> See Government’s Sentencing Mem. at 1, *United States v. Esformes*, No. 16-20549-CR (S.D. Fla. Nov. 15, 2019); Kenneth P. Vogel et al., *Behind Trump Clemency, a Case Study in Special Access*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2020/12/24/us/politics/trump-pardon-clemency-access.html>; Jeff Weinsier, *President Commutes Sentence of Miami Beach’s ‘King of Medicare Fraud’*, <https://www.local10.com/news/local/2020/12/23/president-commutes-sentence-of-miami-beachs-king-of-medicare-fraud/>.

<sup>126</sup> Compare Press Release, Dep’t of Just., South Florida Health Care Facility Owner Sentenced to 20 Years in Prison for Role in Largest Health Care Fraud Scheme Ever Charged by the Department of Justice (Sept. 12, 2019), <https://www.justice.gov/opa/pr/south-florida-health-care-facility-owner-sentenced-20-years-prison-role-largest-health-care> (quoting Assistant Special Agent in Charge Denise M. Stemen of FBI Miami that “Philip Esformes is a man driven by almost unbounded greed”), with *Florida Businessman Gets 20 Years in \$1B Medicare Fraud*, TAMPA BAY TIMES (Sept. 13, 2019), <https://www.tampabay.com/news/florida/2019/09/13/florida-businessman-gets-20-years-in-1b-medicare-fraud/> (quoting Esformes’ defense attorney Howard Srebnick that “[t]here was no need for greed. He wanted to prove that he could be successful.”).

<sup>127</sup> *United States v. Esformes*, No. 16-20549-CR, 2018 WL 6626233, at \*1 (S.D. Fla. Aug. 10, 2018), *report and recommendation adopted in part, rejected in part*, 2018 WL 5919517 (S.D. Fla. Nov. 13, 2018).

<sup>128</sup> Indictment at 7–27, *United States v. Esformes*, No. 16-20549-CR (S.D. Fla. July 21, 2016).

<sup>129</sup> Press Release, Dep’t of Just., South Florida Health Care Facility Owner Convicted for Role in Largest Health Care Fraud Scheme Ever Charged by the Department of Justice, Involving \$1.3 Billion in Fraudulent Claims (Apr. 5, 2019), <https://www.justice.gov/opa/pr/south-florida-health-care-facility-owner-convicted-role-largest-health-care-fraud-scheme-ever>.

<sup>130</sup> Tr. of Sentencing Hr’g at 51, *United States v. Esformes*, No. 16-20549-CR (S.D. Fla. Oct. 31, 2019) (finding amount of loss to be between \$4.9 million and \$8.3 million); Press Release, Dep’t of Just., South Florida Health Care Facility Owner Convicted for Role in Largest Health Care Fraud Scheme Ever Charged by the Department of Justice, Involving \$1.3 Billion in Fraudulent Claims (Apr. 5, 2019), <https://www.justice.gov/opa/pr/south-florida-health-care-facility-owner-convicted-role-largest-health-care-fraud-scheme-ever> (stating a total of \$1.3 billion in fraudulent claims); see Michael Hiltzik, *He Was Convicted in a Historic Healthcare Fraud. Trump Is Letting Him Walk Free*, L.A. TIMES (Dec. 29, 2020), <https://www.latimes.com/business/story/2020-12-29/this-trump-pardon-esformes-healthcare-fraud>.

notice of surprise inspections.”<sup>131</sup> Foreshadowing the college admissions scandal known as Operation Varsity Blues, Esformes also paid approximately \$300,000—in plastic bags each filled with \$10,000 cash—to bribe the basketball coach at the University of Pennsylvania to admit his son as a priority recruit.<sup>132</sup> In all, Esformes benefited from his health care fraud scheme to the tune of more than \$37 million.<sup>133</sup>

In April 2019, after an eight-week jury trial, Esformes was convicted on twenty counts.<sup>134</sup> The jury failed to reach a verdict on six counts, including the main charge of conspiracy to commit health care fraud and wire fraud.<sup>135</sup> On September 12, 2019, the U.S. District Court for the Southern District of Florida sentenced Esformes to twenty years’ imprisonment, ten years under the thirty years prosecutors had sought.<sup>136</sup> The sentence included three years’ supervised release, a restitution payment of \$5,530,207, and a forfeiture payment of \$38 million.<sup>137</sup> Esformes promptly filed an appeal of his convictions in the U.S. Court of Appeals for the Eleventh Circuit, which remains pending.<sup>138</sup> After the appellate court rules, Esformes’ six unresolved charges will be scheduled for retrial.<sup>139</sup> Apparently pleased with the case

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<sup>131</sup> Press Release, Dep’t of Just., South Florida Health Care Facility Owner Convicted for Role in Largest Health Care Fraud Scheme Ever Charged by the Department of Justice, Involving \$1.3 Billion in Fraudulent Claims (Apr. 5, 2019), <https://www.justice.gov/opa/pr/south-florida-health-care-facility-owner-convicted-role-largest-health-care-fraud-scheme-ever>.

<sup>132</sup> See *id.*; Mark Schlabach, *Ex-Penn Coach Allen Says He Took \$300K Bribe*, ESPN (Mar. 11, 2019), [https://www.espn.com/nba/story/\\_/id/26234766/ex-penn-coach-allen-says-took-300k-bribe](https://www.espn.com/nba/story/_/id/26234766/ex-penn-coach-allen-says-took-300k-bribe).

<sup>133</sup> Press Release, Dep’t of Just., South Florida Health Care Facility Owner Sentenced to 20 Years in Prison for Role in Largest Health Care Fraud Scheme Ever Charged by The Department of Justice (Sept. 12, 2019), <https://www.justice.gov/opa/pr/south-florida-health-care-facility-owner-sentenced-20-years-prison-role-largest-health-care>.

<sup>134</sup> Press Release, Dep’t of Just., South Florida Health Care Facility Owner Convicted for Role in Largest Health Care Fraud Scheme Ever Charged by the Department of Justice, Involving \$1.3 Billion in Fraudulent Claims (Apr. 5, 2019), <https://www.justice.gov/opa/pr/south-florida-health-care-facility-owner-convicted-role-largest-health-care-fraud-scheme-ever>.

<sup>135</sup> Order on Def.’s Expedited Mot. for Release Pending Appeal at 1, *United States v. Esformes*, No. 16-20549-CR (S.D. Fla. Apr. 9, 2020); see Carolina Bolado, *Court Sets \$50M Bond for Esformes Ahead of Fraud Retrial*, LAW360 (Aug. 13, 2021); Jack Queen, *Esformes Says Trump’s Clemency Blocks New Fraud Trial*, LAW360 (May 18, 2021), <https://www.law360.com/articles/1385880>.

<sup>136</sup> Press Release, Dep’t of Just., South Florida Health Care Facility Owner Sentenced to 20 Years in Prison for Role in Largest Health Care Fraud Scheme Ever Charged by The Department of Justice (Sept. 12, 2019), <https://www.justice.gov/opa/pr/south-florida-health-care-facility-owner-sentenced-20-years-prison-role-largest-health-care>; Tr. of Sentencing Hr’g at 138–40, *United States v. Esformes*, No. 16-20549-CR (S.D. Fla. Oct. 31, 2019); see Michael Hiltzik, *He Was Convicted in a Historic Healthcare Fraud. Trump Is Letting Him Walk Free*, L.A. TIMES (Dec. 29, 2020), <https://www.latimes.com/business/story/2020-12-29/this-trump-pardon-esformes-healthcare-fraud>.

<sup>137</sup> Pres. Donald J. Trump, Executive Grant of Clemency (Dec. 22, 2020), <https://www.justice.gov/pardon/page/file/1349136/download>; Jack Queen, *Esformes Says Trump’s Clemency Blocks New Fraud Trial*, LAW360 (May 18, 2021), <https://www.law360.com/articles/1385880>.

<sup>138</sup> Notice of Appeal, *United States v. Esformes*, No. 16-20549-CR, 2019 WL 2743576 (S.D. Fla. July 1, 2019).

<sup>139</sup> Order on Def.’s Expedited Mot. for Release Pending Appeal at 1, *United States v. Esformes*, No. 16-20549-CR (S.D. Fla. Apr. 9, 2020); see Carolina Bolado, *DOJ Plans to Retry Remaining Charges Against Esformes*, LAW360 (May 4, 2021), <https://www.law360.com/articles/1381314/doj-plans-to-retry-remaining-charges-against-esformes> (quoting prosecutor that “[t]he decision to move forward on hung

progress thus far, the Department of Justice praised the district court's sentencing "in the largest health care fraud scheme charged by the U.S. Justice Department."<sup>140</sup>

Esformes had been in federal custody since his arrest on July 22, 2016, with a projected release from prison in 2033.<sup>141</sup> However, on December 22, 2020, after Esformes had spent four-and-one-half years in custody and with his convictions on appeal, then-President Trump commuted Esformes' sentence and ordered his immediate release.<sup>142</sup> Reflecting on the intensity of both the defendant's work ethic and his conspiratorial scheming, the district judge at the sentencing hearing had described Esformes as "a complicated man" and "an enigma."<sup>143</sup> He is also well connected. With his vast wealth, Esformes has resources unavailable to most prisoners, and his clemency bid enjoyed high-profile backing.<sup>144</sup> Then-U.S. Attorney General William Barr recommended clemency to Trump.<sup>145</sup> When the White House Press Secretary announced the commutation, she described support from several former Attorneys General and "other notable legal figures," as well as Esformes' "devot[ion] to prayer and repentance" and "declining health."<sup>146</sup>

Esformes is free, for now.<sup>147</sup> He still faces the restitution and forfeiture payments.<sup>148</sup> The circuit court will decide his appeal, and the district court will decide his fate on the remaining charges. As Esformes' attorney stated at his sentencing hearing, this case "involved, not just guilt or innocence[;] it

counts has not wavered one bit"); Carolina Bolado, *Court Sets \$50M Bond for Esformes Ahead of Fraud Retrial*, LAW360 (Aug. 13, 2021), <https://www.law360.com/articles/1412772/court-sets-50m-bond-for-esformes-ahead-of-fraud-retrial>.

<sup>140</sup> Press Release, Dep't of Just., South Florida Health Care Facility Owner Sentenced to 20 Years in Prison for Role in Largest Health Care Fraud Scheme Ever Charged by The Department of Justice (Sept. 12, 2019), <https://www.justice.gov/opa/pr/south-florida-health-care-facility-owner-sentenced-20-years-prison-role-largest-health-care>.

<sup>141</sup> Pres. Donald J. Trump, Executive Grant of Clemency (Dec. 22, 2020), <https://www.justice.gov/pardon/page/file/1349136/download>.

<sup>142</sup> *Id.*; Inmate Information with Release Date, <https://int.nyt.com/data/documenttools/esformes-bop/8688478c08c60ddd/full.pdf>.

<sup>143</sup> Tr. of Sentencing Hr'g at 134, *United States v. Esformes*, No. 16-20549-CR (S.D. Fla. Oct. 31, 2019).

<sup>144</sup> See Kenneth P. Vogel et al., *Behind Trump Clemency, a Case Study in Special Access*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2020/12/24/us/politics/trump-pardon-clemency-access.html> (quoting attorney Alan Dershowitz that the Aleph Institute, a nonprofit humanitarian group to which the Esformes family has donated money, "played a significant role" in Esformes' clemency effort and "put together the papers" for his petition).

<sup>145</sup> Jack Queen, *Esformes Says Trump's Clemency Blocks New Fraud Trial*, LAW360 (May 18, 2021), <https://www.law360.com/articles/1385880>.

<sup>146</sup> Statement by Press Secretary Regarding Executive Grants of Clemency (Dec. 23, 2020), <https://www.presidency.ucsb.edu/documents/statement-the-press-secretary-regarding-executive-grants-clemency-5>.

<sup>147</sup> See Carolina Bolado, *DOJ Plans to Retry Remaining Charges Against Esformes*, LAW360 (May 4, 2021), <https://www.law360.com/articles/1381314/doj-plans-to-retry-remaining-charges-against-esformes> (reporting that district court judge "said he would not detain Esformes for now, nor would he place any additional conditions on his supervised release").

<sup>148</sup> Jack Queen, *Esformes Says Trump's Clemency Blocks New Fraud Trial*, LAW360 (May 18, 2021), <https://www.law360.com/articles/1385880>.

involved the process.”<sup>149</sup> Specifically, the process of his prosecution involved a now infamous filter team, which was precisely the issue of concern for the former Attorneys General named in the White House Press Secretary’s announcement.

On the day of Esformes’ arrest, federal agents executed a search warrant at one of his facilities, Eden Gardens Assisted Living Facility, and seized seventy boxes of business records related to the fraud investigation.<sup>150</sup> The government knew that an Illinois attorney worked at Eden Gardens, but did not know whether the attorney had done any legal work for Esformes.<sup>151</sup> Out of caution, the government adopted a filter protocol for non-case agents to perform the search and segregate potentially privileged materials into a “taint” box.<sup>152</sup> A filter attorney would then review the documents for attorney-client privilege and work product protection.<sup>153</sup>

So much for best-laid plans.<sup>154</sup> In fact, the Eden Gardens filter team lacked both independence and information. Several agents had participated in related health care fraud investigations, and others later joined the Esformes investigation.<sup>155</sup> The agents did not receive adequate instructions for the search, including a list of names of Esformes’ attorneys and law firms.<sup>156</sup> As the search proceeded, the agents did only a “ cursory review” of paper documents on site and “no review at all of the electronic storage media.”<sup>157</sup> Ultimately, hundreds of privileged documents—“clearly prepared by law firms and/or marked ‘privileged and confidential’ or ‘attorney/client privilege’ or ‘work product privileged’ or ‘legal’”—were not placed in the one taint box but in the sixty-nine boxes provided to the prosecution team.<sup>158</sup> Upon review, the lead prosecutor “came across a document” with a law firm name on its header.<sup>159</sup> The government designated a filter team to review the Eden Garden materials again, which led to the discovery of privileged

<sup>149</sup> Tr. of Sentencing Hr’g at 65, *United States v. Esformes*, No. 16-20549-CR (S.D. Fla. Oct. 31, 2019) (statement of defense attorney Howard Srebnick).

<sup>150</sup> *United States v. Esformes*, No. 16-20549-CR, 2018 WL 6626233, at \*1 (S.D. Fla. Aug. 10, 2018), *report and recommendation adopted in part, rejected in part*, 2018 WL 5919517 (S.D. Fla. Nov. 13, 2018).

<sup>151</sup> *United States v. Esformes*, No. 16-20549-CR, 2018 WL 5919517, at \*20, \*23 (S.D. Fla. Nov. 13, 2018) (noting that government took a “myopic view” of Illinois attorney “as a criminal and not an attorney”).

<sup>152</sup> *Id.* at \*20.

<sup>153</sup> *Id.*

<sup>154</sup> Cf. ROBERT BURNS, TO A MOUSE, ON TURNING HER UP IN HER NEST WITH THE PLOUGH (Nov. 1785), <https://www.scottishpoetrylibrary.org.uk/poem/mouse/> (“The best-laid schemes o’ *Mice* an’ *Men* Gang aft agley.”).

<sup>155</sup> *Esformes*, 2018 WL 5919517, at \*20, \*23.

<sup>156</sup> *Id.* at \*20–21.

<sup>157</sup> *Id.* at \*24.

<sup>158</sup> *Id.* at \*21, \*23 (noting that defendant’s privilege log “consist[ed] of 1,244 entries showing privilege claims for approximately 800 items”).

<sup>159</sup> *Id.* at \*21.

materials commingled with nonprivileged documents in four boxes.<sup>160</sup> The government then halted its review.<sup>161</sup>

The district court was displeased. Describing the Eden Gardens search as at “best . . . clumsy and border-line incompetent,” the court found the government’s privilege protocol “to a large extent inadequate and ineffective” and the selection of agents “ill-advised.”<sup>162</sup> The court also chastised the individuals on the case, stating that “the prosecutors and agents in this case failed to uphold the high standards expected from federal agents and prosecutors from the United States Attorney’s Office and Department of Justice.”<sup>163</sup> The stings did not end there. While the prosecution team acted in good faith, “their execution of their duties was often sloppy, careless, clumsy, ineffective, and clouded by their stubborn refusal to be sufficiently sensitive to issues impacting the attorney client privilege.”<sup>164</sup> Through “multiple errors,” the government infringed on Esformes’ privileges.<sup>165</sup> Yet, finding minimal prejudice to Esformes, the court ultimately declined to dismiss the indictment or disqualify the prosecutors. Instead, the court suppressed certain evidence based largely on another privilege issue, where the government had secretly recorded conversations between Esformes and defendants in a related prosecution of health care fraud.<sup>166</sup>

Esformes has targeted these filter team issues as grounds for the Eleventh Circuit to vacate his convictions.<sup>167</sup> Several former high-ranking Department of Justice officials agree, mirroring the powerful support Esformes received for his clemency bid. Officials including former U.S. Attorneys General John D. Ashcroft, Alberto R. Gonzales, and Michael B. Mukasey; former FBI Director Louis J. Freeh; and former U.S. Solicitor General Seth P. Waxman filed a brief in the Eleventh Circuit as *amici curiae* in support of Esformes.<sup>168</sup> Describing the Eden Gardens materials as “the worst privilege violations in this case,” they argue that dismissal of the criminal proceeding is the only adequate remedy “when the government’s search of the defendant’s offices, which included his attorney’s office, used a patently defective privilege

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<sup>160</sup> *Id.* at \*22.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at \*23–24 (finding further that government “continued to act with disregard for potential privilege issues after the Eden Gardens search”).

<sup>163</sup> *Id.* at \*34.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at \*4–15, \*34 (finding that government “did not intentionally intrude the defense camp” when it secretly recorded conversations because those recordings concerned a separate investigation into potential obstruction of justice).

<sup>167</sup> Brief of Appellant Philip Esformes at 17–24, 57, *United States v. Esformes*, Nos. 19-13838, 19-14874 (11th Cir. Sept. 4, 2020).

<sup>168</sup> Brief of Former High-Ranking Dep’t of Just. Officials as *Amici Curiae* in Support of Appellant at 1, *United States v. Esformes*, Nos. 19-13838, 19-14874 (S.D. Fla. Sept. 11, 2020).

‘taint’ protocol.”<sup>169</sup> The National Association of Criminal Defense Lawyers chimed in, as well, endorsing dismissal.<sup>170</sup>

The Eleventh Circuit will decide the appeal in *United States v. Esformes*. As the judicial branch rules on the *Esformes* matter in particular, the executive branch has taken into its own hands privilege matters in general.

### B. Dedicated Privilege Review Team

The ongoing *United States v. Esformes* case shines an unflattering light on the Department of Justice’s filter team protocol for privilege issues. The district judge’s stinging opinion—which was restrained in comparison with the magistrate judge’s report and recommendation<sup>171</sup>—appeared just before the 2019 opinion from the U.S. Court of Appeals for the Fourth Circuit that disparaged filter teams wholesale as improperly judicial.<sup>172</sup> The Fourth Circuit’s opinion was not at all restrained,<sup>173</sup> and it is unclear how effective its pearl-clutching rhetoric will prove.<sup>174</sup> By contrast, the legacy of *United States v. Esformes* will likely endure. That case is already a “blockbuster,” attracting headlines and commentary in legal circles.<sup>175</sup> Especially with its

<sup>169</sup> *Id.* at 2, 7, 9, 23–26 (“Dismissal is therefore the only remedy that restores the defendant to the circumstances that existed before the government’s pervasive privilege violations.”).

<sup>170</sup> Brief of the Ntn’l Ass’n of Crim. Def. Lawyers as *Amici Curiae* for Appellant, Urging Reversal at 4–6, *United States v. Esformes*, Nos. 19-13838, 19-14874 (S.D. Fla. Sept. 11, 2020).

<sup>171</sup> Compare *United States v. Esformes*, No. 16-20549-CR, 2018 WL 6626233, at \*60 (S.D. Fla. Aug. 10, 2018), *report and recommendation adopted in part, rejected in part*, 2018 WL 5919517 (S.D. Fla. Nov. 13, 2018) (“The undersigned assigns no credibility to the prosecution team’s ‘new’ narrative, which, in any event, makes no logical sense; and deplores the prosecution team’s attempts to obfuscate the record.”), with *United States v. Esformes*, No. 16-20549-CR, 2018 WL 5919517, at \*32 (S.D. Fla. Nov. 13, 2018) (“Why would they conspire with each other and risk their careers to create a ‘new narrative’ over this issue? It’s inconsistent with their conduct throughout the case. The Court finds an articulable basis in the record to find that the prosecution team did not engage in any intentional misconduct in the case.”).

<sup>172</sup> *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 164, 181 (4th Cir. 2019) (finding filter team improper because “the Team’s creation inappropriately assigned judicial functions to the executive branch, the Team was approved in *ex parte* proceedings prior to the search and seizures, and the use of the Team contravenes foundational principles that protect attorney-client relationships”).

<sup>173</sup> See *id.* at 178 (expanding on Sixth Circuit’s analogy in *In re Grand Jury Subpoenas*, 454 F.3d 511, 524 (6th Cir. 2006), and criticizing magistrate judge for “fail[ing] to recognize and consider the significant problems with that [filter team] delegation, which left the government’s fox in charge of guarding the Law Firm’s henhouse”).

<sup>174</sup> See *In re Search Warrants Executed on Apr. 28, 2021*, No. 21-MC-425 (JPO), 2021 WL 2188150, at \*2 n.3 (S.D.N.Y. May 28, 2021) (interpreting Fourth Circuit’s opinion such that court “did not hold that the Government’s use of a filter team is categorically inappropriate” and disagreeing with court’s suggestion “that the use of a filter team by a federal prosecuting office may violate the constitutional separation of powers”); *In re Sealed Search Warrant & Application for a Warrant*, No. 20-MJ-03278, 2020 WL 5658721, at \*5 (S.D. Fla. Sept. 23, 2020), *aff’d sub nom.* *In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, No. 20-03278-MJ, 2020 WL 6689045 (S.D. Fla. Nov. 2, 2020) (distinguishing *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019)).

<sup>175</sup> Jack Queen, *Esformes Says Trump’s Clemency Blocks New Fraud Trial*, LAW360 (May 18, 2021), <https://www.law360.com/articles/1385880>; see R. Robin McDonald, *Despite Clemency, Miami Nursing Home Operator Pursues Appeal to Dismiss \$43M in Financial Penalties*, LAW.COM (Dec. 29, 2020), <https://www.law.com/dailyreportonline/2020/12/29/despite-clemency-miami-nursing-home-operator-pursues-appeal-to-dismiss-financial-penalties/>; Adam Dobnik, *DOJ Prosecution Tainted by Privilege Violations, former AGs Tell*



marquee *amicus* filings, *Esformes* has put privilege blunders on the federal appellate front steps.

At least correlating with these judicial opinions and news reports if not caused by them, in 2020 the Department of Justice created the Special Matters Unit.<sup>176</sup> The Department had recently issued guidance to prosecutors to submit filter protocols to magistrate judges.<sup>177</sup> The Criminal Division's Fraud Section now includes a dedicated, standalone group of attorneys specializing in "issues related to privilege and legal ethics."<sup>178</sup> The Special Matters Unit "conducts filter reviews," "litigates privilege-related issues," and "provides training and guidance to Fraud Section prosecutors," including on the proper collection of evidence.<sup>179</sup>

Unlike prior guidance on privilege filter protocols from the *Justice Manual*, the Special Matters Unit's job description is not keyed to searches of an attorney's office. Reflecting the widening reach of filter teams in practice, the Unit is designed to handle privilege in fraud matters generally. And there is *one* team. The Special Matters Unit acts as a standing replacement to the ad hoc case-by-case filter teams that the Department had deployed previously, offering "a new sense of uniformity and consistency."<sup>180</sup> When future privilege issues arise, defense lawyers have a centralized point of contact in Washington, D.C.<sup>181</sup>

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*Appeals Court*, GLOBAL INVESTIGATIONS REV. (Sept. 14, 2020), <https://globalinvestigationsreview.com/just-anti-corruption/privilege/doj-prosecution-tainted-privilege-violations-former-ags-tell-appeals-court>; Guy Singer et al., *Third-Party Privilege Reviews Could Solve an Enduring Problem at DOJ*, GLOBAL INVESTIGATIONS REV. (July 17, 2020), <https://globalinvestigationsreview.com/just-anti-corruption/privilege/third-party-privilege-reviews-could-solve-enduring-problem-the-doj>.

<sup>176</sup> Dep't of Just., *Fraud Section Year in Review 2020*, at 4 (2021), <https://www.justice.gov/criminal-fraud/file/1370171/download>; Adam Doprik, *Fifth Circuit Criticizes DOJ's Retention of Privileged Docs*, GLOBAL INVESTIGATIONS REV. (July 16, 2021), <https://globalinvestigationsreview.com/just-anti-corruption/privilege/fifth-circuit-criticizes-doj-retention-of-privileged-docs> (noting that "[o]ver the past two years, the DOJ has been steadily seeking ways to improve its handling of seized privileged materials to better protect its criminal cases from attacks and harmful rulings"); Clara Hudson, *New DOJ Privilege Unit Put to the Test*, GLOBAL INVESTIGATIONS REV. (Sept. 30, 2020), <https://globalinvestigationsreview.com/just-anti-corruption/privilege/new-doj-privilege-unit-put-test> (describing Special Matters Unit as "launched following a rise in privilege disputes and recent criticism from the courts").

<sup>177</sup> See Adam Dobrik, *DOJ Prosecution Tainted by Privilege Violations, former AGs Tell Appeals Court*, GLOBAL INVESTIGATIONS REV. (Sept. 14, 2020), <https://globalinvestigationsreview.com/just-anti-corruption/privilege/doj-prosecution-tainted-privilege-violations-former-ags-tell-appeals-court>; Adam Dobrik, *DOJ Moves to Shore Up Privilege Review Practices*, GLOBAL INVESTIGATIONS REV. (Sept. 10, 2020), <https://globalinvestigationsreview.com/just-anti-corruption/privilege/doj-moves-shore-privilege-review-practices>.

<sup>178</sup> Dep't of Just., *Fraud Section Year in Review 2020*, at 4 (2021), <https://www.justice.gov/criminal-fraud/file/1370171/download>.

<sup>179</sup> *Id.*; Maggie Hicks, *Defence Lawyers View New Special Matters Unit as a Chance to Shape Privilege Policy*, GLOBAL INVESTIGATIONS REV. (July 21, 2020), <https://globalinvestigationsreview.com/just-anti-corruption/privilege/defence-lawyers-view-new-special-matters-unit-chance-shape-privilege-policy>.

<sup>180</sup> Maggie Hicks, *Defence Lawyers View New Special Matters Unit as a Chance to Shape Privilege Policy*, GLOBAL INVESTIGATIONS REV. (July 21, 2020), <https://globalinvestigationsreview.com/just-anti-corruption/privilege/defence-lawyers-view-new-special-matters-unit-chance-shape-privilege-policy>.

<sup>181</sup> *Id.*

Distance and dedication blur the appearance of a conflict of interest. The Special Matters Unit is further removed from a prosecution team in any given case, as its attorneys are not simply other, uninvolved “agents and lawyers” pulled from a U.S. Attorney’s Office.<sup>182</sup> The privilege review remains in-house, as the Unit exists within the Department of Justice. Rumor has it that defense attorneys prefer the sardonic name, Special Problems Unit. But so far, courts appear receptive.

The Unit saw early success in the 2020 case of *United States v. Satary* in the U.S. District Court for the Eastern District of Louisiana. There, the defendant was charged with running a health care fraud scheme centered on cancer genomic testing.<sup>183</sup> The government created a filter team comprising attorneys from the Fraud Section, which helped execute search warrants at several laboratories.<sup>184</sup> The government then proposed a privilege protocol: the team would segregate potentially privileged materials and seek a court order or permission from the relevant party to release them; the team could release materials to prosecutors in *Satary* and other genomic testing cases; and the defendant could assert his privilege claims.<sup>185</sup> Both the magistrate and district judges approved the protocol and, in any event, found that the defendant lacked standing to object to disclosure of the laboratories’ materials.<sup>186</sup>

The Special Matters Unit is the newest tool in the government’s toolbox for handling privilege issues. While conflict continues over the propriety of allowing one party to enforce the privileges of another party, the decades-long disputes about privilege walls, filter teams, and the Special Matters Unit point to a more profound issue regarding the nature of criminal prosecutions. If we view prosecutions as adversarial all the way down, then skepticism of any government privilege review will persist. By contrast, if we view prosecutions as quasi-adversarial, then the government’s in-house review makes sense.

### III. UNDERLYING VIEW OF CRIMINAL JUSTICE

Returning to where we began, what does all this have to do with the dark universe in physics? The analogy requires that we look deeper. In both

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<sup>182</sup> See JUST. MANUAL § 9-13.420: SEARCHES OF PREMISES OF SUBJECT ATTORNEYS (Jan. 2021), <https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.420>.

<sup>183</sup> *United States v. Satary*, 504 F. Supp. 3d 544, 550 (E.D. La. 2020).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 547–52.

<sup>186</sup> *Id.* at 547, 552, 554 (noting that “federal case law clearly holds that a corporation’s attorney-client privilege belongs to the corporation, not to the corporation’s officers and directors or shareholders”); see Clara Hudson, *New DOJ Privilege Unit Put to the Test*, GLOBAL INVESTIGATIONS REV. (Sept. 30, 2020), <https://globalinvestigationsreview.com/just-anti-corruption/privilege/new-doj-privilege-unit-put-test>; Kimberly A. Parker, et al., *Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021*, WILMERHALE: INSIGHTS (Jan. 28, 2021), <https://www.wilmerhale.com/en/insights/client-alerts/20210126-2020-global-antibribery-yearinreview>.

physics and the law, something is going on that we do not perceive on the surface but detect indirectly. The movements of visible matter imply the existence of dark matter providing a strong gravitational attraction and dark energy stretching the universe apart. The disputes over privilege in prosecutions imply the existence of diverse views of criminal justice that exert a strong normative push and pull.<sup>187</sup> That is, different underlying views justify or discredit different strategies.

Criminal law occupies a unique, exalted space in our jurisprudence. The stakes can rise no higher, with a defendant's liberty and life on the line. Prosecutors are unlike civil litigants filing complaints. The civil plaintiff's goal is to prevail. Prosecutors are ministers of justice.<sup>188</sup> Nearly a century ago, the Supreme Court in *Berger v. United States* identified the government's moral interest in a criminal prosecution: "not that it shall win a case, but that justice shall be done."<sup>189</sup> The United States Attorney is "in a peculiar and very definite sense a servant of the law," representing a sovereign who must "govern impartially."<sup>190</sup> The sovereign's representative should "prosecute with earnestness and vigor," but may not win at all costs.<sup>191</sup> In a famous phrase, the high court made clear that a prosecutor "may strike hard blows, [but] is not at liberty to strike foul ones."<sup>192</sup>

The Supreme Court's language in *Berger* is so soaring and inspirational that it risks romanticizing a prosecutor into a superhero.<sup>193</sup> Both criminal and

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<sup>187</sup> I use "normative" in the philosophical sense, as "entailing that some action, attitude or mental state of some other kind is justified, an action one ought to do or a state one ought to be in." Stephen Darwall, *Normativity*, ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (2001), <https://www.rep.routledge.com/articles/thematic/normativity/v-1>.

<sup>188</sup> See MODEL RULES OF PROF'L RESP. R. 3.8 cmt. 1 (A.B.A., 2021) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); *Sorenson v. United States*, 168 F. 785, 800 (8th Cir. 1909) ("The desire for a conviction, and the zeal of the prosecutor to secure one, make it more the duty of the ministers of justice to see that the safeguards of the law are not broken down to compass the conviction."); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) ("The Government's interest is in dispassionate assessment of the propriety of criminal charges for affronts to the Judiciary. The private party's interest is in obtaining the benefits of the court's order. While these concerns sometimes may be congruent, sometimes they may not."); *United States v. Dawson*, 486 F.2d 1326, 1330 (5th Cir. 1973) (recognizing that federal prosecutors bear "the heavy responsibility . . . to conduct criminal trials with an acute sense of fairness and justice").

<sup>189</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*; see also Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1426 (2018) ("American prosecutors are officially entreated to seek not merely convictions, but also justice."); Bennett L. Gershman, "Hard Strikes and Foul Blows": *Berger v. United States 75 Years After*, 42 LOY. U. CHI. L.J. 177, 179 (2010) ("*Berger's* exhortation is routinely cited by courts when they reverse a conviction resulting from a prosecutor's misconduct; by lawyers in appellate briefs as a ritualistic incantation of the law's commitment to fair criminal process and the prevention of wrongful convictions; and by academics as a reminder of the appropriate ethical standard for a prosecutor").

<sup>193</sup> See Bennett L. Gershman, "Hard Strikes and Foul Blows": *Berger v. United States 75 Years After*, 42 LOY. U. CHI. L.J. 177, 179 (2010) (noting that "the prosecutor described by *Berger* embodies an even more heroic persona—a gladiator who is required to play by special rules that may require him to eschew winning for the nobler goal of serving the cause of justice"); ADVENTURES OF SUPERMAN (radio broadcast 1940–51), <https://www.cbr.com/superman->

civil attorneys are human beings, with human flaws. But the ideal persists. The attorney representing the People “is held to a *higher* standard of behavior.”<sup>194</sup> The American Bar Association in its *Criminal Justice Standards* describes a prosecutor as “an administrator of justice” whose primary duty “is to seek justice within the bounds of the law, not merely to convict.”<sup>195</sup> Similarly, the National District Attorneys Association states in its *National Prosecution Standards* that “[t]he primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth.”<sup>196</sup> Keeping that responsibility in mind, following the standards becomes “simply a matter of common sense.”<sup>197</sup>

Such sense is as sweeping as it is common. The government’s “special duty to seek justice, not merely to convict,”<sup>198</sup> requires “respect[ing] the constitutional and legal rights of all persons, including suspects and defendants.”<sup>199</sup> The government’s respect reaches named parties, third parties, and nonparties alike: “all persons.”<sup>200</sup> Indeed, the term “special” in “special duty” reveals the moral nature of a criminal proceeding. “Special” is not simply a description to identify one duty rather than another, but a signal that the attorney charged with that duty acts for the common good.

Accordingly, a prosecutor does not stand in stark competition against a defendant. Because prosecutors seek justice rather than convictions, the concept of justice must be distinct from the concept of convictions. In some cases, a conviction serves the goal of justice; in other cases, it does not. In all cases, the government’s duty gives rise to criminal proceedings that are not designed to be purely adversarial, but rather quasi-adversarial.

This quasi-adversarial view of criminal justice is the invisible force underlying and animating the government’s strategies for handling privilege issues. The view gives normative force to the Special Matters Unit, as it did previously to walling off reviewers and deploying filter teams. Attorneys in the Department of Justice can and should enforce another party’s attorney-client privilege and work product protection just as they can and should

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american-way-not-part-never-ending-battle-truth-justice/ (promoting “Superman, Champion of Truth and Justice” and noting that “the American Way” was added later for political reasons).

<sup>194</sup> *United States v. Young*, 470 U.S. 1, 25 (1985) (Brennan, J., concurring); see *United States v. Garcia*, 758 F.3d 714, 722 (6th Cir. 2014) (noting that “the Constitution and the courts impose restraints on the trial conduct of Government attorneys that are sometimes more onerous than the analogous restraints imposed on the defense”).

<sup>195</sup> CRIMINAL JUSTICE STANDARDS 3-1.2: FUNCTIONS AND DUTIES OF THE PROSECUTOR (A.B.A., 4th ed. 2017).

<sup>196</sup> NAT’L PROSECUTION STANDARDS at 2 (NAT’L DISTRICT ATTORNEYS ASS’N, 3d ed. 2009).

<sup>197</sup> *Id.* at 77.

<sup>198</sup> *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011) (quotation omitted).

<sup>199</sup> CRIMINAL JUSTICE STANDARDS 3-1.2: FUNCTIONS AND DUTIES OF THE PROSECUTOR (A.B.A., 4th ed. 2017); see NAT’L PROSECUTION STANDARDS at 53 (NAT’L DISTRICT ATTORNEYS ASS’N, 3d ed. 2009) (requiring “the protection of the rights of all (even the prospective defendant)”).

<sup>200</sup> CRIMINAL JUSTICE STANDARDS 3-1.2: FUNCTIONS AND DUTIES OF THE PROSECUTOR (A.B.A., 4th ed. 2017).

respect all persons' constitutional and legal rights. Enforcing privileges fits the justice-seeking job description.

The quasi-adversarial view may strike some, especially criminal defense attorneys, as an ideal divorced from reality.<sup>201</sup> The United States Attorneys' Offices do not include a column for "Justice Served" when listing the disposition of criminal cases and defendants in their annual statistics.<sup>202</sup> And a quasi-adversarial system cannot slide too far into overlapping interests, as the Supreme Court views "the adversary system as the primary means by which truth is uncovered."<sup>203</sup> Privilege strategies, like *Brady* and *Giglio* obligations, represent a "limited departure from the adversary system" that "illustrates the special role played by the American prosecutor in the search for truth."<sup>204</sup> That special role—rather than the conduct of any specific, fallible prosecutor—provides the normative link. The Special Matters Unit makes sense only if we subscribe to the quasi-adversarial view of criminal justice. If we do not subscribe to that view, then every in-house privilege strategy rings hollow. The concept crumbles.

Indeed, the absence of that view in civil law helps explain why filter teams are nonexistent in civil discovery. There, one-party privilege review is a conceptual misfit. Private lawsuits are purely adversarial, where neither side can claim the moral high ground of representing the sovereign. Rather, each party represents its own interests and seeks to win the benefit of the court's order.<sup>205</sup> This result may be counterintuitive: in a civil proceeding with *lower* stakes, each party enforces its own privilege claims. The key is that the government's privilege protocol in criminal proceedings does not rest on the underlying stakes, but on the underlying view of criminal justice.

Looking beneath the government's privilege protocol not only identifies the source of normative force, but also provides a new perspective on the messy case law concerning filter teams. We can revisit appellate opinions with a sorting principle: the government properly enforces privilege only as a minister of justice. That underlying view ensures that the government has

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<sup>201</sup> See Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1426 (2018) (federal public defender arguing that prosecutors are pulled between maximizing the chance of victory and making "room for values like mercy, due process, and proportionality" and that "[t]his tension, combined with the powerful cultural and professional forces that push prosecutors to seek convictions and harsh punishments, causes adversarialism to dominate American prosecution"); Abbe Smith, *Are Prosecutors Born or Made?*, 25 GEO. J. LEGAL ETHICS 943, 943–49 (2012) (describing personal encounters and conversations with prosecutors).

<sup>202</sup> See United States Attorneys' Annual Statistical Report (Fiscal Year 2020), at 5-7 <https://www.justice.gov/usao/page/file/1390446/download> (listing columns for "Guilty," "Not Guilty," "Dismissed," "Rule 20," and "Other").

<sup>203</sup> *United States v. Bagley*, 473 U.S. 667, 675 (1985).

<sup>204</sup> *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 555 (4th Cir. 1999); see *Bagley*, 473 U.S. at 675.

<sup>205</sup> See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987).

moral authority to handle privilege issues and is not simply exercising power.<sup>206</sup>

For example, an adversarial view of criminal justice underlies the opinions of the Sixth Circuit in *In re Grand Jury Subpoenas* and the Fourth Circuit in *In re Search Warrant Issued June 13, 2019*.<sup>207</sup> Both courts declined to leave the government's fox in charge of the privilege holder's henhouse.<sup>208</sup> Accordingly, both opinions depict a criminal proceeding as competitive, each side in stark opposition to the other.<sup>209</sup> Rather than ascribing to prosecutors a special role to seek justice and protect the rights of all, the courts depict the government on a par with the defendant. Both sides share the same zero-sum, self-interested goal of winning. Otherwise, the government would not be cast as a metaphorical fox invading and exploiting a vulnerable henhouse.<sup>210</sup> The fox is a symbol of predatory power, and we do not trust it to respect the constitutional and legal rights of all animals on the farm.

On constitutional grounds, the Fourth Circuit further declined to permit lawyers and *non-lawyers* in the executive branch to perform the quintessentially judicial task of resolving privilege disputes.<sup>211</sup> Judicial power vests in the judicial branch. So be it. But the Fourth Circuit misconstrues the Department of Justice's privilege strategies, as evidenced by the opinion's shifting language. The court correctly states that the filter team at bar had authorization "to make decisions on attorney-client privilege and the work-product doctrine."<sup>212</sup> In the next sentence, the Fourth Circuit states, again correctly, that "a court simply cannot delegate its responsibility to decide privilege issues."<sup>213</sup> When a privilege dispute arises, the judiciary is tasked with "the resolution of that dispute."<sup>214</sup> But these are separate tasks. *Making decisions* is different from *deciding issues and resolving disputes*. The initial task lies properly with the executive branch only if we subscribe to a quasi-adversarial view of criminal justice, which the Fourth Circuit does not. The ultimate task of resolving issues and disputes lies always with the

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<sup>206</sup> See generally Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 79 (2011) ("Law is indeed a normative social practice.").

<sup>207</sup> *In re Grand Jury Subpoenas*, 454 F.3d 511, 524 (6th Cir. 2006); *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 183 (4th Cir. 2019).

<sup>208</sup> See 454 F.3d at 523; 942 F.3d at 177–79.

<sup>209</sup> See 454 F.3d at 522–24; 942 F.3d at 177–79.

<sup>210</sup> See *Don't Let the Fox Guard the Henhouse*, FAIRLEX DICTIONARY OF IDIOMS (2015).

<sup>211</sup> See *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 176.

<sup>212</sup> *Id.* at 177.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 176.

judicial branch.<sup>215</sup> A filter team or Special Matters Unit team stands in the shoes of the privilege holder, not the court.<sup>216</sup>

By contrast, a quasi-adversarial view of criminal justice underlies the Eleventh Circuit's opinion in *United States v. DeLuca*. There, the court acknowledged the filter team's mistake in sending at least one attorney-client email to prosecutors and focused its inquiry on whether that mistake prejudiced the defendant.<sup>217</sup> Notably, the court did not take issue with the propriety of filter teams in general, but instead looked to the success or failure of the specific team before it. Indeed, the Eleventh Circuit's chilly reception of the Supreme Court's decision in *Kastigar* underscores its acceptance of a prosecutor's special role.<sup>218</sup> Both the dissenting opinion of Justice Marshall and the majority opinion of Justice Powell in *Kastigar* suggest a desire for guardrails, something beyond "the good faith of the prosecuting authorities" to protect a witness from subsequent prosecution.<sup>219</sup> The Eleventh Circuit in *DeLuca* dismissed such concerns as nothing new, and anyway *Kastigar* is distinguishable.<sup>220</sup>

The Eleventh Circuit will hear the appeal in *United States v. Esformes*. The court has another opportunity to reveal, albeit indirectly, its view of criminal justice. If the Eleventh Circuit follows its own precedent in *DeLuca*, then we should expect an analysis focused on the conduct of the filter team rather than an existential inquiry into the concept of government privilege review. Perhaps the team was sloppy and clumsy, or not. Perhaps that sloppiness and clumsiness prejudiced the defendant, or not. The court will likely pose the question, *How bad were the mistakes in this case?* rather than, *Should a filter team exist?*

Thus, looking at underlying views of criminal justice allows us to sort these judicial opinions into groups. The former group—from the Fourth and Sixth Circuits—rejects the concept of the government's in-house privilege review. Whether the government builds walls or deploys filter teams or dedicates attorneys in D.C. is irrelevant. The government should not enforce another's privilege. Full stop. The latter group—from the Eleventh Circuit—accepts the concept and focuses case-by-case on success or failure. As long

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<sup>215</sup> See *United States v. Raddatz*, 447 U.S. 667, 669, 683 (1983) (reviewing provision of Federal Magistrates Act and finding delegation appropriate "so long as the ultimate decision is made by the district court"); *Crowell v. Benson*, 285 U.S. 22, 36–37, 54 (1932) (reviewing award under Longshoremen's and Harbor Workers' Compensation Act and finding delegation appropriate where "reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function").

<sup>216</sup> See *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) (preferring privilege review protocol that allows wider scope for disputes).

<sup>217</sup> *United States v. DeLuca*, 663 F. App'x 875, 877 (11th Cir. 2016).

<sup>218</sup> *Id.* at 880–81.

<sup>219</sup> Compare *Kastigar v. United States*, 406 U.S. 441, 460 (1972), with *id.* at 469 (Marshall, J., dissenting).

<sup>220</sup> See *DeLuca*, 663 F. App'x at 880 (noting that "this case does not involve compelled testimony, and whatever the merits of a *Kastigar*-like approach, our precedent requires a showing of demonstrable prejudice").

as courts join the latter group and focus on success or failure, the Department of Justice can promote the Special Matters Unit as best practices. Clarity emerges from the bottom up.

#### CONCLUSION

The government's privilege strategies, culminating in the Special Matters Unit, make sense to the extent prosecutors are cast as ministers of justice. The surface discussion of approving or disapproving a privilege protocol hides a deep discussion of competing views of criminal justice. That deep discussion is the dark universe of federal privilege. It turns out, the dark universe is as illuminating as it is animating, forcing us to contend with profound matters of morality embedded in our jurisprudence. And those are special matters indeed.



