

How to Fix DOJ Privilege Teams

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The federal government frequently executes searches and seizures in the course of criminal investigations. Many of the premises searched contain materials protected by privileges, placing them outside the reach of the Department of Justice. However, again and again those materials are swept up, potentially landing in the hands of government attorneys who are not permitted to review them—placing defendants’ Sixth Amendment right to effective assistance of counsel at risk of being violated. To rectify this risk, the DOJ employs “privilege teams” to filter through seized materials, removing those that are protected by privilege, before handing off the remaining materials to the prosecution team. This process is great in theory, but heavily flawed in practice. The Justice Manual fails to require an adequate number of safeguards, resulting in recurrent mistakes and rampant inconsistencies across jurisdictions. The failure of privilege teams to provide accurate, trustworthy determinations has undermined trust in DOJ prosecutions and places the entire practice in jeopardy. This Comment will analyze the shortcomings of privilege teams and propose reforms to DOJ procedures that have the potential to save the practice and restore confidence in the DOJ’s ability to protect privilege.

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I. INTRODUCTION

Privilege teams, also known as “taint teams” or “filter teams,”¹ are groups at the Department of Justice (DOJ) made up of attorneys and investigators who review materials seized by the government for legal privileges.² After a period of informal use by the DOJ,³ privilege teams were made official in 1995 with a policy memo issued by then-Deputy Attorney General Jamie Gorelick.⁴ The memo created a new subsection in the United States Attorneys’ Manual (later renamed the Justice Manual) that focused on investigations into attorneys and instructed AUSAs in the steps they needed to take before and after searching and seizing documents from an attorney’s office.⁵ Today, the use of privilege teams has become commonplace, applying well beyond investigations into attorneys.⁶

¹ Hereinafter I will only use the term “privilege team,” but the other terms will appear in quotes.

² U.S. DEP’T OF JUST., JUST. MANUAL § 9-13.420(E) (2021).

³ See, e.g., *In re Search Warrant for Law Offices Executed on March 19, 1992 and Grand Jury Subpoena Duces Tecum Dated March 17, 1992*, 153 F.R.D. 55, 56 (S.D.N.Y. 1994). This case provides an example of the use of a privilege team in 1992, three years prior to the DOJ memo officially establishing them.

⁴ U.S. DEP’T OF JUST., U.S. ATT’YS’ MANUAL § 9-2.161(b) (1995).

⁵ *Id.*

⁶ Christina M. Frohock, *Special Matters: Filtering Privileged Materials in Federal Prosecutions*, 49 AM. J. CRIM. L. 63, 69 (2021).

Despite their widespread use, privilege teams remained relatively unknown to most of the public for decades.⁷ Then, in August 2022, the FBI raided the home of former president Donald Trump—an event that, among other things, brought privilege teams into mainstream discussion.⁸ What followed was a contentious legal battle where Trump’s attorneys fought but ultimately failed to keep seized documents out of the hands of the government’s privilege team.⁹ This affair left many people asking questions about privilege teams and whether they are appropriate tools for protecting privilege.¹⁰

Privilege teams have both critics and supporters. Some hail them as efficient tools that nobly preserve privilege,¹¹ while others condemn them as hazardous “trojan horses” that subvert their own stated goals.¹² Apprehension regarding privilege teams is understandable.¹³ However, much of that apprehension could be resolved by reforming privilege team procedures, meaning that, overall, privilege teams are a suitable solution to an important issue in searches and seizures.

This Comment will summarize the landscape as it currently exists, identify issues, then propose solutions. Specifically, Section II of this Comment will describe the legal privileges at stake. Then it will examine what privilege teams do well and what they do poorly when striving to protect those privileges. Section III will summarize the legal environment. It will begin with the Justice Manual requirements, then it will summarize the ways courts treat privilege teams. Section III will conclude with an explanation of the legal alternatives available to replace the teams but explain why they are inadequate. Finally, in Section IV, this Comment will summarize the insufficiencies of the Justice Manual’s

⁷ See generally *The Daily Show: What is a “Taint Team”?* (Comedy Central broadcast Apr. 13, 2018), YOUTUBE, <https://perma.cc/YZN5-X6V5>.

⁸ Jill Colvin & Lindsay Whitehurst, *Timeline of investigation into former President Donald Trump’s Mar-a-Lago documents*, WPTV-TV (Sept. 13, 2022, 12:38 PM), <https://perma.cc/X4ET-LRNS> (last updated Oct. 13, 2022, 3:45 PM).

⁹ *Id.*; see also *Trump v. United States*, No. 22-81294-CIV, 2022 WL 4015755 (S.D. Fla.), *vacated and remanded*, 54 F.4th 689 (11th Cir. 2022).

¹⁰ See generally Zoe Tillman, *Everything You Need to Know About Trump’s Push for a ‘Special Master’*, WASH. POST (Sept. 6, 2022, 4:38 AM), <https://perma.cc/UHE7-4XYP>.

¹¹ *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.”).

¹² Steven J. Enwright, Note, *The Department of Justice Guidelines to Law Office Searches: The Need to Replace the Trojan Horse Privilege Team with Neutral Judicial Review*, 43 WAYNE L. REV. 1855, 1864 (1997). (“[T]he privilege team is a prosecutorial ‘Trojan Horse’ that undermines the attorney-client privilege.”).

¹³ See *infra* Section III.B.

guidelines and propose reforms to DOJ procedures to rectify them.

II. PROS AND CONS OF PRIVILEGE TEAMS

Despite concerns, privilege teams should not be abolished. The benefits outweigh the shortcomings, and the DOJ has the power to fix those shortcomings. To know what fixes are necessary, one must know what the DOJ is doing right and what concerns they have left unaddressed. But first, it is essential to understand the rights that privilege teams are meant to protect.

A. The Privileges that Are at Risk¹⁴

Exposure of privileged documents to DOJ prosecutors can compromise a case and lead to dismissal or suppression of evidence,¹⁵ so the DOJ tries to shield its prosecutors from seeing such materials. To shield prosecutors, the DOJ employs privilege teams when an investigation—typically a white-collar investigation—leads to the seizure of materials that raise legitimate privilege concerns.¹⁶ Privilege teams are responsible for filtering seized materials before they are given to a prosecution team, identifying and removing those that are privileged.¹⁷ Documents may be protected by attorney-client privilege or work-product protection (or in Donald Trump’s case, executive privilege). The Federal Rules of Evidence direct federal courts to apply common-law principles of privilege when no federal law applies.¹⁸

Work product protection applies to materials created by attorneys in anticipation of litigation, ensuring that their thoughts and strategy can be placed on paper without fear it will be acquired by the opposition via discovery.¹⁹ The protection only applies to tangible material or its equivalent.²⁰ In any attorney’s office, including the many in-house lawyers’ offices at corporations, there will be a high likelihood that materials covered by work product protection will be present. Even the most narrowly

¹⁴ This Comment is concerned with federal privilege teams, so it will only address federal law on the subject of privileges and will not address state law.

¹⁵ *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.”).

¹⁶ U.S. DEP’T OF JUST., JUST. MANUAL § 9-13.420 (2021).

¹⁷ *Id.*

¹⁸ FED. R. EVID. 501.

¹⁹ *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981).

²⁰ FED. R. EVID. 502.

tailored search warrants could lead to confiscation of these materials.

However, the main concern of privilege teams is and has always been attorney-client privilege.²¹ Attorney-client privilege is a legal privilege that—when invoked—guards communications between attorneys and their clients from being obtained by the opposition.²² It is “the oldest of the privileges for confidential communications known to the common law.”²³ For attorney-client privilege to apply, four elements must be present: first, the communication must involve a client or someone seeking to be a client; second, it must have been made to a lawyer (or subordinate) acting in their capacity as a lawyer; third, it must have been confidential and made in the course of seeking legal advice; and fourth, the privilege holder must claim the privilege and not waive it.²⁴ If these requirements are met, the material is deemed privileged and kept confidential from the government.²⁵

Neither attorney-client privilege nor work-product protection has the status of a constitutional right, but they are strongly safeguarded by courts.²⁶ This is because work product and attorney-client confidentiality, although not directly protected by the Constitution, are necessary to prevent constitutional rights that are directly protected (the right to effective assistance of counsel) from being undermined.²⁷ For attorneys to be effective, they must know and understand the facts surrounding a case and be able to strategize and prepare documents for litigation.²⁸ Open and honest communication between attorney and client is necessary to achieve this, and confidentiality, assured by privilege, facilitates that openness.²⁹ Exposure of attorney-client communications to DOJ prosecutors suppresses the openness required for effective assistance of counsel.³⁰

²¹ Privilege teams were developed with a focus on law firm searches. See U.S. DEP’T OF JUST., U.S. ATT’YS’ MANUAL § 9-2.161(b) (1995).

²² *Upjohn*, 449 U.S. at 386.

²³ *Id.* at 389.

²⁴ WILLIAM H. J. HUBBARD, CIVIL PROCEDURE: AN INTEGRATED APPROACH 387 (Saul Levmore et al. eds., 2021).

²⁵ *Id.*

²⁶ In re Search Warrant Issued June 13, 2019, 942 F.3d 159, 174 (4th Cir. 2019), *as amended* (Oct. 31, 2019) (“Notably, the attorney-client privilege and the work-product doctrine jointly support the Sixth Amendment’s guarantee of effective assistance of counsel.”).

²⁷ Ellen S. Podgor & Wilma F. Metcalf, *The Fox Guarding the Henhouse: Government Review of Attorney-Client Privileged Material in White Collar Cases*, 103 B.U. L. REV. (forthcoming 2023).

²⁸ *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978).

²⁹ *Id.*; see also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

³⁰ *Upjohn*, 449 U.S. at 389.

Privilege protection is not without exceptions. Even if all the elements are met, attorney-client privilege does not apply when a client seeks assistance “for the purpose of committing a crime or fraud[.]”³¹ This is known as the crime/fraud exception.³² Another example is the fiduciary exception; when an attorney “advises a fiduciary trustee or corporate officer or director as to matters within the scope of that person’s or entity’s fiduciary responsibilities, the true client is not the fiduciary itself but rather the beneficiaries—those persons or entities to whom the fiduciary’s duty is ultimately owed.”³³ And significantly, attorney-client privilege, when it applies, protects the communications, not the underlying facts.³⁴ This is a non-exhaustive list of exceptions, but it demonstrates some of the nuance that exists when determining whether materials are privileged. When privilege teams analyze seized materials, they must apply tests for privilege while keeping possible exceptions in mind.

B. Aspects of Privilege Teams that Protect Privilege Well

Privilege teams come in many different forms based on the prosecuting entity, but they all share some advantageous common threads. The DOJ uses privilege teams to recognize and respect the sanctity of attorney-client privilege. And notably, it is a procedural hurdle, not merely a statement of principles that the DOJ strives to fulfill. It creates a firewall between the prosecutors and the privileged information (barring any leaks from the privilege team),³⁵ insulating DOJ attorneys “from conflicts of interest, immunized testimony, or materials that may have been illegally obtained.”³⁶ That firewall exists because the privilege review is conducted by individuals not involved with the underlying enforcement action.³⁷ Otherwise, if the attorneys on the prosecution team were responsible for conducting privilege review, inevitable “tainting” of evidence would occur that could lead to legal ramifications for a case.³⁸

³¹ David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 443–44 (1986).

³² *Id.*

³³ *Id.*

³⁴ *Upjohn*, 449 U.S. at 395–96.

³⁵ Heidi Boghosian, *Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege*, 1 CARDOZO PUB. L., POLY & ETHICS J. 15, 21 (2003).

³⁶ *S.E.C. v. Rajaratnam*, 622 F.3d 159, 183 n.24 (2d Cir. 2010).

³⁷ U.S. DEPT OF JUST., JUST. MANUAL § 9-13.420(E) (2021).

³⁸ *Rajaratnam*, 622 F.3d at 183 n.24.

Moreover, privilege teams facilitate government investigations. Firstly, the DOJ is the best-positioned party to carry out this task. DOJ prosecutors are the individuals who seek search warrants for potentially privileged material. They must specify the place to be searched and the materials they expect to seize.³⁹ Therefore, they will be the first to know when a privilege review is needed. They can either initiate the process themselves, which is convenient and efficient, or be required to outsource the review to another party, which further burdens an already not-so-speedy justice system.

Also, unlike subpoenas, search warrants preserve the element of surprise and prevent destruction of evidence.⁴⁰ Privilege teams allow the government to investigate crimes, use search warrants, and prevent future crime without blatantly violating privileges. This more broadly facilitates successful investigations and ensures justice for criminal wrongdoing.

Privilege teams may also be an indispensable piece of the justice system puzzle because there may not be enough judges and special masters to filter documents in every case. Privilege review, regardless of who conducts it, adds a step in the process that requires resources and time. The DOJ has over 5,000 Assistant U.S. Attorneys,⁴¹ while there are just 673 federal district court judges.⁴² The appropriate solution is to improve teams, not eliminate them. Elimination would cause an even greater risk to the accused, since increasing the administrative burden and pressure on judges leads to mistakes or delays.

C. Aspects of Privilege Teams that Protect Privilege Poorly

There has been no shortage of criticism of privilege teams. First and foremost, attorneys, judges, and academics are concerned with the obvious conflict of interest. As the Sixth Circuit put it in *In Re Grand Jury Subpoenas*, “the government’s fox is left in charge of the [defendant’s] henhouse, and may err by neglect or malice, as well as by honest differences of opinion.”⁴³ The

³⁹ U.S. CONST. amend. IV.

⁴⁰ Cecil A. Lynn, *You’ve Been Served: Corporate Response to Grand Jury Subpoenas & Search Warrants for Electronically Stored Information*, 9 SEDONA CONF. J. 183, 190 (2008).

⁴¹ OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., AUDIT REPORT 09-03, RESOURCE MANAGEMENT OF THE UNITED STATES ATTORNEYS’ OFFICES 1 (2008), <https://perma.cc/9BEK-YFPZ>.

⁴² U.S. COURTS, *Chronological History of Authorized Judgeships—District Courts*, <https://perma.cc/7CN8-ZUQ3> (last visited Jan. 15, 2023).

⁴³ *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

fact that privilege review is kept in-house at the DOJ undermines the main purpose of privilege teams—providing defendants with an unbiased, independent third party to review documents and protect attorney-client privilege. Defense attorneys fear leaks of information from privilege team members to their colleagues on prosecution teams.⁴⁴

Further issues stem from the sheer difficulty of determining when a privilege exists and whether an exception applies. For one, the DOJ is likely to have a more restrictive view of privilege than defense counsel. Also, “a team of prosecutors and agents who lack context for the documents under review are often ill-equipped to make accurate privilege determinations.”⁴⁵ It can be difficult to determine whether the communication was intended to be confidential, made in the course of seeking legal advice, and made to a lawyer (or a lawyer’s subordinate) acting in their capacity as a lawyer. Agents who are not trained attorneys or experienced in privileged communications are more likely to make incorrect assessments.⁴⁶

The difficulty of privilege determinations is illustrated by a case initially taken up by the Supreme Court in its 2022–2023 term but later dismissed as improvidently granted. The question presented in *In re Grand Jury*⁴⁷ was: what is the proper test for a privilege determination when a document has inseparable business and legal purposes?⁴⁸ This is a prevalent problem in cases stemming from internal investigations.⁴⁹ The primary purpose test currently dominates courts, but as the Supreme Court oral argument demonstrated, that test isn’t even applied consistently by judges.⁵⁰ It would be difficult to expect non-attorneys to apply it accurately and consistently. Even when privilege is apparent to the reviewers, whether the privileged communication falls under an exception, like the crime/fraud exception, and is therefore not protected, adds another layer of complication and another

⁴⁴ *Id.*

⁴⁵ Daniel Suleiman & Molly Doggett, *Despite Inherent Risks to the Attorney-Client Relationship, Taint Teams Are Here to Stay (for Now)*, THE ABA/CJS WHITE COLLAR CRIME COMMITTEE NEWSLETTER (Winter/Spring 2022), <https://perma.cc/K7HL-Z77N>.

⁴⁶ *Id.*

⁴⁷ *In re Grand Jury*, 13 F.4th 710 (9th Cir. 2021), *cert. dismissed*, *In re Jury*, 143 S. Ct. 543 (2023).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Transcript of Oral Argument, *In re Jury* (21-1397), OYEZ, retrieved at <https://perma.cc/6ZJA-N32G>.

opportunity for error. However, this risk of error exists regardless of who is conducting the review; it is not specific to privilege teams.

In addition to the fact that privilege determinations can be tough, it's within the team's sole discretion to decide whether to seek judicial approval of those tough calls. This is one area in which courts routinely step in, requiring court or special master approval for any disputed categorizations. And discretion abounds in other areas as well, leading to different teams in different jurisdictions operating very differently for similar cases.

Furthermore, there is a fear that privilege teams with insufficient safeguards would pose a risk of "chilling" full, honest communication between attorneys and clients, undermining the purpose of attorney-client privilege.⁵¹ If clients fear exposure of their criminal wrongdoings through a law firm search then they will hide information from them.⁵² However, it has been almost 25 years since privilege teams became official and there is no evidence that open communication between attorneys and clients has been "chilled." Clients probably do not suspect that their lawyers will be investigated.

Additionally, the growth in digital communications adds a layer of complication for privilege review that some argue privilege teams are not suited to address.⁵³ It may be true that attorneys plucked out of their normal duties to participate in privilege review are likely not experts in digital searches, but they don't have to be. This is an overblown fear. It is true that the plethora of materials confiscated nowadays results largely from the seizure of digital documents, not physical ones.⁵⁴ And the process of searching for privilege in digital materials is different than physical documents, making use of techniques like keyword searches.⁵⁵

However, the underlying legal analysis is the same, and the privilege team section of the Justice Manual provides guidance for these cases. First, "[i]f it is anticipated that computers will be searched or seized, prosecutors are expected to follow the procedures set forth in the current edition of *Searching and Seizing Computers*, published by CCIPS."⁵⁶ CCIPS is a Section of the

⁵¹ Enwright, *supra* note 12, at 43.

⁵² *Id.*

⁵³ Patrick Hanley & Widmaier Marcus Charles, *Should State Law Enforcement Officials Be Required to Develop and Implement Minimization Protocols to Govern the Execution of Digital Search Warrants?*, 100 MASS. L. REV. 5, 7 (2018).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ U.S. DEPT OF JUST., JUST. MANUAL § 9-13.420(E) (2021).

Criminal Division of the DOJ made up of attorneys who specialize in computer crimes, and one of its main goals is to provide all DOJ prosecutors and investigators with guidance on the collection of electronic evidence.⁵⁷ Second, prior to obtaining a search warrant, the team must consider “[w]hether appropriate arrangements have been made for storage and handling of electronic evidence and procedures developed for searching computer data (i.e., procedures which recognize the universal nature of computer seizure and are designed to avoid review of materials implicating the privilege of innocent clients).”⁵⁸ The DOJ clearly takes steps to ensure digital evidence is handled with care, and privilege teams must comply with that mandated level of care.

III. THE LEGAL STATE OF PRIVILEGE TEAMS

One of the hallmarks of the law surrounding privilege teams is ambiguity. Despite directives from the executive and decrees from the judiciary, there remains a great deal of variation in the performance of privilege teams.⁵⁹ The root cause of this inconsistency is that the Justice Manual guidance is deficient (and hasn’t changed much since its inception in 1995). Courts have also contributed by too often being passive or ambivalent when presented with objections to privilege teams.⁶⁰ And attorneys sometimes fail to raise objections when they should.⁶¹ This section will summarize existing guidance in the Justice Manual, survey when courts have approved of or criticized privilege teams, and analyze implications of the Fraud Section’s recently developed Special Matters Unit.

A. The Justice Manual

In roughly two pages, the DOJ sets out guidelines for privilege teams—its only mechanism to achieve what it calls “close control” of searches that raise privilege concerns.⁶² Privilege teams are made up of lawyers and agents from the DOJ who are not part of the prosecution/investigation team involved with the

⁵⁷ U.S. DEP’T OF JUST., *Computer Crime and Intellectual Property Section*, <https://perma.cc/94JN-DKWL>.

⁵⁸ U.S. DEP’T OF JUST., JUST. MANUAL § 9-13.420(F) (2021).

⁵⁹ See cases cited *infra* Section III.B.

⁶⁰ See cases cited *infra* note 90 and 91.

⁶¹ See, e.g., *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1040 (D. Nev. 2006) (defendant “waited more than three years after the search” to raise objections about the privilege team with the court).

⁶² U.S. DEP’T OF JUST., JUST. MANUAL § 9-13.420 (2021).

underlying enforcement action.⁶³ According to the Justice Manual, these teams are utilized “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[.]”⁶⁴

The operation of any given privilege team may vary substantially because the Justice Manual provides only vague standards within which the teams must operate. It requires that specific instructions be given prior to a search, but it does not state who is responsible for coming up with and delivering the instructions.⁶⁵ Presumably it’s the person in charge of the privilege team, but it could also be the lead agent, the department head, or the lead attorney.⁶⁶

The Manual further instructs that procedures should be “designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team.”⁶⁷ This is the most detailed part of the Justice Manual’s instructions for privilege teams, but it is somewhat dismal when it comes to specifying safeguards. The first half of the sentence provides a guiding principle, which is to limit the intrusion into privileged materials as much as possible. The second half of the sentence places the power to reveal information to the investigation team exclusively in the hands of the attorney-in-charge. Therefore, the most critical decision is kept in-house at the DOJ, instead of with a more objective third party, like a neutral magistrate. This prosecutorial discretion alone is not objectionable, but as the following discussion shows, the number of ad hoc decisions that must be made in every case adds up to an unacceptable level of inconsistency across cases.

Discretion is reinforced in the subsequent subsection of the Manual, which states that DOJ personnel must determine—before a warrant is secured—in each case, who will conduct the review, “i.e., a privilege team, a judicial officer, or a special master.”⁶⁸ The guidelines also require consideration of a few other factors. First, whether all seized materials or only those that are

⁶³ *Id.* at (E).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See generally id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at (F).

“arguably privileged” will be submitted to a judicial officer for review.⁶⁹ Second, whether copies of seized materials will be given to the subject’s attorney.⁷⁰ (This is “encouraged” when it would “not impede or obstruct the investigation” but not required.) And third, whether arrangements have been made to search computers and store electronic evidence.⁷¹ Note that while each office has to consider these factors, the guidelines do not dictate that they must take action one way or another on any of them. Therefore, each office can decide what it prefers, and procedures can vary not only by office but also by case.

It is possible that the vagueness inherent in the Justice Manual’s guidelines is a design feature, not a design flaw. Vague instructions allow prosecutors discretion to decide how many safeguards to implement. But that begs the question: what purpose does this discretion serve? The DOJ may rightfully wish to treat investigations into different crimes differently. However, the issue at present is one of privilege protection, not what to offer in a plea negotiation. Prosecutorial discretion is appropriate in plea negotiations because different defendants may deserve different punishments for their actions. But prosecutorial discretion is not an appropriate tool to skirt privilege.

The Justice Manual provides two final instructions. First, the team members should be available to advise agents conducting a search but should not participate in the search themselves.⁷² This ensures that legal guidance can be provided to agents on the ground, and the guidance does not come from attorneys on the prosecution team so no privileged material can slip through at this point. And second, the affidavit used to secure the search warrant should “generally state the government’s intention to employ procedures designed to ensure that attorney-client privileges are not violated.”⁷³ This provision gives investigators the opportunity to inform the court as to how privilege will be protected. However, because it only requires a general statement, the investigators don’t have to specify that a privilege team will be used or its preplanned procedures, leaving the subjects of searches in the dark.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

1. Special Matters Unit

In 2020, following a very critical opinion from the Fourth Circuit,⁷⁴ the Fraud Section of the DOJ created the Special Matters Unit (SMU).⁷⁵ The SMU is a centralized unit that “(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.”⁷⁶ No official procedures have been published publicly, but it appears to operate under the same Justice Manual rules as all privilege teams. The only change is that members of the SMU do not also participate in criminal investigations; they focus solely on privilege issues.

Consequently, the SMU provides a couple advantages over regular privilege teams. Defense attorneys and their clients can rest assured that attorneys with expertise in privilege are reviewing their files. And there is an added separation between those reviewing materials for privilege and other investigating AUSAs. These aspects result in filter reviews that are more accurate and provide a greater appearance of fairness, which has been one of the strongest criticisms of the DOJ.

A little more information on the goals of the SMU can be found in an online job posting for a trial attorney position in the unit.⁷⁷ The posting explains that part of the attorney’s responsibilities would be “to establish uniform practices for handling evidence collection and review that implicate claims of attorney-client or other privileges.”⁷⁸ This means that at least in the Fraud Section, DOJ attorneys may be given a level of consistency and predictability for privilege reviews that has not previously existed. However, this predictability does not extend to defendants or the public because these “uniform practices” are undisclosed.

One obvious shortcoming of the SMU is that it only works with the Fraud Section’s three litigating units (the Market Integrity and Major Frauds Unit, the Health Care Fraud Unit, and the Foreign Corrupt Practices Act Unit) and the DOJ’s recently formed Task Force KleptoCapture.⁷⁹ Other branches of the

⁷⁴ *United States v. Under Seal*, 942 F.3d 159 (4th Cir. 2019), *as amended* (Oct. 31, 2019). This case is discussed *supra* in Section II.C.

⁷⁵ DEPT OF JUST., FRAUD SECTION: YEAR IN REVIEW 2020 at 4 (Feb. 2021), <https://perma.cc/5W54-X9LS>.

⁷⁶ *Id.*

⁷⁷ See DEPT OF JUST., *Trial Attorney (Special Matters Unit)*, <https://perma.cc/3WVF-6THY> (last visited Jan. 8, 2023).

⁷⁸ *Id.*

⁷⁹ See DEPT OF JUST., FRAUD SECTION, *supra* note 76, at 4.

Criminal Division are completely excluded from the benefits of having separate privilege review units. However, the Fraud Section does encompass a substantial number of white-collar cases, so the impact is still significant. Furthermore, many of the criticisms frequently directed at privilege teams prior to the creation of the Special Matters Unit are still relevant:

[w]hile these [Special Matters Unit] privilege teams will not have the pressure of other cases and will likely have more specialized knowledge in terms of what might be or might not be privileged, they are still employees of the DOJ, meaning, technically the ‘the fox still has access to the henhouse’.⁸⁰

Some people may never see a privilege review as fair as long as it is housed within the DOJ, but the SMU is nevertheless a big step towards improving the appearance of fairness. The creation of the SMU implies that the DOJ is aware of the trouble caused by privilege teams. Not only do they make mistakes, but they seriously undermine confidence in DOJ prosecutions. The SMU represents a first step from the DOJ in recognizing these harms and showing intent to rectify them.

B. Federal Treatment by Courts

Federal courts have largely approved of the use of privilege teams; however, they have also signaled that approval is conditional on the existence of adequate safeguards.⁸¹ When adequate safeguards are not in place, courts have generally imposed additional procedures, but other times they have stripped privilege teams of their power entirely and appointed a third-party to take over the document review.

1. Courts Endorse Privilege Teams that are Restrained by Well-defined Procedures.

Privilege team procedures vary substantially between districts, since different U.S. Attorney’s offices impose their own requirements. This has resulted in a spectrum of protection levels, some of which courts have been happy to validate. Privilege teams are generally accepted when (1) the potentially privileged materials are already in the government’s possession, (2) the “lawfulness” of the acquisition of the materials was not itself challenged,

⁸⁰ Sheena Foye & James R. Wyrsh, *DOJ Creates Special Unit to Handle Privileged Documents*, AM. BAR ASS’N (Oct. 29, 2020), <https://perma.cc/Z8N6-RKTZ>.

⁸¹ See cases cited *infra* Section II.B.1.

(3) the amount of material to be examined is more voluminous, and (4) the privilege team doesn't negatively affect the appearance of fairness too much.⁸² In *United States v. Jackson*,⁸³ the District Court for the District of Columbia applied these four factors and determined that an independent third party would be better than a privilege team. The decision turned on the fact that the records were not yet in the government's possession (which isn't usually the case) and a special master would "best promote the appearance of fairness."⁸⁴ The court, however, noted that in other circumstances "using government taint teams might otherwise be commonplace and fair."⁸⁵ Ultimately, although the court granted the request for a special master in this case, it endorsed the practice of using privilege teams for review in general.

Circuit courts have also spoken on privilege teams, with one recently validating the practice in 2021, in *United States v. Korf*.⁸⁶ The Eleventh Circuit approved a procedurally constrained privilege team that followed a court-modified protocol (with many more safeguards than historically used). The privilege-holders conducted the first review of seized materials and created a privilege log. Then, the DOJ's privilege team could challenge any designations on the log it disagreed with, at which point it gained access to the documents to create the challenge. Moreover, the privilege team members had to be staff from outside the investigating office, and the investigative team only received items on the log by court order or if both parties agreed there was no privilege protection. The Eleventh Circuit ultimately ruled in the government's favor, approving this process, because the privilege team "[complied] with even the most exacting requirements other courts that have considered such protocols have deemed appropriate."⁸⁷ And more importantly, the Eleventh Circuit held that privilege teams in general do not *per se* violate privilege holders' rights.⁸⁸ The Seventh Circuit has also signaled support for the

⁸² *United States v. Jackson*, No. CR.A.07-0035 RWR, 2007 WL 3230140, at *5 (D.D.C. Oct. 30, 2007).

⁸³ *Id.*

⁸⁴ *Id.* at *6.

⁸⁵ *Id.*

⁸⁶ 11 F.4th 1235 (11th Cir. 2021).

⁸⁷ *Id.* at 1252.

⁸⁸ *Id.* at 1239.

principle that privilege teams are not legally flawed and have the potential to protect subjects' rights if operated properly.⁸⁹

Another way courts facilitate privilege teams is through passivity. There have been many cases in which courts recognize the use of privilege teams but choose neither to approve or criticize them. In some cases, it is because attorneys failed to raise objections, forcing courts to accept privilege teams as facts.⁹⁰ In other cases, the issue is raised then only partially addressed.⁹¹

2. Courts Prohibit the Use of Privilege Teams that Fail to Ensure the Appearance of Fairness.

When privilege teams appear unfair due to a lack of safeguards, courts have either chosen to impose additional procedures or disband them altogether for alternatives. With few exceptions, courts have largely taken a case-by-case approach, which mirrors the case-by-case approach of U.S. Attorney's offices when creating and implementing the teams.

In re Grand Jury Subpoenas,⁹² a 2006 case from the Sixth Circuit, repudiated the use of a privilege team to filter potentially privileged documents when there were no extenuating circumstances. Notably, this case turned on the same fact that was determinative in *Jackson*—the documents were not yet in government possession. However, contrary to the optimism of the court in *Jackson*, the tone of the Sixth Circuit was much more skeptical and hostile. It highlighted one of the main concerns about privilege teams: “the government’s fox is left in charge of the [defendant’s] henhouse, and may err by neglect or malice, as well as by honest differences of opinion.”⁹³ The court was also bothered that there was “[no] 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” because there was no opportunity for

⁸⁹ *United States v. Proano*, 912 F.3d 431, 437 (7th Cir. 2019) (finding that there was no evidence suggesting the taint team procedure was flawed, so the defendant’s rights were not violated).

⁹⁰ *See, e.g., United States v. Howard*, 540 F.3d 905 (8th Cir. 2008) (identifying the use of a taint team to screen jail calls but issuing no value judgment on the practice); *United States v. Myers*, 593 F.3d 338 (4th Cir. 2010) (recognizing the use of a taint team, accepting it as a fact of the case).

⁹¹ *See, e.g., United States v. Ary*, 518 F.3d 775 (10th Cir. 2008) (acknowledging that the taint team failed to identify some papers that were likely protected by work-product protection but found the defendant waived privilege).

⁹² 454 F.3d 511 (6th Cir. 2006).

⁹³ *Id.* at 523.

anyone else to see the documents before they were given to prosecutors.⁹⁴

Courts have mostly disapproved of the use of privilege teams on a case-by-case basis, but there have been some standard-setting decisions for certain aspects of privilege teams that courts have said they will not allow. In 2015, the Third Circuit held that the first level of privilege review should always be conducted by “an independent DOJ attorney acceptable to the District Court,” never a non-attorney federal agent (which contradicts Section 9–13.420(E) of the Justice Manual).⁹⁵ But the court declined to go further and impose other requirements, reserving such decisions for district courts to make on a case-by-case basis. Then, in 2021, the Fifth Circuit held that the DOJ’s longstanding practice of keeping copies of returned privileged materials violated the defendant’s rights by depriving him of his property and violating his right to privacy over privileged materials.⁹⁶ The privilege team in that case conspicuously avoided communicating with the defendant, and it ultimately refused to destroy or return copies of materials it determined privileged long after it concluded its work.⁹⁷

Despite widespread criticism, privilege teams have been lucky enough to avoid the spotlight for most of their almost twenty-five-year existence, both in the public and in the courts of law. Then, in 2019, this changed with a scathing opinion from the Fourth Circuit that sharply criticized the validity and authority of privilege teams. In *United States of America v. Under Seal*,⁹⁸ federal agents collected tens of thousands of emails and documents from a law firm in the course of investigating one of the firm’s attorneys and one of that attorney’s clients. Most of the material seized was not related to the subjects under investigation and in fact pertained to other clients being investigated in completely unrelated matters. Additionally, the privilege team included attorneys, a paralegal, a legal assistant, and forensic examiners.⁹⁹ The law firm sought an injunction but was denied. Then, later, the district court added the requirement that the privilege team send materials deemed nonprivileged to the law firm or the court for approval before forwarding them to the

⁹⁴ *Id.*

⁹⁵ 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).

⁹⁶ Harbor Healthcare Sys., L.P. v. United States, 5 F.4th 593 (5th Cir. 2021).

⁹⁷ *Id.* at 596–97.

⁹⁸ In re Search Warrant Issued June 13, 2019, 942 F.3d 159 (4th Cir. 2019), *as amended* (Oct. 31, 2019).

⁹⁹ *Id.* at 165.

investigation team, but this was too little too late.¹⁰⁰ The Fourth Circuit found the procedures to be inadequate for the protection of privilege. The court also argued that the privilege team should not have been authorized prior to the execution of a search warrant in *ex parte* proceedings because the judge did not yet know what and how much was seized.¹⁰¹ To sum up, the Fourth Circuit's opinion repudiated the privilege team procedures.¹⁰² For the first time, the DOJ took note of criticism and responded the following year by creating the Special Matters Unit.

C. Legal Alternatives

To ensure privileges aren't trampled, a party must conduct privilege review of seized materials before prosecutors see them. The best-positioned party to ensure this happens in every case that requires it is the government. However, privilege review has been and will continue to be conducted through legal alternatives at times. Due to the concerns over privilege teams, attorneys often try to restrict them or shut them down altogether and pursue those alternatives. In these situations, speed is important, because the court is more likely to side with the government if the documents are already in their possession and under review.¹⁰³ For those defendants who issue their objections in time, there are a few alternatives they can pursue.

1. Special Master

The most well-known alternative to a privilege team is the special master. Special masters are individuals or experts, like former judges, who are appointed by federal judges to help

¹⁰⁰ *Id.* at 170.

¹⁰¹ *Id.* at 178.

¹⁰² The Fourth Circuit also stated in dicta that when a privilege dispute exists, "the resolution of that dispute is a judicial function." And "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." *Id.* at 176. In effect, the court questioned the constitutionality of the entire practice. This question will not be addressed by this Comment. No other circuit court has raised this issue, and for the purposes of this Comment, it is assumed that privilege team review is constitutional. This assertion is not without legal merit; in *United States v. Avenatti* the District Court for the Southern District of New York disagreed with the Fourth Circuit and held that privilege teams are constitutional and do not violate separation of powers because a court still reserves its power "to adjudicate any disputes that may arise." *United States v. Avenatti*, 559 F. Supp. 3d 274, 283–84 (S.D.N.Y. 2021). This case is currently being appealed to the Second Circuit.

¹⁰³ See cases cited *infra* Section III.C.1. and III.C.2.

oversee and manage complex cases.¹⁰⁴ For example, a federal judge may appoint a special master to oversee a consent decree or to monitor the discovery process in a massive, multidistrict antitrust case.¹⁰⁵ This was also the alternative sought by President Trump in the classified documents case. (He asked the court to assign a special master to take over the privilege review of documents seized from Mar-a-Lago.)¹⁰⁶

Authority to appoint a special master, and delegate judicial responsibilities to an assistant, can come from Rule 53 of the Federal Rules of Civil Procedure, consent of the parties, or the court's inherent powers.¹⁰⁷ Special masters are often attorneys but don't have to be, and they ensure that a court order is carried out. Unlike privilege teams, which are funded through the DOJ, special masters' fees are set by the judge and charged to the parties.¹⁰⁸ Special masters can also work with a team but aren't required to.

The greatest advantage of using a special master instead of a privilege team is the added independence.¹⁰⁹ Because they are outside the executive branch, they are seen as more neutral—and therefore, fairer.¹¹⁰ But the supply of special masters is not unlimited. The DOJ has a much larger workforce to draw upon than the court system. There may not be enough special masters for the number of cases that raise privilege concerns.

Additionally, appointing a special master in a case can prove cumbersome, especially when a privilege team is already involved in the dispute. If a privilege team has already begun its review, the government is likely to argue that a special master is unnecessary.¹¹¹ And more importantly, the special master may “unduly delay the government's investigations,” harming the public's interest in efficiently stopping and punishing criminal wrongdoing.¹¹² This is especially likely if the special master is working independently because it would take longer to review the documents alone than with a team of attorneys. However, courts

¹⁰⁴ See BakerHostetler, *The Need for Special Masters in Complex Antitrust Cases*, JD SUPRA (March 6, 2020), <https://perma.cc/N4L3-QXBK>.

¹⁰⁵ *Id.*

¹⁰⁶ Tillman, *supra* note 10.

¹⁰⁷ Margaret G. Farrell, *The Function and Legitimacy of Special Masters*, 2 WIDENER L. SYMP. J. 235, 245–46, 246 n.38 (1997).

¹⁰⁸ FED. R. CIV. P. 53(a).

¹⁰⁹ Frohock, *supra* note 6, at 70.

¹¹⁰ *Id.*

¹¹¹ *Trump v. United States*, No. 22-81294-CIV, 2022 WL 4015755, at *7–*8 (S.D. Fla.), *vacated and remanded*, 54 F.4th 689 (11th Cir. 2022).

¹¹² *United States v. Under Seal*, 942 F.3d 159, 181 (4th Cir. 2019), *as amended* (Oct. 31, 2019).

generally seem hesitant to accept the argument that special masters cause undue delay when the privilege team procedures that they would be replacing appear facially inadequate for the protection of privilege.¹¹³ If the DOJ were to update its procedures and ensure that sufficient safeguards exist nationwide, this point would become moot.

2. Judicial Officer

A second alternative is to use a judicial officer. A judicial officer is similar to a special master, and the terms can often be used synonymously. Both are subordinate officials appointed by judges to ensure court orders are carried out, both perform similar responsibilities, and both are listed in the Justice Manual as appropriate alternatives to privilege teams.¹¹⁴ However, judicial officer has also been defined as only including district court or magistrate judges,¹¹⁵ or as any person authorized to act as a judge in a criminal court of law.¹¹⁶ This is different from special masters, because masters are appointed pursuant to the Federal Rules of Civil Procedure.¹¹⁷ If the judge on a case conducts the privilege review, that could be considered review by a judicial officer. Because judges often lack the time necessary to conduct a privilege review (due to the voluminous amount of digital records now seized in the average search), special masters are appointed instead. Judicial officers as a replacement for all privilege teams is simply not feasible.

3. Private Privilege Teams

A new alternative that hasn't taken off quite yet is to outsource the responsibility of privilege review to private attorneys.¹¹⁸ This is not an alternative listed in the Justice Manual. Nonetheless, they would presumably operate much like DOJ privilege teams; groups of trained attorneys would conduct document review, handing over nonprivileged materials to prosecutors and seeking court approval for uncertain designations.¹¹⁹ The key

¹¹³ *Id.* at 181–82.

¹¹⁴ U.S. DEPT OF JUST., JUST. MANUAL § 9-13.420(F) (2021).

¹¹⁵ Judicial Improvements Act of 1990, 28 U.S.C. § 482.

¹¹⁶ Speedy Trial Act of 1974, 18 U.S.C. § 3156(a)(1).

¹¹⁷ FED. R. CIV. P. 53.

¹¹⁸ William Marquardt & Richard Gregorie, *Using Independent Taint Teams To Better Protect Attorney-Client Privilege*, JD SUPRA (Feb. 28, 2022), <https://perma.cc/AB47-P67U>.

¹¹⁹ *See id.*

difference is that the groups would be independent, housed in and run by private law firms outside the DOJ.¹²⁰

Law firms would be more likely to make use of the latest technology and eDiscovery review platforms, increasing accuracy.¹²¹ However, they would almost certainly be more expensive than government privilege teams.¹²² Indigent defendants would be unable to bear any of the cost, and defendants with financial means would object to paying for the review of documents they claim privilege over and seek to reacquire as soon as possible. The government could bear the cost, but that places a higher price tag on justice ultimately borne by the public.

Also, a potential risk with this alternative is that the private lawyers could be persuaded to prioritize the interests of one side over the other, like how regulators are sometimes thought to be “captured” by interest groups.¹²³ This would erode the appearance of fairness that independent review is supposed to provide. Given that the government would likely foot the bill,¹²⁴ private privilege teams are more likely to be biased towards the DOJ. A private law firm seeking business from a client—in this case, the government—will naturally try to ensure that client is pleased. The easiest way to do this is to make privilege determinations that favor the government. This issue could potentially be alleviated if the court were responsible for choosing and appointing law firms, not the DOJ. But the government would certainly try to exercise some degree of sway, either behind the scenes or through insistent objection to specific law firms to such a degree that judges stop appointing those firms because it is easier. Even if the judges didn’t stop appointing those firms, there would still be the burden of holding additional hearings.

Another issue is that without some form of vetting in place, law firms could choose whomever they like to be on their privilege teams, from paralegals to assistants to investigators to first-year associates. Moreover, they would be responsible for establishing their own procedures. Each law firm could operate differently, some with sufficient safeguards and some without, but altogether inconsistently. There would be no predictability for defendants as private privilege teams would be assigned ad-hoc to each case. Ultimately, these teams could easily replicate the same problems

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

that exist in government privilege teams—but at a higher cost—so they are not an improvement.

4. Review By the Defendant's Attorneys

The final alternative (which also cannot be found in the Justice Manual) is for attorneys to request the ability to examine the documents themselves and create a privilege log which the DOJ can then challenge. This is similar to how the discovery process works in civil proceedings with subpoenas. Privilege teams can be used as a tool for prosecutors to avoid the judicial hurdles of subpoenas.¹²⁵ To issue a subpoena, the government must show probable cause that the privilege does not apply, then the court reviews the documents in camera and makes its ruling on them.¹²⁶ For a search warrant, the government need only show probable cause that the suspect committed an offense. They don't have to show that privilege doesn't apply. In fact, they generally know privileged documents will be included in the seizure, but they plan to filter them out later with the privilege team.

Advocates would say that giving suspects control over the review is preferable because the holders of privilege are best positioned to make privilege determinations.¹²⁷ In the civil context, this is understandable. However, in the criminal context, the risk of abuse is more concerning. Suspects could abuse this opportunity; knowing that they could be facing criminal penalties, they could try to slow the process down and conceal as much as possible even if it's not protected by privilege. A counterargument to this stance is that due to the way people value money, the efforts to conceal documents would be no better or worse than in civil proceedings. However, while people do care greatly about their wealth, they typically care more about their freedom. And even if the efforts to conceal were the same, the risk of injustice is not the same when criminal charges (which require a higher standard of proof) are pending. The risk of stalling justice isn't worth the additional benefit of added accuracy in privilege determinations when the same level of accuracy could be achieved by the government.

¹²⁵ Enwright, *supra* note 12, at 1856.

¹²⁶ See *United States v. Zolin*, 491 U.S. 554, 574 (1989).

¹²⁷ Robert Anello, *Do Special Masters Really Trump Taint Teams? Here's A Better Option*, FORBES (Sept. 9, 2022), <https://perma.cc/S5W3-PZ37>.

IV. RECOMMENDED CHANGES TO THE JUSTICE MANUAL

Privilege teams are a good idea, and the ultimate tool for guidance and structure of these teams is the Justice Manual. However, the Manual is lacking when it comes to safeguards, and public trust is suffering as a result. This Section summarizes the most critical shortcomings and recommends solutions.

A. Summary of the Insufficiency of the Justice Manual

The Justice Manual is out of date with current practices regarding privilege teams. The relevant section of the manual is “Searches of Premises of Subject Attorneys,” and it only applies to attorneys’ premises and “searches of business organizations where such searches involve materials in the possession of individuals serving in the capacity of legal advisor to the organization”—aka businesses with on-site in-house counsel.¹²⁸ The fact of the matter is that privilege teams are—and should be—used in any context where protected materials are likely to be seized. Corporate offices undeniably hold records of communications with attorneys, regardless of whether the attorneys are in-house or external counsel. Nonetheless, the subjects of investigations currently have to assert in court that a business office search is the functional equivalent of a law office search before proceeding with substantive arguments about their validity. This is an inefficient waste of time. The truth is that privilege concerns arise in many contexts, and the DOJ chooses to use privilege teams in all those contexts. The practice has outgrown its guidelines.

The guidelines have also failed to change and update when systemic problems have emerged. The Justice Manual was last updated January 2021, yet it remains almost identical to the memo announcing its creation. Hence, the same issues that existed twenty years ago persist today. For example, in 1991, in *United States v. Noriega*,¹²⁹ without consulting a third-party, the privilege team—specifically a non-lawyer DEA agent—provided the investigatory team with tapes of the defendant speaking to his attorney, a violation of attorney-client privilege.¹³⁰ The agent believed the conversation was “so insignificant” as to not warrant protection. Years later, in 2014, in *United States v. DeLuca*,¹³¹

¹²⁸ U.S. DEP’T OF JUST., JUST. MANUAL § 9-13.420 (2021).

¹²⁹ *United States v. Noriega*, 764 F.Supp. 1480 (S.D. Fla. 1991).

¹³⁰ *Id.*

¹³¹ *United States v. DeLuca*, No. 6:11-CR-221-ORL-28, 2014 WL 3341345 (M.D. Fla. July 8, 2014), *aff’d*, 663 F. App’x 875 (11th Cir. 2016).

without consulting a third-party, a privilege team consisting of FBI agents and AUSAs sent ten attorney communications to the prosecution team because they incorrectly believed the defendant had waived privilege.¹³² If the DOJ had required the privilege team to consult the court before releasing materials, this could have been prevented. Yet the DOJ has generally resisted overhauls to privilege team procedures.

Privilege team operations are inconsistent and unpredictable. Private attorneys, judges, and potential subjects of investigations are left without any idea of what to expect. And there is very little guidance for the DOJ's own personnel. The amount of discretion left to the person in charge ends up creating many, many privilege teams that function under different procedures and offer different levels of protection. On one hand, some vagueness is beneficial. It allows the DOJ to adapt its procedures to each case, some genuinely in need of more safeguards than others. However, under the current standards there is too much vagueness. Minimal safeguards can be implemented that provide an element of consistency while preserving wiggle room to adapt procedures to each case.

B. Recommended Changes to the Justice Manual

The following subsection details recommendations for the DOJ that will greatly improve the legitimacy and accuracy of privilege teams. The first recommendation outlines changes that need to be made to existing Justice Manual provisions. The rest are procedures that should be added.

1. Adjust the Scope of the Justice Manual Section

One of the issues identified above is that privilege teams are used in many contexts that the Justice Manual fails to acknowledge.¹³³ The DOJ needs to review and update the language in the relevant section, most of which has not changed from the 1995 Deputy AG's memo that created privilege teams.¹³⁴ First, the section title in the Justice Manual should be updated. It is currently titled, "Searches of Premises of Subject Attorneys."¹³⁵ Although law firm searches are certainly an important use of privilege teams, it is misleading and inaccurate to exclude the

¹³² *Id.*

¹³³ *See supra* Section IV.A.

¹³⁴ *See* U.S. DEP'T OF JUST., U.S. ATT'YS' MANUAL § 9-2.161(b) (1995).

¹³⁵ U.S. DEP'T OF JUST., JUST. MANUAL § 9-13.420 (2021).

other uses in the title. A new title could be “Searches of Premises that Raise Privilege Concerns,” or “Searches of Premises with Materials that May Be Protected by Privilege.” This change will update the title so it reflects the current use of privilege teams. Not only is this more accurate, but it also makes clear to prosecutors and the public that privilege teams operate under the same requirements regardless of the location the potentially privileged materials were confiscated from.

These updates need to be carried out throughout the section. In the “NOTE” it states, “This policy also applies to searches of business organizations where such searches involve materials in the possession of individuals serving in the capacity of legal advisor to the organization.” This sentence represents one change from the 1995 Deputy AG’s memo, but it could still be seen as cabinining the application of the section too greatly. A business does not necessarily have to have in-house counsel for the government to suspect it holds privileged material. For example, a company currently in the midst of a legal battle with another private company or the government would certainly have records of communications with attorneys, like emails, on the office computers. Suspecting this, the DOJ could use a privilege team. It should be clear that the Justice Manual encompasses cases like this. Language to that effect may say “This policy also applies *but is not limited* to searches of business organizations”

Outdated language is also present in the paragraph that follows the NOTE, which describes the purpose of the section (to protect legitimate claims of privilege).¹³⁶ The easiest way to update this introductory paragraph is to broaden it. It currently states, “There are occasions when effective law enforcement may require the issuance of a search warrant for *the premises of an attorney who is a subject of an investigation, and who also is or may be engaged in the practice of law on behalf of clients.*”¹³⁷ Instead, it could state, “There are occasions when effective law enforcement may require the issuance of a search warrant for *premises the government has legitimate reason to believe may contain materials protected by privilege.*”

Third, the DOJ should make privilege team membership open to only attorneys and clearly state so in the Manual. Courts have repeatedly echoed their distaste for non-attorney

¹³⁶ *Id.*

¹³⁷ *Id.* (emphasis added)

investigators making privilege determinations, and as explained above, they are justified in their concern.¹³⁸

2. Add a Second Layer of Review

Privilege teams should be required to seek permission from the court or the subject's attorneys PRIOR to the release of ANY documents to the prosecution team. The current guidelines authorize the supervising attorney to decide when to turn over materials the team deems nonprivileged.¹³⁹ This provides a single layer of review, which is inadequate—privileged materials have slipped through this way in the past. Moreover, when privilege teams fail to implement this safeguard themselves, courts have often ordered it.¹⁴⁰ A second layer of review that confirms judgments by the privilege team will eliminate mistakes or errors, and it will greatly increase the appearance of fairness and legitimacy of the teams.

For materials where the privilege status is disputed between the DOJ and the defendant, the matter should go directly to the court. For materials that create some confusion, like those that the team identifies as privileged but thinks fall under an exception, the DOJ can create a log and first ask the subject's attorneys, then proceed to judicial review for disputes. For materials that are clearly privileged, the team can contact the subject's attorney and arrange the best method to return them. Returns should be consistent with the Fifth Circuit's 2021 decision in *Harbor Healthcare Systems, L.P. v. United States*;¹⁴¹ the DOJ should not retain any copies of privileged materials.

In addition to requiring court or attorney approval of privilege designations, documents should not be handed over in batches or in multiple stages. All documents should be examined, then the team can start the process of handing over nonprivileged materials to the investigatory team. The DOJ may be concerned about how this could delay investigations. Nowadays, thousands and thousands of digital documents are confiscated in searches,

¹³⁸ See *supra* Section III.B.2.

¹³⁹ U.S. DEP'T OF JUST., JUST. MANUAL § 9–13.420 (2021).

¹⁴⁰ 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), *aff'd*, 11 F.4th 1235 (11th Cir. 2021) (A magistrate judge imposed a “Modified Review Protocol” that prevented the prosecution team from receiving any documents until the defendant or the Court agreed.).

¹⁴¹ 5 F.4th 593 (5th Cir. 2021); *cf.* Eastman v. United States, No. 1:22-MC-00023 RB/KK, 2022 WL 9346072, at *5 (D.N.M. Oct. 14, 2022) (holding that destruction or return of documents is not required when prosecution is pending).

especially for white-collar crimes, which are harder to prove and require a lot of documents for evidence.¹⁴² It may take a privilege team weeks or months to get through such a large amount of material. However, this will serve as a deterrent to prosecutors who seek overly broad warrants. And it's a necessary evil because context can be determinative in privilege evaluations. Documents initially deemed nonprivileged may later be found to be work-product, for example, after privilege team members read through other seized materials that provide more information about the communications and attorney's notes.

3. Explicit Ex-Ante Approval of Privilege Team Procedures

The warrant application should include a detailed explanation of privilege team procedures that will be used, so the court can approve it. The Justice Manual makes it so that search warrants *may* attach any written instructions or should “generally state the government’s intention” to protect privilege. The Justice Manual should instead *require* that search warrants identify the government’s intention to use a privilege team and attach a list of all procedures the privilege team plans to abide by. This ensures that a judge is aware of the risk to privilege and understands how the government intends to handle it. Then, if the judge feels any additional safeguards are necessary based on the materials expected to be seized, they can be imposed ex-ante.¹⁴³

An alternative, similar, ex-post safeguard—advocated for, but not mandated, by the Fourth Circuit¹⁴⁴—could be requiring the DOJ to obtain approval from a judge or magistrate to use a privilege team *after* materials are seized, instead of when obtaining the search warrant. At that point, knowing what was actually confiscated by the government, judges could make fully informed decisions on whether a privilege team is appropriate. Defendants would have a chance to make arguments and voice their opinion on the use of a privilege team. They can also suggest any added procedures or request to conduct the initial review themselves. However, this extra step would significantly decrease administrative efficiency and increase court costs, and it would be unnecessary if the DOJ adopts the other recommendations.

¹⁴² Frohock, *supra* note 6, at 65–70.

¹⁴³ Preventing harm in these cases is important for defendants because they have difficulty obtaining relief ex-post, regardless of the legal standard used for demonstrating privilege. Anello, *supra* note 127.

¹⁴⁴ *United States v. Under Seal*, 942 F.3d 159, 178 (4th Cir. 2019), *as amended* (Oct. 31, 2019).

One could argue that while privilege teams in general, and with adequate safeguards, can be effectively used, sometimes cases may involve sensitivities that require a truly independent (i.e., not in the executive branch at all) decision-maker. If a case is that sensitive, then the judge authorizing the warrant and the privilege team would be aware and could step in (for example, providing conditional approval and requiring the government come back for ex-post approval before the privilege team begins its work). Cases where seized documents end up revealing previously unknown sensitivities are likely exceedingly rare. The additional cost of requiring post-search approval of privilege teams is not worth the marginal benefit it would provide. Therefore, while ex-post approval can be recommended in the Justice Manual when time and circumstances permit, it should not be required.

4. Show that No Equally Effective, Less Intrusive Methods Exist

The warrant application should also include a showing that no equally effective, less intrusive means exist to obtain the materials. The Justice Manual already requires that the least intrusive means, such as a subpoena, be “considered and rejected”¹⁴⁵ before more intrusive measures are taken. It emphasizes that less intrusive means should be used if possible, and attorneys need to acquire prior approval from the U.S. Attorney or Assistant Attorney General before seeking a search warrant.¹⁴⁶ But this is, again, all in-house. A stronger protection will exist if in addition—or instead—the investigator had to show a judge or magistrate that no equally effective, less intrusive means to obtain the materials exists. If less intrusive means are used (when appropriate), then cases are less likely to unnecessarily scoop up privileged materials that can’t be used to prove a case.

At the end of the day, this won’t be much of an additional burden on the DOJ. Their attorneys are already required to consider less intrusive measures. They should simply send that information along to the judge as well to ensure their analysis of the circumstances is correct. It would be a small addition to the process to obtain a search warrant, and it may also be a burden that is easily overcome. Probable cause is a low bar in practice, and in many (if not most) cases there will be reason to believe that

¹⁴⁵ U.S. DEPT OF JUST., JUST. MANUAL § 9–13.420(B) (2021).

¹⁴⁶ *Id.*

a search warrant would be more effective so as not to lose the element of surprise and risk the subject destroying evidence before it can be obtained.

5. SMUs for Every Office

The DOJ should consider creating a Special Matters Unit in every DOJ branch, or take the SMU out of the Fraud Section and make it department-wide. This safeguard is less critical to improving operations if the other recommendations are implemented, but it may do the most to repair the DOJ's reputation. Much of the criticism over privilege teams is that they leave the fox in charge of the henhouse.¹⁴⁷ This recommendation specifically targets that element—the appearance of fairness. Units under the DOJ that focus solely on privilege determinations with trained expert attorneys will be harder to criticize. Having SMUs in every department will ensure that prosecutors aren't prematurely and inappropriately exposed to information they can use down the line to start new investigations or bring new cases they wouldn't have otherwise been able to bring.

V. CONCLUSION

Protecting privilege is necessary to ensure the Sixth Amendment right to effective assistance of counsel is upheld. For almost twenty-five years, the DOJ has protected privilege by walling off prosecutors from seized materials through privilege teams. The practice of using privilege teams has immense potential to achieve its goals, but it has been plagued by criticism from the legal community—including some courts—due to insufficient safeguards. Although some people have advocated for the removal of privilege teams altogether (and the installation of an alternative option completely removed from DOJ control), the best solution is to fix privilege team procedures but continue the practice. Compared to alternatives, privilege teams are more efficient and less expensive. They just need to appear fairer and be more consistent.

The risk that the DOJ will confiscate privileged information, especially in the digital age, is very high. As a consequence, the DOJ practice of using privilege teams has vastly outgrown the context it started in. They are used well outside the realm of law office searches, and it is time the Justice Manual caught up to

¹⁴⁷ *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

reflect this. Beyond updates, the DOJ also desperately needs to install new mandatory safeguards to be used with every privilege team. The court, as an independent third-party, needs to play a role in checking the determinations of privilege, and privilege teams need to be segregated as much as possible from investigation teams. Implementing these recommendations will ameliorate most of the shortcomings of privilege teams today. It will also provide predictability and protection to subjects of investigations. And it will answer many of the criticisms levelled at the DOJ about privilege teams, hopefully silencing the critics. Fair privilege review can be conducted by the government when adequate safeguards exist. The DOJ needs to update the Justice Manual and provide those safeguards.