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#NoFilter: How Discovery Filter Teams Breach Privilege Rights and Why They Require Stricter Regulation

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**#NoFILTER: HOW DISCOVERY FILTER TEAMS
BREACH PRIVILEGE RIGHTS AND WHY THEY REQUIRE STRICTER REGULATION**

Kelly Murray¹

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I. INTRODUCTION

Recent advances in technology have brought about Zoom meetings in bathrobes, work commutes to the living room, and cars that drive themselves. Though technological advancements have made many aspects of modern life simpler and more attainable, other areas of life have scrambled to keep up with the previously unimaginable digital world.

For example, most recently, the acceleration of technology has pushed many large corporations to handle most of their affairs on digital platforms.² From a legal standpoint, this means that when large businesses and their clients are criminally charged, the digital trail is far more complex than it once was.³ Accordingly, when the government uses individual search warrants to obtain these massive amounts of digital evidence, the process is arduous and time consuming.⁴ The discovery process of corporate lawsuits can drag out over years, if not decades.⁵ Therefore, the government's successful use of individual search warrants has dwindled due the time commitment and the warrants' narrow use.⁶

² Although the use of technology has steadily increased throughout the last thirty years or so, it is worth mentioning that COVID-19 has only increased the use of technology in the industrial world. Anjar Priyono et al., *Identifying digital Transformation Paths in the Business Model of SMEs During the COVID-19 Pandemic*, 6 J. OF OPEN INNOVATION: TECH., MKT., AND COMPLEXITY 1, 1 (2020) (“The COVID-19 pandemic has caused dramatic environmental changes that encourage firms to adopt digital technology on a wider scale and under time pressure”). Accordingly, it is likely that the issues raised in this note will be exacerbated in the years to come.

³ Evan Davis, *4th Circuit Upends Longstanding DOJ Practice for Filter Teams to Review Attorney-Client Privileged Materials*, TAX LITIGATOR (Nov. 6, 2019), <https://www.taxlitigator.com/4th-circuit-upends-longstanding-doj-practice-for-filter-teams-to-review-attorney-client-privileged-materials-by-evan-davis/> (“The quicksand of federal investigations turns out not to be recalcitrant witnesses or destruction of evidence, but a volume of digital evidence that outstrips the agents’ and prosecutors’ capacity to review. This is particularly true where the review must be done twice – first by a “filter team” for privileged matters and then, by a separate “investigative team,” for evidence to be used in the investigation.”).

⁴ Don Samuel, *Is the DOJ Filter Team Process Tainted?*, CONTEMPORARY LAW BLOG (Apr. 4, 2020), <https://www.contemporarylawblog.com/blog/is-the-doj-filter-team-process-tainted/> (“The use of taint/filter teams in white collar search warrant seizure cases is widespread. Rarely is a business, or a doctor’s office searched that a team of prosecutors unaffiliated with the prosecution team is not appointed. Invariably, businesses have records of consultations with lawyers, such as advice about regulatory matters, or the legality of certain proposed ventures.”).

⁵ *Id.*

⁶ While discussing the failure of courts to successfully use filter teams, one author wrote that “[t]his inability to delegate will, in turn, further slow down the review process and exponentially increase costs over using agents and lawyers already on the government’s payroll.” *Supra* n. 2.

To remedy this, the U.S. Department of Justice created “filter teams” or “taint teams” to expedite the search warrant process.⁷ The teams are composed of federal agents and attorneys who are not involved in the criminal investigation itself.⁸ These individuals search through large volumes of digital materials and establish whether any attorney-client privileged or work-product doctrine information are seized.⁹ The filter team then gives the discoverable, non-privileged information to the prosecutors on the investigation.¹⁰ This negates the need for narrowly tailored search warrants that each require independent approval and execution. Thus, filter teams bypass the need for individual search warrants because all materials are seized and reviewed by an insulated “third party” in one transaction.

Unfortunately, courts do not use filter teams consistently, which has created its own slew of issues.¹¹ Circuits have been split on whether the use of filter teams should be permissible since their origination. While some circuits routinely question the legality of filter teams because they can breach privilege rights,¹² others support the use of filter teams, which has led to their “widespread” use by the Department of Justice over the years.¹³ In spite of the support filter teams

⁷ The names “filter team”, “taint team”, and occasionally “privilege team” are used interchangeably and all refer to the same government group. This note will refer to these teams as “filter teams” but any name could be exchanged throughout. The name filter team is used because the teams “filter” out privileged documents, while the name taint team is used because the teams search for “tainted” (privileged) evidence to exclude from discovery.

⁸ U.S. Dep’t of Just., Just. Manual § 9-13.420 (E) (2021) (“To 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.”).

⁹ *Id.* “While every effort should be made to avoid viewing privileged material, the search may require limited review of arguably privileged material to ascertain whether the material is covered by the warrant.”

¹⁰ *United States v. Elbaz*, 396 F. Supp. 3d 583, 588 (D. Md. 2019) (“Documents separated out as potentially privileged . . . would be reviewed by the Filter Team and, if deemed nonprivileged, made available for review by the Prosecution Team”).

¹¹ For example, simply taking a look at the Justice Manual’s requirements for filter teams highlights the wide variety of outcomes that the DOJ permits. Specifically, the manual provides several review procedures that filter teams *can* use, however, none of these are *required* to be implemented by courts. *See* U.S. Dep’t of Just., Justice Manual § 9-13.420 (F).

¹² *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006); *See generally In re Search Warrant for Law Offices*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994); *See also In re the Matter of Search Warrants Executed on April 9, 2018*, No. 18 MJ 3161 (S.D.N.Y. Apr. 16, 2018).

¹³ Davis, *supra* note 3.

have received in some circuits, these circuits have not reached an agreement on how they should be regulated.

On their face, filter teams have an important place in today's rapidly evolving digital society. They facilitate document review and shorten discovery periods in complex criminal cases that are likely to become increasingly frequent. Yet, their currently delegated power under the Department of Justice is far too strong. With the proper regulations in place, filter teams could become a tactful tool for courts to utilize to keep up with the high demands of the modern world.

This note examines the Supreme Court's substantial need to weigh in on how filter teams should be used given current circuit splits and identifies several best practices to remedy the issues they currently present. Part I of this note discusses the principal issues for which filter teams are scrutinized. Namely, numerous district courts hold that filter teams provide the government with the unfair advantage of determining which materials from their opposing counsel are privileged.¹⁴ This often leads to an overly broad inclusion of privileged documents, which can violate defendants' Sixth Amendment rights to a fair and complete trial.¹⁵ Some courts even go so far as to question the constitutionality of filter teams.¹⁶ This extreme opposition emphasizes the level of scrutiny to which filter teams are subject.

Parts II and III of this note discuss proposals for the issues identified in Part I. These sections propose the ideal regulations for filter teams and methods of reimagining what filter teams look like if the Supreme Court declines to adequately regulate them.

Part II identifies several regulations that can successfully minimize the unfair nature of filter teams by requiring additional steps either before or after filter teams have access to privileged

¹⁴ U.S. Dep't of Just., Justice Manual, *supra* note 11.

¹⁵ U.S. CONST. amend. VI.

¹⁶ *See generally In re Search Warrant*, 942 F. 3d 159, 176 (4th Cir. 2019).

documents. For example, parties could agree upon document review protocols at the outset of discovery.¹⁷ The Supreme Court could also initially require the defending party to provide the filter team with privilege logs that describe the nature and privilege status of each seized digital document to prevent accidental privilege disclosure.¹⁸ Lastly, the Supreme Court could allow defendants to review filter teams' decisions before documents are given to the prosecution.

Finally, Part III of this note proposes additional layers of privilege insulation for the Supreme Court to consider if it declines to implement the proposals in Part II. These proposals go beyond suggesting regulations for existing filter teams and argue that alternative measures exist to deal with the same issues. For example, courts could protect defendants from privilege leaks with the assignment of a Special Master¹⁹ rather than using a filter team at all. They could also utilize the DOJ's newly appointed, specialized "filter teams" called Special Matters Units.²⁰ Finally, the Supreme Court could consider a new combination of features from Special Masters and Special Matters Units that maximize each of their best characteristics. Accordingly, while there are several options available to the Supreme Court to better regulate filter teams, there are other options of efficient privilege review available even if the court strikes them down.

¹⁷ *Preventative Medicine Associates, Inc. v. Commonwealth*, 992 N.E.2d 810, 823 (Mass. 2013) (Explaining that prior to the use of a filter team, the government should "obtain the judge's approval of the search protocol to be used and specifically the procedures proposed to protect against searches of privileged communications between the defendant and his attorneys.").

¹⁸ *See, e.g., Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992) ("Some courts require that a privilege log contain basic information about each separate communication over which a party asserts a privilege").

¹⁹ *See generally, Cohen v. United States*, No. 1:18-mj-03161 (S.D.N.Y. Apr. 13, 2018).

²⁰ *Trial Attorney (Special Matters Unit)*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/legal-careers/job/trial-attorney-special-matters-unit-1> (last visited December 1, 2021).

II. The Origin of Filter Teams and Criminal Discovery

A. *Privilege Rights and the Sixth Amendment*

Privilege rights are zealously guarded in the United States.²¹ Notably, the attorney-client privilege is “the oldest of the privileges for confidential communications known to the common law”.²² While courts must recognize several types of privileged communications, two are of particular significance to this note: the attorney client privilege and work product doctrine. The attorney-client privilege protects communications between attorneys and their clients while a legal relationship is in place.²³ The general rationale behind this privilege is that clients will not communicate truthfully with their attorneys if they know the information is not confidential.²⁴

Similarly, privilege rights are also extended to attorneys’ work product.²⁵ This privilege protects an attorney’s “impressions, conclusions, opinions, or legal research theories” while providing legal services for a client.²⁶ The work product doctrine is a crucial component to a fair trial because it protects an attorney’s legal theories and trial strategies from being compromised during the discovery process.²⁷ The protection of attorney-client privilege and the work-product doctrine “jointly support the Sixth Amendment’s guarantee of effective assistance of counsel” by

²¹ “Although the attorney-client privilege is subject to certain limited exceptions, it generally enjoys strong protection in the courts. As a result, it helps create the circumstances for an attorney to provide effective representation to a client”. Michael Michell and Edward Roche, *Attorney-Client Privilege is Worth Fighting For*, SMITH LAW (Dec. 12, 2019), <https://www.smithlaw.com/resources-publications-1384>.

²² *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

²³ *U.S. v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950) (“The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.”).

²⁴ See *United States v. Rosner*, 485 F.2d 1213, 1224 (2nd Cir. 1973).

²⁵ See generally FED. R. CIV. P. 26(b)(3)(B).

²⁶ *Id.*

²⁷ “Absent privacy of communications and the “full and frank” discussions that flow therefrom, a lawyer could be deprived of the information necessary to prepare and present his client’s defense.” See generally *U.S. v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950).

ensuring clients and attorneys maintain the privacy needed for the best possible legal outcome.²⁸ Thus, with these rights in place, parties are guaranteed the opportunity for a complete and fair trial.²⁹

However, when a defendant's privilege rights are breached, it creates an "incurable prejudice" that may even cause the case to be retried.³⁰ Further, the punishments that result from the mere possibility of a privilege breach are often serious.³¹ Punishments frequently include sanctions and the attorney or firm's disqualification from the case.³² Actual disclosures of privileged information result in formal reprimand, suspension, or disbarment.³³

Given the significance of privilege rights within the judicial process, the government sought a way to guarantee these rights in high-profile criminal cases that involved large volumes of discoverable materials.³⁴ In the past, prosecutors could only obtain these materials through a series of specifically tailored search warrants.³⁵

For example, the Fourth Amendment requires that search warrants "describ[e] the place to be searched, and the persons or things to be seized".³⁶ Thus, search warrants must be supported by probable cause and an affidavit specifically describing the materials to be searched.³⁷ This process

²⁸ *Preventative*, 992 N.E.2d at 823.

²⁹ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense").

³⁰ *United States v. Orman*, 417 F. Supp. 1126, 1133 (D. Colo. 1976) (holding that the government's surveillance of attorney-client conferences incurably prejudiced the client and the case was dismissed).

³¹ David S. Ruder, *Disqualification of Counsel: Disclosures of Client Confidences, Conflicts of Interest, and Prior Government Service*, 35 Bus. Law. 963, 965 (1980).

³² *Id.*

³³ Gleason L. Archer, *ETHICAL OBLIGATIONS OF A LAWYER*, 161 at 282 (1910).

³⁴ *Id.*

³⁵ "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Supra* n. 30.

³⁶ *Id.*

³⁷ "Because petitioner did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly "unreasonable" under the Fourth Amendment." *Groh v. Ramirez*, 540 U.S. 551, 563 (2004).

is time consuming because of the narrow scope of each warrant. While the traditional search warrant process in white collar crime cases successfully protected Sixth Amendment privilege rights, it was a tedious and expensive process that clogged dockets because of the number of search warrants needed and the time each required.

Accordingly, the government's proposal of filter teams was intended to both accelerate discovery proceedings and maintain privilege rights when large volumes of documents are involved.³⁸ Consequently, the public along with a wealth of courts are outraged by the use of filter teams because they often breach the very privilege rights they were intended to protect.³⁹ Although filter teams generally follow the limited procedures required by the Department of Justice, without additional protections in place, privilege risks posed by this framework lead to "inevitable" breaches of privilege.⁴⁰ Yet, if properly regulated by the Supreme Court, filter teams provide undeniable advantages to the just resolution of federal criminal proceedings for several reasons.

B. The Ideology Behind Filter Teams

As discussed above, filter teams originated in order to allow the government to expedite criminal proceedings while providing a bulwark between the investigating prosecutors and their access to privileged materials.⁴¹ Without this buffer, investigating prosecutors would violate the

³⁸ The United States recognizes several other types of privileged communications, however, this note will focus on the attorney-client privilege and work product doctrine. Clergy-communicant, marital privilege, therapist-patient, privilege against self-incrimination, physician-patient, law enforcement officer-informant, new reporter-news source, etc. See Fed. R. Ev. 501. This section's primary focus is evidenced by the concern with protecting privilege rights throughout. Additionally, section C indicates that the Criminal Division is committed to the timeliness of these investigations. See generally Justice Manual § 9-13.420.

³⁹ Former President Donald Trump claimed the attorney client privilege is dead while posting to his deactivated Twitter account, "@POTUS", regarding filter teams. He later added that the search was "A total WITCH HUNT with massive conflicts of interest!"). Michael Sheetz and Mike Calia, *President Trump Claims 'Attorney-client privilege is dead' After FBI Raids his Lawyer Michael Cohen's Office and Residence*, CNBC (April 10, 2018), <https://www.cnbc.com/2018/04/10/trump-tweet-attorney-client-privilege-is-dead.html>.

⁴⁰ *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

⁴¹ Courts have recognized that it may not be possible to extract legitimate evidence from electronic sources without coming into contact with privileged information. In order to protect both sides of the investigation, the courts have acknowledged the necessity for independent teams of professionals to examine and identify those documents that

constitutional rights of the accused and make an investigation unlawful.⁴² Qualifying cases that do not employ filter teams are generally laborious and time consuming due to frequent disputes over which materials require search warrants.⁴³ Filter teams allow the litigation process to bypass months, if not years, of the discovery process, which has contributed to their popularity.⁴⁴ The U.S. Department of Justice Manual lays the foundation for the power and creation of filter teams.⁴⁵ The manual provides in pertinent part that filter teams exist in order to:

[P]rotect 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.⁴⁶

Additionally, filter teams are staffed by federal agents and prosecutors not involved in the investigation.⁴⁷ These government agents are randomly assigned to a filter team because they are intended to shield those involved in the investigation from the unlawful discovery of privileged

qualify as privileged”. MICHAEL W. GRAVES, *DIGITAL ARCHAEOLOGY: THE ART AND SCIENCE OF DIGITAL FORENSICS* 67 (Bernard Goodwin et al., 1st ed. 2014).

⁴² “To avoid the disclosure of attorney-client materials, the government assembles an internal team of experienced attorneys and criminal investigators, who have no interest in the matter, to review the documentation in order to protect and preserve the attorney-client privilege.” William Marquardt and Richard Gregorie, *Using Independent Taint Teams to Better Protect Attorney-Client Privilege*, <https://www.jdsupra.com/legalnews/using-independent-taint-teams-to-better-1639680/> (last visited on Mar. 1, 2022).

⁴³ See *In re Investigation of Bay Ingram*, 915 F. Supp. 2d 761, 765 (E.D. La. 2012).

⁴⁴ One author commented on the Fourth Circuit’s decision not to use filter teams. See generally *In re Search Warrant*, 942 F.3d 159 (4th Cir. 2019). He stated that the failure to use a filter team “will result in increased costs for white collar defendants, impose an increased burden on the judiciary, and slow the review process without any cognizable benefit to the defendant or to the party on whom the warrant was executed”. Adam M. Felsenstein, *Worry Warrants: Potential New Restrictions on Government Taint Teams* (Jan. 1, 2020), <https://www.thsh.com/criminal-justice-insider/worry-warrants-potential-new-restrictions-on-government-taint-teams>

⁴⁵ *Supra* note 8.

⁴⁶ *Id.*

⁴⁷ “In sum, the Filter [team] Protocol improperly delegated judicial functions to the Filter Team. And the magistrate judge failed to recognize and consider the significant problems with that delegation, which left the government’s fox in charge of guarding the Law Firm’s henhouse”. *In re Search Warrant*, 942 F. 3d 159, 178 (4th Cir. 2019)(citing *In re Grand Jury Subpoenas*, 454 F.3d at 523.).

materials.⁴⁸ Numerous courts agree that filter teams create little chance of breaching privilege rights when properly regulated.⁴⁹

Given that significant caveat, courts have routinely struggled to consistently regulate filter teams because of the limited and vague guidance from the U.S. Department of Justice.⁵⁰ For instance, the DOJ advises that filter teams “should” discuss various review procedures but does not require them to do so.⁵¹ Consequently, many circuits have found the risk of breaching privilege rights too high to justify their use.⁵²

C. *The Historical Use of Filter Teams*

Federal courts have failed to reach a unanimous decision on how to regulate the use of filter teams or, in some cases, whether they should be used at all. In 2019, the Fourth Circuit rejected the use of filter teams altogether.⁵³ This court examined whether the government had the authority to seize information from an attorney’s office after he allegedly withheld client information.⁵⁴

⁴⁸ “The taint teams do not consist of attorneys solely assigned to those teams. Instead, when the DOJ obtains documents by seizure, whether through an e-mail provider or during a raid, prosecutors not involved in the investigation are called upon to join the taint team for the investigation, isolate potentially privileged material, and send the remainder of the material to the prosecuting attorneys. The members of the taint teams have historically been prosecutors pulled from their own cases to make privilege determinations on other cases involving different prosecuting attorneys.” Jim McGovern, Ethan Kate, Samantha Spiro, *The Department of Justice Introduces a New Privilege Team*, HOGAN LOVELLS 3, 6 (May 31, 2020), https://www.hoganlovells.com/~media/hogan-lovells/pdf/2020-pdfs/2020_05_31_the_doj_introduces_new_privilege_team.pdf.

⁴⁹ *See, e.g., In re Ingram*, 915 F. Supp. 2d at 765; *United States v. Taylor*, 2010 LEXIS 112393 at 1 (D. Me. July 16, 2010); *United States v. Triumph Cap. Group, Inc.*, 211 F.R.D. 31, 43 (D. Conn. 2002); *United States v. Grant*, 2004 LEXIS 9462 at 2 (S.D.N.Y. May 25, 2004).

⁵⁰ *Supra* note 11.

⁵¹ *Id.*

⁵² *Supra* note 17.; *Harbor Healthcare Sys., L.P. v. United States*, F.3d 593 (5th Cir. 2021).; *see In re Grand Jury Subpoenas*, 454 F.3d at 523; *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991); *United States v. Elbaz*, 396 F.Supp.3d 583, 165–67 (D. Md. 2019).

⁵³ *In re Search Warrant*, 942 F. 3d 159, 178 (4th Cir. 2019).

⁵⁴ “According to the government, its investigation of Client A was obstructed by Lawyer A, and the relationship between Lawyer A and Client A triggered an application of the crime-fraud exception to the attorney-client privilege and work-product doctrine”. *Id.* at 165.

At the District Court, a magistrate approved the government’s filter team request in order to obtain the materials and denied the attorney’s preliminary injunction to stop the filter team from gaining this access.⁵⁵ On appeal, the Fourth Circuit reversed and held that filter teams were generally improper.⁵⁶ The court held that “a court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute.”⁵⁷ Essentially, filter teams are part of the U.S. Department of Justice, which is an entity of the executive branch. However, filter teams exercise judicial power when they determine whether information is privileged.⁵⁸ The court also took issue with procedural tactics the government used in obtaining approval for a filter team.⁵⁹

This was not the first-time filter teams have been adamantly opposed. For example, several other courts found filter teams to be “highly questionable” because they unfairly favor the prosecution.⁶⁰ They have even been described as a “total institutional failure”.⁶¹

A major concern with filter teams is that their members are employed by the government, which is a party to criminal investigations. Therefore, they are likely to take “a more restrictive view of privilege” than the defense because they benefit from information that they do not have to discover themselves.⁶² Further, the Sixth Circuit argued that filter teams “may err, by neglect or malice, as well as by honest difference of opinion” because the possibility of inadvertently

⁵⁵ *Id.* at 164-65, 168-69.

⁵⁶ *Id.*

⁵⁷ *Id.* at 176.

⁵⁸ *Id.*

⁵⁹ *Id.* at 177.

⁶⁰ See *United States v. Neil*, 952 F. Supp. 834, 841 (D.D.C. 1997); *In re Grand Jury Subpoenas*, 454 F.3d 511 at 523.; *In re Search Warrant for L. Offs.*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994).

⁶¹ Jane Wester, ‘Total Institutional Failure’: *Adjournment of Former Goldman Sachs Banker’s Trial is Extended*, NEW YORK LAW JOURNAL (Feb. 25, 2022, 05:19 PM), <https://www.law.com/newyorklawjournal/2022/02/25/total-institutional-failure-adjournment-of-former-goldman-sachs-bankers-trial-is-extended/> (commenting after a filter team failed to disclose nearly 15,000 discoverable documents to both parties).

⁶² *In re Search Warrant for L. Offs. Executed on Mar. 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994).

disclosing privileged information through human error is considerably high.⁶³ Some courts have gone as far as to argue that the mere “appearance of unfairness” is enough to discourage their use because of how highly protected privilege rights are in the United States.⁶⁴

Conversely, in another recent case, the Eleventh Circuit supported the use of filter teams and found them “necessary”.⁶⁵ In *U.S. v. Korf*, the United States obtained a search warrant in order to seize evidence of fraud and money-laundering from a company called Optima.⁶⁶ Due to the company’s involvement in other litigation at the time, they moved to bar this warrant as they feared the government would obtain privileged materials and have an unfair understanding of the company’s potential defense in future criminal cases.⁶⁷

However, the court permitted Optima to review their materials for privileged documents and give this list to the filter team. The team could then challenge the privileged materials but could not forward any information to the prosecution team unless Optima approved it or the court overruled the decision.⁶⁸ Even with these new protocols, Optima moved to deny the use of a filter team but the court overruled.⁶⁹ Further, the court held that this case was distinguishable from the Fourth Circuit’s holding because the filter team never seized large volumes of unrelated privileged communications but kept the scope of the investigation narrow.⁷⁰ Thus, in this case, the circuit supported the use of filter teams.⁷¹

⁶³ *In re Grand Jury Subpoenas*, 454 F.3d at 523. Filter teams have historically disclosed privileged information on accident in numerous cases. *See, e.g., United States v. Esformes*, No. 16-20549-Cr-Scola/Otazo-Reyes, 2018 LEXIS 193190, (S.D. Fla. Nov. 13, 2018); *United States v. Elbaz*, 396 F. Supp. 3d 583, 588-90 (D. Md. 2019); *United States v. Noriega*, 764 F. Supp. 1480, 1482-84 (S.D. Fla. 1991).

⁶⁴ *United States v. Neill*, 952 F. Supp. 834, 841 n.14 (D.D.C. 1997).

⁶⁵ *U.S. v. Korf*, 11th Cir. No. 20-14223, 2021 U.S. App. LEXIS 26063 (Aug. 30, 2021).

⁶⁶ *Id.*

⁶⁷ *Id.* at 1244.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1248-51.

⁷⁰ *Id.* at 1251.

⁷¹ *Id.* at 1252.

Although many circuits have adamantly opposed filter teams, countless circuits support the use of filter teams and argue that filter teams have successfully been “routinely employed to conduct privilege reviews”.⁷² These circuits emphasize that filter teams are sufficiently isolated from the prosecution. Interestingly, in many cases supporting the use of filter teams, measures beyond those proposed by the Department of Justice were taken to prevent the inadvertent disclosure of privileged materials.⁷³ This suggests that the most effective and supported use of filter teams requires additional regulations intended to check the scope of their power and safeguard fundamental constitutional rights.

III. FILTER TEAMS ARE A VALUABLE LEGAL TOOL BUT REQUIRE SIGNIFICANT REGULATION

A. *Part I: Problems with the Unregulated Use of Filter Teams*

With the rising number of government investigations that rely on filter teams to accelerate the ever-sluggish court proceedings, an increasing demand exists to understand the scope of power these teams hold and how to best regulate them.⁷⁴ Because filter teams are granted the power to analyze such vast quantities of privileged materials, they must be subject to heavy regulation.⁷⁵ Without regulation, filter teams present bias issues, procedural issues, and even constitutional problems.

Further, the regulation of filter teams should include clearly defined, uniform procedural requirements to avoid significant legal consequences.⁷⁶ For example, additional layers of insulation should be considered by the Supreme Court. However, even considering the shortcomings of filter

⁷² See, e.g., *In re Ingram*, 915 F. Supp. 2d at 765; *United States v. Taylor*, No. 10-86-P-H, 2010 U.S. Dist. LEXIS 112393, at *1 (D. Me. July 16, 2010); *United States v. Crim. Triumph Cap. Grp.*, 211 F.R.D. 31, 43 (D. Conn. 2002), *United States v. Grant*, No. 04 CR 207, 2004 U.S. Dist. LEXIS 9462, at *2-3 (S.D.N.Y. May 25, 2004).

⁷³ See generally *Id.*

⁷⁴ *Grand Jury Subpoenas*, 454 F.3d at 523; *Neill*, 952 F. Supp. at 840.

⁷⁵ *Grand Jury Subpoenas*, 454 F.3d at 514.

⁷⁶ *Id.*

teams, their potential benefits to society are worth the effort needed to substantially regulate how they function.

1. Filter Teams are Self-Serving

By their nature, filter teams present “reasonably foreseeable risks of privilege”.⁷⁷ Risks to privilege are at issue because filter teams are intended to be impartial, yet they are not sufficiently insulated from the prosecution.⁷⁸ Accordingly, filter teams have a self-serving view of privilege.⁷⁹

Various circuit courts agree that filter teams grant the government unequivocal power to review an opponent’s privileged information “creat[ing] an appearance of unfairness”.⁸⁰ A growing concern exists that filter teams afford the government advantages because it is a party to the very lawsuits using this governmental investigative strategy.⁸¹ This concern stems from the idea that the government’s own employees have the final say in what materials can be used by the prosecution in evidence. As such, filter teams do not “filter” the government from viewing privileged materials but simply, “change[] the identity of the government attorneys and agents who first review that information.”⁸²

⁷⁷ *See Id.* at 523.

⁷⁸ *United States v. Under Seal*, 942 F.3d 159, 175 (“When the pertinent legal principles are properly applied to the unrefuted evidence, the Filter Team’s review of the materials seized from the Law Firm was and is injurious to the Firm and its clients.”)

⁷⁹ *Under Seal*, 942 F.3d at 175 (“Crucially, the court failed to recognize that an adverse party’s review of privileged materials seriously injures the privilege holder.” (citing *United States v. Philip Morris, Inc.*, 314 F.3d 612, 622 (D.C. 2003))).

⁸⁰ *Under Seal*, 942 F.3d at 182-83.

⁸¹ *Search Warrant*, 153 F.R.D. at 59 (“It is a great leap of faith to expect that members of the general public would believe any such Chinese wall [taint team] would be impenetrable; this notwithstanding our own trust in the honor of an AUSA [Assistant U.S. Attorney].”)

⁸² *Government “Taint Teams” May Open a Pandora’s Box: Protecting Your Electronic Records in the Event of an Investigation*, WILMERHALE (MAY 11, 2004), <https://www.wilmerhale.com/en/insights/publications/government-taint-teams-may-open-a-pandoras-box-protecting-your-electronic-records-in-the-event-of-an-investigation-may-11-2004>.

Privilege decisions are ultimately subjective and filter teams can use this to the government's advantage.⁸³ The Fourth Circuit noted that filter teams "might have a more restrictive view of privilege than the subject of the search, given their prosecutorial interests in pursuing the underlying investigation".⁸⁴ Ideally, filter teams are only permitted to forward nonprivileged information to the prosecution team, however, the definition of what constitutes "privileged materials" primarily depends on who makes the decision.⁸⁵ This creates a conflict of interest.⁸⁶ When the decision is left in the hands of a government employee, it follows that they would be more likely to designate materials that are actually privileged as non-privileged.⁸⁷ It is not a stretch of the imagination to consider that individuals may be inclined to make decisions that directly benefit the same office for which they work.⁸⁸

Further, filter teams may be self-serving because their members are generally unqualified to make privilege decisions and as a result, may inadvertently make decisions favoring the government.⁸⁹ While the biased decisions of filter teams might be shaped "by neglect or malice, as

⁸³ *Supra* n. 44 ("The prosecutors and the 'taint team' members are all employees of the Department of Justice and are often part of the same office. The walls between them are artificial and there is no oversight over discussions between prosecutors and the 'taint team.' Without knowing the content of the case, it can be difficult for a 'taint team' to make accurate determinations whether the seized material is privileged. Accordingly, the white collar defense bar has often been critical of the efficacy of this process.").

⁸⁴ *Grand Jury Subpoenas*, F.3d at 523.

⁸⁵ *Id.* ("As such, we do not see any check in the proposed taint team review procedure against the possibility that the government's team might make some false negative conclusions, finding validly privileged documents to be otherwise.").

⁸⁶ *Id.* ("[A] filter team might 'have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation, and . . . some [filter] team attorneys will make mistakes or violate their ethical obligations. It is thus logical to suppose that [filter] teams pose a serious risk to holders of privilege.").

⁸⁷ *Id.* ("It is reasonable to presume that the government's [filter] team might have a more restrictive view of privilege than appellants' attorneys.").

⁸⁸ The saying "don't bite the hand that feeds you" is particularly applicable to filter teams in this context.

⁸⁹ *Search Warrant*, 942 F.3d at 177 ("To compound that error, the Privilege Assessment Provision delegated judicial functions to *non-lawyer* members of the Filter Team. In other words, the Privilege Assessment Provision authorized paralegals and IRS and DEA agents to designate seized documents as nonprivileged, and allowed the Filter Team AUSAs to deliver such documents to the Prosecution Team without the approval of the Law Firm or a court order. The Third Circuit has strongly criticized a similar protocol and explicitly ruled that non-lawyer federal agents could not make privilege determinations" (*citing In re Search of Elec. Commc 'ns*, 802 F.3d 516, 530 n.54 (3d Cir. 2015))).

well as by honest differences of opinion”, they may also be made due to ignorance.⁹⁰ According to the Department of Justice manual, filter teams may be staffed with either federal prosecutors or federal agents.⁹¹ Thus, because the term “federal agent” is not further defined in the manual, filter teams may be staffed with individuals possessing little knowledge of legal proceedings.⁹² This lack of guidance from the Department of Justice permits legal decisions from unqualified individuals that can result in “misclassifi[cation] and [materials] erroneously provided to an investigation or prosecution team”.⁹³

Consequently, the Department of Justice’s current design of filter teams permits various avenues of inequitable legal outcomes through the overproduction of “non privileged” documents for the prosecution. Fortunately, this practice has been met with public scrutiny and has resulted in a trend away from allowing miscellaneous federal agents and to serve on filter teams.⁹⁴

2. Filter Teams Present Procedural Issues

Filter teams present procedural issues because they lack adequate procedural regulation by both the DOJ and individual courts. For example, filter teams can retain the defense’s privileged documents even after they have completed their purpose in the discovery process.⁹⁵ Filter teams sometimes hold onto privileged evidence because they may find a way to later admit the evidence as “nonprivileged” in the future.⁹⁶ After documents have been seized by a filter team and

⁹⁰ *Grand Jury Subpoenas*, 454 F.3d at 523.

⁹¹ *Supra* note 8.

⁹² *Id.*

⁹³ *In re Search Warrant*, 942 F. 3d at 177.

⁹⁴ “[T]he Privilege Assessment Provision delegated judicial functions to *non-lawyer* members of the Filter Team. In other words, the Privilege Assessment Provision authorized paralegals and IRS and DEA agents to designate seized documents as nonprivileged, and allowed the Filter Team AUSAs to deliver such documents to the Prosecution Team without the approval of the Law Firm or a court order.” *id.* (emphasis added).

⁹⁵ See generally *In re Search of Law Office, Residence, and Storage Unit*, 341 F.3d 404, 412 (5th Cir. 2003) (holding that a filter team did not have to return privileged materials it took from a law office).

⁹⁶ The Fifth Circuit held that “Rule 41(e) is not intended to deny the United States the use of evidence permitted by the fourth amendment and federal statutes, even if the evidence might have been unlawfully seized.” *Id.* at 412 (citing *United States v. Calandra*, 414 U.S. 338, 349 n.6, 38 L. Ed. 2d 561, 94 S. Ct. 613 (1974)).

categorized into privileged versus non-privileged materials, it is typically presumed that the privileged materials return to the subject of the investigation.⁹⁷ However, this is not always the case.

Generally, under rule 41(g) of the Federal Rules of Criminal Procedure, when privileged information is seized from a search warrant, the subject may either file a motion to suppress the unlawfully obtained evidence or move for its return.⁹⁸ Unfortunately, when a filter team is used, even if a party's motion to suppress was successful, it "does not force the government to return those materials to the criminal defendant".⁹⁹ Consequently, there is no way for a defending party that is subject to the use of a filter team to protect their privileged materials from being retained for future use.

In *Harbor Healthcare*, after a filter team reviewed seized materials, the government kept privileged materials that were filtered from its use "for the potential for a future filter team, if the criminal team looks at the privilege logs and disagrees for some reason".¹⁰⁰ As discussed above, the definition of what constitutes privileged materials is a subjective one. Accordingly, the government should not have the ability to retain materials it cannot presently view in the hopes that a future filter team will find a way to gain access that they could not. The purpose of a filter

⁹⁷*Id.*

⁹⁸ See Fed. R. Crim. P. 12 (2006 ed.); see also Fed. R. Crim. P. 41(g) (2006 ed.).

⁹⁹ "[S]uppression motions vindicate an interest entirely different from Rule 41(g) motions. Suppression merely prevents the government from using certain materials as evidence in a judicial proceeding—suppression does not force the government to return those materials to the criminal defendant. *Cf. Hunt v. U.S. Dep't of Just.*, 2 F.3d 96, 97 (5th Cir. 1993) (determining that a Louisiana forfeiture proceeding was not an adequate remedy because it would not help the movant recover wrongfully seized funds)". *Harbor Healthcare Sys., L.P. v. United States*, F. 3d 593 (5th Cir. 2021).

¹⁰⁰ *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 599 (5th Cir. 2021).

team is entirely defeated if the materials that have been deemed “off-limits” have the potential to be accessed at any time.¹⁰¹

3. Filter Teams May Be Unconstitutional in Practice

Recently, the Fourth Circuit criticized filter teams for breaching the Separation of Powers Doctrine.¹⁰² The court theorized that breaches occur because filter teams are an agency of the United States Department of Justice, which falls under the Executive Branch.¹⁰³ Therefore, when a filter team uses its power to decide whether or not seized documents are privileged, they are “inappropriately assigned judicial functions” as a member of the executive branch.¹⁰⁴ This is so because filter teams interpret the Federal Rules of Evidence on their own, rather than in front of a judge.¹⁰⁵ Generally, disputes over what types of privileged information can come into court must be litigated.¹⁰⁶ This side stepping of the judicial process is thought to be a breach of the Separation of Powers Doctrine because filter teams make judicial decisions while working under the executive branch.¹⁰⁷ Accordingly, an executive agency cannot exercise judicial power without reaching beyond the Constitutional limitations put in place to prevent one branch from exercising too much power given to another branch.¹⁰⁸

While no other court has opposed filter teams to the extent the Fourth Circuit has, perhaps the court highlights how ferociously guarded privilege rights are in the United States. Thus, filter teams’ access to privileged materials should be substantially minimized in order to protect the

¹⁰¹ “The government has thus conceded that it has no intent to respect Harbor’s interest in the privacy of its privileged materials as the investigation unfolds”. *Id.* at 177.

¹⁰² *In re Search Warrant*, 942 F. 3d at 176-78.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 176-177.

¹⁰⁵ *Id.*

¹⁰⁶ *United States v. Sutton*, 2009 LEXIS 481411 at 9 (M.D. Ga. Feb. 25, 2009).

¹⁰⁷ *Id.* at 12.

¹⁰⁸ *Id.*

privilege rights of United States citizens. Fortunately, numerous courts have addressed possible solutions to the unregulated use of filter teams.

B. Part Two: Proposed Mechanisms for Increasing the Effectiveness of Filter Teams

The Supreme Court has yet to weigh in on the issues that filter teams have presented in various circuits. Though filter teams have received negative treatment in some circuits, other circuits have found various methods of minimizing the risks of privilege disclosure that filter teams present. Several circuits have opted to keep the traditional structure of filter teams while implementing different methods and regulations on how filter teams review privileged documents. Other courts have chosen to do away with the traditional structure of filter teams and use alternative means of privileged document review.

The following proposals are methods of best practice that courts should use to circumvent the inherent issues that come with the use of filter teams. Any method used individually would undoubtedly provide defending parties with protection against privilege leaks. However, a combination of these methods would provide the best result. Though no individual method is perfect, they are the most likely to provide a successful path to the Supreme Court.

Additionally, even if the Supreme Court finds that none of these methods are sufficient or declines to implement regulations on filter teams altogether, there are still ways to protect defendants' rights during privilege reviews. Individual courts and the Department of Justice can reimagine the role of a filter team and implement alternative methods of privilege review while retaining positive outcomes.

1. Initial Review Mechanisms to be Implemented Before Document Production

a) Review Protocols

The Supreme Court should require parties in criminal proceedings to agree on a discovery plan to avoid privilege disclosure. Courts that use filter teams would benefit from implementing procedures used in civil litigation. In civil cases, defense teams can minimize potential access to privileged materials by creating their own review protocols under Federal Rule of Evidence 502(d).¹⁰⁹ This rule supports the expeditious review of materials, which filter teams are designed for, while allowing the defending party to set requirements and expectations of the review process.¹¹⁰ Courts can require that the parties agree on “the procedures proposed to protect against searches of privileged communications between the defendant and his attorneys.”¹¹¹ Because 502(b) encourages parties to agree on privilege issues at the start of the case, the privilege expectations from both parties would be clear and this would lead to fewer breaches of privilege rights.¹¹²

Further, the parties may agree upon how they will assert privilege claims if issues arise.¹¹³ The Supreme Court should enforce this rule like 26(f)(3)(D) of the Federal Rules of Civil Procedure, wherein the parties are required to cooperate and create a discovery plan at the outset

¹⁰⁹ Fed. R. Ev. 502(d).

¹¹⁰ “FRE 502 reflects an effort by Congress to enable litigants to minimize the extraordinary cost of civil discovery in federal proceedings without risking broad waiver of privilege in either federal or state proceedings. FRE 502 does this in two ways. First, FRE 502 limits subject matter waiver to voluntary disclosures and eliminates subject matter waiver for inadvertent disclosures. *See* FED. R. EVID. 502(a), (b). Second, FRE 502 enables federal courts to adopt protective orders and confidentiality agreements, including non-waiver provisions, that will be binding in other federal and state proceedings. *See* FED. R. EVID. 502(d), (e).” DAVID GREENWALD & MICHELE SLACHETKA, PROTECTING CONFIDENTIAL LEGAL INFORMATION, 218, 414 (2019) (ebook).

¹¹¹ *Preventative Medicine Associates, Inc. v. Commonwealth*, 992 N.E.2d 257, 268 (Mass. 2013).

¹¹² Fed. R. Ev. 502(d).

¹¹³ “The scheduling order may . . . include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502.” Fed. R. Civ. P. 16(b)(3)(B)(iv).

of trial.¹¹⁴ Moreover, how or when privileged documents will be returned at the conclusion of the discovery process should be determined at this point. To this extent, the government would have to go through agreed-upon procedures to re-review previously seized documents as opposed to keeping them in the hopes of using them in the future. As cooperation and planning between parties has already proven to be a successful requirement and a beneficial practice in the civil context, courts should consider enforcing similar protocols for filter teams in criminal actions.

b) Privilege Logs

Another avenue to initially prevent the prosecution from privilege exposure is the use of privilege logs.¹¹⁵ Privilege logs are documents that are made by a defending party asserting privilege who is subject to a search warrant.¹¹⁶ The party will assemble a list of materials in their possession that they believe fall under some type of privilege. Under Rule 26 of the Federal Rules of Civil Procedure, a party may create a log describing the general subject matter of the record and the privilege being claimed but they have “the burden of proving that the privilege applies (among other things i.e., date, type of document, authors, recipients)”.¹¹⁷

Courts have occasionally encouraged the use of privilege logs in the criminal context when a filter team is assigned to a case because they accelerate the review process for filter teams. In these cases, a privilege log presents a filter team with the defense team’s pre-organized materials

¹¹⁴ “(3) *Discovery Plan*. A discovery plan must state the parties’ views and proposals on . . . (D) any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in order under Federal Rule of Evidence 502.” Fed. R. Civ. P. 26(f)(3)(D).

¹¹⁵ See Fed. R. Civ. P. 26(b)(5)(A)(ii).

¹¹⁶ “The use of privilege logs and affidavits of the authors and recipients of the documents containing privileged communications are common ways in which the privilege is invoked.” *Carnes v. Crete Carrier Corp.*, 244 F.R.D. 694, 698 (N.D. Ga. 2007). “The party asserting the attorney-client privilege . . . bears the burden to provide a factual basis for its assertions. This burden is met when the party produces a detailed privilege log . . . [and] an accompanying explanatory affidavit from counsel.” *CSC Recovery Corp. v. Daido Steel Co.*, No. 94 Civ. 9214, 1997 WL 661122, at *11 (S.D.N.Y. Oct. 27, 1997) (privilege logs and affidavits were sufficient to assert the privilege). *Supra* n. 111 at 75.

¹¹⁷ *Id.*

before the filter team has access to them.¹¹⁸ Thus, privilege leaks would be nearly impossible because all materials logged as privileged would be guaranteed individual review before getting turned over to the prosecution. This illuminates the tendency for privileged documents to “slip through”. Moreover, if privileged materials are passed to the prosecution, liability would be easily determined by checking whether the item was on the privilege log or not.

Unfortunately, privilege logs have long been derided as tedious and time consuming for the defending party.¹¹⁹ Consequently, courts have looked for other ways to utilize the organizational benefits of privilege logs while making the process less time consuming. For example, some courts only require the defending party to provide a log of search terms that will turn up privileged documents rather than a log of each document that the defending party believes is privileged.¹²⁰ This permits filter teams to quickly find and remove privileged materials without requiring them to review the privilege log document by document.¹²¹

However, this method is not as effective as a traditional privilege log, which includes descriptions of the documents along with an explanation of why they are privileged.¹²² Although permissible,¹²³ general search terms may leave out important materials.¹²⁴ Therefore, the Supreme Court should be wary of sacrificing privilege rights for the sake of saving time.

¹¹⁸ *In re Sealed Search Warrant & Application for a Warrant by Tel. Or Other Reliable Electronic Means*, 2020 LEXIS 213671 175 (S.D. Fla. Nov. 2, 2020), *aff'd*, 11 F.4th 1235 (11th Cir. 2021).

¹¹⁹ JOHN A. SHARP, *THE DREADED PRIVILEGE LOG: RULES AND PRACTICE TIPS*, 5 (2010), <https://www.ned.uscourts.gov/internetDocs/cle/2010-07/PrivilegeLogs.pdf>.

¹²⁰ *Dornoch Holdings Int'l, Ltd. Liab. Co. v. Conagra Foods Lamb Weston, Inc.*, 2013 U.S. Dist. LEXIS 84896 at 2 (D. Idaho May 1, 2013).

¹²¹ *Id.* at 5.

¹²² “Privilege logs typically have information like the date, the parties involved in the document, a summary of the withheld material, and the privilege asserted to meet the Federal Rule of the Civil Procedure 26(b)(5)(A). Parties can agree to different formats, however, to reduce the burden while obtaining necessary information.” *Categorical Privileges Logs Best Practices*, PRACTICE PANTHER, NTL.L.R. 12, 63 (Dec. 13, 2021)

<https://www.practicepanther.com/blog/what-litigators-should-know-about-categorical-privilege-logs/>.

¹²³ *Id.*

¹²⁴ “Examples are as simple as attorney advice contained in a document in which an attorney is identified only by first name or a nickname, or in an email in which the attorney uses an unidentified email address, resulting in the

Accordingly, if the Supreme Courts considers privilege logs as a regulation method for filter teams, it would ideally implement traditional privilege logs. Though they are somewhat time consuming for the defending party, they provide a necessary layer of protection against privilege disclosure. Yet, even the use of a non-traditional privilege log would provide improvement from the lack of protection many defendants currently face with the use of filter teams. Thus, any privilege logs could provide a route for filter teams to see success in the Supreme Court.

2. Follow Up Review of Tainted Evidence in Combination with Privilege Logs

The Supreme Court should also consider allowing the defending party to review a filter team's decisions before documents are sent to the prosecution. This review method is time-efficient and guarantees that there would not be inadvertent privilege disclosures.¹²⁵ The defending party should have the final opportunity to review a filter team's decision before the non-privileged materials are sent to the prosecution team.¹²⁶

After the defense team views the filter team's privilege decisions, the disputed material would then go to a grand jury, which decides whether the materials can be used or not.¹²⁷ Allowing the defending party to review the filter team's decision after they view the seized materials rather than before (i.e. using privilege logs) may potentially eliminate biased privilege decisions on both ends as both parties will have the opportunity to make decisions on the materials.¹²⁸

privileged communication being missed by an electronic search that filters based on the attorney's full name or most common email address. Of course, such mistakes are more likely because the government is simply not motivated to be as careful in its review as a defendant whose privilege, and freedom, is at stake". Robert J. Anello and Richard F. Albert, *Government Searches: The Trouble With Taint Teams* 256 N.Y.L.J. 108, (2016).

¹²⁵ *In re Search of 5444 Westheimer Rd. Suite 1570*, S.D.Tex. No. H-06-328, 2006 U.S. Dist. LEXIS 48850 at *3 (S.D. Tex. July 6, 2006).

¹²⁶ *Id.*

¹²⁷ *Id.* at 8.

¹²⁸ *Id.*

Privilege document review after the use of a filter team rather than before should be the preferred method by courts. The downside to completing the privilege review before the filter team has accessed the materials rather than after, is that the filter team may not have the ability to actually review each document in the privilege log to determine if it is truly privileged or not.¹²⁹ At the time privilege logs are submitted, there could be thousands of documents to sift through and filter teams typically only reference a short description in the log to make decisions on privileged material.¹³⁰ Thus, although having the defense team identify privileged documents beforehand allows filter teams to quickly check the flagged documents, it may lead to the defense's accidental waiver of privilege if filter teams fail to double check their initial decisions.

In contrast, allowing the defense team to review the filter team's findings afterwards provides an additional layer of protection because it encourages filter teams to sort through all documents: both privileged and non-privileged.¹³¹ Additionally, because filter teams are designed to sort through large volumes of documents, they should be capable of handling large document reviews more successfully than a defense team or even an individual attorney.¹³² Therefore, filter teams will continue to serve their intended purpose of speeding up criminal proceedings. Moreover, requiring this opportunity for review is an incredibly simple regulation that every circuit should be required to implement. This final step of review is both easy to execute and effective at supporting parties' fundamental privilege rights.

¹²⁹ *Id.* at 10. The purpose of a privilege log is that the filter team is relieved of the burden of having to read and analyze each document individually. In this way, privilege logs align with the purpose of filter teams expediting trial proceedings. Privilege logs are an effective tool, but courts should consider whether using "search terms" rather than a log of every privileged document is worth the risk of inadvertent privilege disclosure. If courts use privilege logs, they must find a way to ensure that there is a balance of these interests.

¹³⁰ *Id.*

¹³¹ *In re Grand Jury Subpoenas*, 454 F.3d 511 at 523.

¹³² *Id.*

Though this proposal has few downsides, allowing a defending party to review the final privilege decisions a filter team makes could potentially delay a trial. If a defendant and filter team disagree on whether a document should be given to the prosecution, they will likely have to resolve this through the use of a grand jury. This could defeat the purpose of using a filter team to speed up proceedings. However, permitting a defending party to review a filter team's decisions used in conjunction with privilege logs would leave very little reason for privilege disputes. Therefore, a combination of both methods would provide another powerful way to deflect privilege disclosure by filter teams.

C. Part III: Alternative Means of Privilege Review

1. Special Master Review

The Supreme Court should consider using a Special Master when the use of a filter team is not practicable.¹³³ Some courts have held that when the professionalism and legality of a filter team is questioned, a Special Master or magistrate may be assigned to review the seized materials.¹³⁴ In these situations, the assignment is removed from the Department of Justice altogether and is given to an independent, court-appointed official, in place of a filter team.¹³⁵ A Special Master is typically desired by defendants because they find the Special Master to be less partial than a filter team, as they are separate and insulated from the Department of Justice.¹³⁶

¹³³ A special master is appointed by a court to complete an investigative action on its behalf. See *In re the Matter of Search Warrants Executed on April 9, 2018*, No. 18 MJ 3161 (S.D.N.Y. Apr. 16, 2018) (Law360).

¹³⁴ In this case, the court made accommodations to minimize the appearance of unfairness, yet they refuse to acknowledge the existence of actual unfairness. *Id.* (holding that the filter team was not questionable but the decision to appoint a Special Master was for the “perception of fairness, not fairness itself”).

Again, it should be noted that courts consistently find that filter teams “appear” unfair. See *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006); see *United States v. Neil*, 952 F. Supp. 834, 841 (D.D.C. 1997).

¹³⁵ See Alan Feuer and Benjamin Weiser, *Former Judge Chosen to Review Materials Seized From Michael Cohen*, THE NEW YORK TIMES (April 26, 2018), <https://www.nytimes.com/2018/04/26/nyregion/michael-cohen-investigation-special-master.html>.

¹³⁶ *United States v. Regan*, 281 F. Supp. 2d 795, 806 (E.D. Va. 2002); *Black v. United States*, 172 F.R.D. 511, 516 (S.D. Fla.1997).

Further, Special Masters are appointed when a defendant shows the filter team acted improperly.¹³⁷ Therefore, Special Masters are an important solution in place for when filter teams operate unethically.

Special Masters are also often used in criminal cases because they help retain defendants' Sixth Amendment rights to effective assistance of counsel.¹³⁸ In these cases, the Special Master ensures that the privileged communications between the defense party and their attorneys remain private.¹³⁹ Defendants should insist on using Special Masters in place of filter teams more frequently when courts refuse to implement further regulations to protect their privilege rights. However, both parties should consider the extensive amount of time required for a single Special Master to do the work of a filter team.

Thus, Special Masters would be most beneficial in practice if the Supreme Court decided against regulating how filter teams are utilized by courts. In this scenario, a Special Master could replace the use of a filter team that is not properly regulated. This would ensure privilege rights would remain intact. Though not as efficient as filter teams, a Special Master is preferable to a filter team that could cause accidental privilege disclosure as Special Masters are more impartial to privilege decisions than filter teams.

2. Special Matters Unit

Another solution to address the privilege issues that filter teams present is the Special Matters Unit (SMU) within the U.S. Department of Justice's Criminal Fraud Division.¹⁴⁰ The SMU

¹³⁷ See *Cohen v. United States*, No. 1:18-mj-03161 at 4 (S.D.N.Y. Apr. 13, 2018) (CourthouseNews).

¹³⁸ See U.S. Const. amend. VI.

¹³⁹ *Id.*

¹⁴⁰ "In 2020, the Fraud Section created a new unit, the Special Matters Unit, to handle privilege reviews, litigate privilege disputes and conduct legal ethics trainings." Kevin Muhlendorf & Holly Wilson, *Takeaways From DOJ Fraud Section Pandemic Year*, WILEY (Feb. 24, 2021), <https://www.wiley.law/article-Takeaways-From-DOJ-Fraud-Sections-Pandemic-Year>.

was recently created in 2020 and acts in essence as a permanent filter team.¹⁴¹ Most interestingly, it appears as though the Department of Justice even questions the viability of filter teams. Accordingly, the DOJ likely created the SMU in response to the serious opposition to filter teams because their future roles in courts were currently unknown.¹⁴²

The SMU's role is to "focus on issues related to privilege and legal ethics, including evidence collection and processing, pre- and post-indictment litigation, and advising and assisting Fraud Section prosecutors on related matters. The SMU: (1) conducts filter reviews to ensure that prosecutors are not exposed to potentially privileged material, (2) litigates privilege-related issues in connection with Fraud Section cases, and (3) provides training and guidance to Fraud Section prosecutors".¹⁴³ Thus, the Special Matters Unit oversees the same procedures as filter teams but with the addition of training and guiding its members.

Additionally, the SMU addresses privilege issues that previously arose from filter team members' lack of formal training and organization. The SMU consists of federal employees specifically hired to work on the filter team.¹⁴⁴ This is in stark contrast to filter teams used in the past that were staffed by rotating federal agents and prosecutors.¹⁴⁵ In particular, the specialized team is comprised of individuals trained as experts in the area of privilege discovery, rather than the miscellaneous federal agents and attorneys that are currently permitted to serve on filter teams under the guidance of the U.S. Department of Justice Manual.¹⁴⁶ This proposed solution may solve

¹⁴¹ *Trial Attorney (Special Matters Unit)*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/legal-careers/job/trial-attorney-special-matters-unit-1> (last visited December 1, 2021).

¹⁴² *See generally U.S. v. Under Seal*, 942 F.3d 159 (4th Cir. 2019).

¹⁴³ *Fraud Section Year in Review*, UNITED STATES DEPARTMENT OF JUSTICE, (2020), <https://www.justice.gov/criminal-fraud/file/1370171/download>.

¹⁴⁴ *Id.*

¹⁴⁵ U.S. Dep't of Just., Just. Manual § 9-13.420.

¹⁴⁶ *Id.*

filter teams' issues with inadvertent privilege disclosure and privilege leaks because of the members' thorough understanding of privilege.

A SMU also solves issues of privilege disclosures because its permanent nature allows its members to gain valuable experience making privilege decisions.¹⁴⁷ In contrast, filter team members have separate careers within the U.S. Department of Justice.¹⁴⁸ These individuals are pulled from their work to serve on the teams.¹⁴⁹ The result is that the members are unlikely to gain valuable experience on the filter teams. The SMU members are not only required to be knowledgeable in the field of privilege upon hiring, but would also gain valuable experience on the job, which would likely result in more accurate decisions.¹⁵⁰ Moreover, the SMU would experience fewer errors than the rotating members of filter teams, which would result in more consistent applications of privilege review.

Finally, a Special Matters Unit would prevent the courts from getting bogged down with privilege reviews. First, the trained and experienced members of this unit would be much more efficient at sorting through privileged materials.¹⁵¹ Second, if the government separately hired individuals to perform these reviews, the overall expediency that filter teams promote (by design) would be furthered. The SMU would move privilege reviews through the courts on an as needed basis, rather than waiting until the courts have time. Lastly, and most importantly, the SMU would resolve differences among jurisdictions as to how filter teams should be regulated.¹⁵² Accordingly,

¹⁴⁷ FRAUD SECTION YEAR IN REVIEW, *supra* n. 143.

¹⁴⁸ Justice Manual, *supra* note 145.

¹⁴⁹ *Id.*

¹⁵⁰ DEPARTMENT OF JUSTICE, *supra* note 141.

¹⁵¹ UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 143.

¹⁵² *Id.*

inconsistencies between District Courts in the use of filter teams would ideally be lessened and become more judicially economical and predictable with time.

Unfortunately, a Special Matters Unit fails to resolve the most highly criticized issue of insulation that filter teams have historically faced.¹⁵³ Like filter teams, the SMU is a part of the Department of Justice. This means that the unit has the same incentives to find greater quantities of “privileged” materials that benefit the government as filter teams do. While the SMU may have a greater appearance of insulation, which directly addresses a concern of the Fourth Circuit, its actual insulation from the government is no better than that of filter teams. Courts must find a balance between expedient and accurate judicial proceedings and the need for insulated privilege review.

3. A Combination of Solutions that Maximize Certain Values

The DOJ should consider combining the favorable aspects of the SMU and Special Masters as a solution to the Separation of Powers issue that the SMU presents.¹⁵⁴ Namely, Special Masters should be appointed to the SMU. This addresses the Separation of Powers issue presented by the SMU because appointed officials are generally more impartial than elected individuals.¹⁵⁵ Thus, they would be less likely to be influenced by the DOJ and the public.¹⁵⁶ Further, electing the members of the SMU would solve the issues Special Masters are criticized for. In other words, an appointed body of Special Masters to the SMU would help ensure that there would be no delays in privilege review. Although this proposal has not been considered by a court, it seemingly solves

¹⁵³ *Id.*

¹⁵⁴ See above discussion on Constitutional issues that filter teams present.

¹⁵⁵ Khuzami, *supra* n. 137.

¹⁵⁶ *Id.*

numerous issues that filter teams present. Therefore, the DOJ should be open to expanding its view of what a filter team looks like for the sake of protecting privilege rights in the years to come.

IV. CONCLUSION

Filter teams were designed to provide the government a way to quickly resolve cases that involve large volumes of materials. Filter teams became a popular solution to a pressing issue of complex discovery because they provide a time and cost-efficient buffer between the investigating prosecutors and their access to privileged materials. While courts have never reached a unanimous standpoint on this topic, many courts have held strongly opposing views. Therefore, because these decisions differ so widely and strongly, it is likely the Supreme Court will need to weigh in on this issue in the near future to resolve this important circuit split.

If the Supreme Court ever weighs in on the use of filter teams it could decide to regulate filter teams in several ways that could also be used in combination with one another. First it could have the defense counsel review their materials for privileged documents before the filter team and even provide a privilege log. Second, the Supreme Court could allow defense teams to review the filter team's decisions after they reviewed the seized material and before the contested materials go to a grand jury or magistrate and stipulate to agreed-upon discovery documents. Accordingly, the parties can come to an agreement limiting the number of documents in dispute before a judge is involved, thereby speeding up the proceedings.

Next, if the Supreme Court declines to regulate filter teams in the future, there are still options available to decrease privilege leaks. First, courts could choose to appoint a Special Master instead of a filter team to add insulation to privilege decisions. Second, the government could create a Special Matters Unit to increase the speed and accuracy of privilege decisions while

minimizing the risk of privilege leaks. Finally, the government could combine the best aspects of the SMU and Special Masters by appointing Special Masters to the SMU.

While filter teams play an important role in accelerating certain judicial proceedings, they currently pose numerous dangers to privilege rights and have significant room for regulation and improvement. Yet, with the right improvements, filter teams have a place in the modern world.