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PRATT'S
**PRIVACY &
CYBERSECURITY
LAW**
REPORT



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Fifth Circuit Latest to Cry Taint on DOJ Taint Team

*By Elliot S. Rosenwald, Marcus A. Asner, and Alexis Gannaway**

The authors discuss a recent decision by the U.S. Court of Appeals for the Fifth Circuit regarding the government's handling of privileged material seized during investigations, in the context of a pre-indictment motion for return of property under Federal Rule of Criminal Procedure 41(g).

The U.S. Court of Appeals for the Fifth Circuit recently addressed¹ growing concerns about how the government handles privileged material seized during investigations, in the context of a pre-indictment motion for return of property under Federal Rule of Criminal Procedure 41(g). The court concluded that Harbor Healthcare System's Rule 41(g) motion should have been granted because the government showed "callous disregard" for Harbor's rights" in the way it handled certain privileged information it had seized from Harbor.

The Fifth Circuit's decision is very timely, as several recent high-profile cases have grappled with the propriety of "taint teams" (also known as "filter teams"). This process entails the government using its own agents or prosecutors, who are not otherwise affiliated with the investigation or follow-on prosecution, to protect privileged material from investigators' hands.

BACKGROUND ON HARBOR INVESTIGATION

The *Harbor Healthcare* case dates back to 2017, when the U.S. Department of Justice ("DOJ") opened a criminal investigation into Harbor, a company that manages a large network of healthcare professionals in multiple states. The DOJ criminal investigation followed two *qui tam* False Claims Act suits against Harbor as well as parallel civil investigations by both the Department of Health and Human Services and DOJ. Based on information Harbor provided in response to a DOJ Civil Investigative Demand, the U.S. Attorney's Office for the Eastern District of Texas obtained warrants to search Harbor's offices. The government executed the warrants in May 2017, seizing numerous

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¹ *Harbor Healthcare System LP v. United States of America*, No. 19-20624 (5th Cir. 2021), <https://www.ca5.uscourts.gov/opinions/pub/19/19-20624-CV0.pdf>.

documents and electronic devices from Harbor, including communications between Harbor's compliance director and its outside counsel.

As part of the investigation, DOJ assembled an internal taint team. After the taint team reviewed the materials DOJ had seized from Harbor, DOJ declined to meet with Harbor to discuss returning materials that were privileged. Harbor then filed its Rule 41(g) motion, asserting that the seized documents included privileged communications with Harbor's counsel regarding earlier investigations of Harbor. The district court denied Harbor's motion, concluding sufficient processes were in place to screen the seized materials for claims of privilege.

FIFTH CIRCUIT'S RULING

The Fifth Circuit reversed, holding that the "government's ongoing intrusion on Harbor's privacy constitutes an irreparable injury that can be cured only by Rule 41(g) relief" and ordering the government to return the privileged material and destroy any copies it had made. This holding demonstrates the lengths federal courts will go to in order to protect the sanctity of the attorney-client privilege. The Fifth Circuit held that the government's ongoing refusal to return Harbor's privileged materials was the sort of "callous disregard for [Harbor's] rights" that would cause Harbor irreparable injury, part of the Fifth Circuit's standard for granting a Rule 41(g) motion. The court reasoned that the importance of attorney-client privilege is not limited to "a practical need for access" to the privileged material but also "lies in protecting the privacy of the privileged material" in and of itself, regardless of potential use of that material.

The Fifth Circuit's opinion touches on some tricky questions about the propriety of the government's use of taint teams altogether. Privilege entitles a person to resist the disclosure of confidential documents. Allowing government attorneys and agents – employees of the target's or defendant's opponents in an investigation or prosecution – to review documents for privileged information undermines the foundation of privilege. Of course, it is more likely that an opposing party will invade the sanctity of privileged communications when the opposing party is the one conducting the privilege review. Indeed, in *Harbor Healthcare*, the government openly represented that it was holding on to the privileged documents "for the potential for a future filter team, if the criminal team looks at the privilege logs and disagrees for some reason."

In ordering that Harbor's Rule 41(g) motion be granted, the Fifth Circuit emphasized that the very purpose of a taint team is to prevent investigators from accessing privileged information, an aim that is thwarted if the government refuses to destroy or return those documents. To be sure, spoliation may be a concern if privileged documents are returned but later need to be accessed. But courts have plenty of ways to handle spoliation concerns, such as by lodging the materials with a trusted third party. Rule 41(g) also itself explicitly allows for the court to "impose reasonable conditions to protect access to the property" in appropriate circumstances.

QUESTIONS SURROUNDING USE OF TAINT TEAMS

Until recently, the government utilized taint teams fairly routinely, but courts increasingly have noted flaws with the process. In recent months, courts have given less deference to the government's use of its own employees for taint teams and increasingly are appointing special masters to conduct any needed taint review.

One contemporary and highly publicized example arose recently in New York, when federal prosecutors seized materials from Rudy Giuliani's law office pursuant to an investigation into Giuliani's communications with Ukraine when he was serving as a lawyer for former President Donald Trump. District Judge J. Paul Oetken of the U.S. District Court for the Southern District of New York approved the appointment of a special master to carry out the taint review on the court's behalf. This case presented an unusual circumstance where the prosecutors and defendants both agreed to former District Judge Barbara Jones serving as the privilege review master, likely due to the significant public scrutiny surrounding the case.

Other circuit courts have also weighed in on the debate surrounding taint teams. Perhaps the most strident criticism came in the U.S. Court of Appeals for the Fourth Circuit's October 2019 decision in *In re Search Warrant Issued June 13*.² The Fourth Circuit held that the use of a taint team to review a law firm's seized records not only infringed on the privilege of the firm's clients but also perhaps violated the separation of powers by entrusting the executive branch with the judicial branch's power to determine what is and is not privileged. The Fourth Circuit ordered the district court to appoint a special master, though it stopped short of explicitly saying that a special master should always be used instead of a taint team. It followed different reasoning from both Judge Oetken in the Giuliani matter and the Fifth Circuit in *Harbor Healthcare*, demonstrating the broad array of analytical approaches that courts are adopting as they wrestle with the practical problems posed by seizure of privileged materials.

² <https://www.ca4.uscourts.gov/opinions/191730.P.pdf>.