

116TH CONGRESS
2D SESSION

H. R. 5546

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 22, 2020

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To regulate monitoring of electronic communications between an incarcerated person in a Bureau of Prisons facility and that person's attorney or other legal representative, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Effective Assistance
3 of Counsel in the Digital Era Act”.

4 **SEC. 2. ELECTRONIC COMMUNICATIONS BETWEEN AN IN-**
5 **CARCERATED PERSON AND THE PERSON’S**
6 **ATTORNEY.**

7 (a) PROHIBITION ON MONITORING.—Not later than
8 180 days after the date of the enactment of this Act, the
9 Attorney General shall create a program or system, or
10 modify any program or system that exists on the date of
11 enactment of this Act, through which an incarcerated per-
12 son sends or receives an electronic communication, to ex-
13 clude from monitoring the contents of any privileged elec-
14 tronic communication. In the case that the Attorney Gen-
15 eral creates a program or system in accordance with this
16 subsection, the Attorney General shall, upon implementing
17 such system, discontinue using any program or system
18 that exists on the date of enactment of this Act through
19 which an incarcerated person sends or receives a privileged
20 electronic communication, except that any program or sys-
21 tem that exists on such date may continue to be used for
22 any other electronic communication.

23 (b) RETENTION OF CONTENTS.—A program or sys-
24 tem or a modification to a program or system under sub-
25 section (a) may allow for retention by the Bureau of Pris-
26 ons of, and access by an incarcerated person to, the con-

1 tents of electronic communications, including the contents
2 of privileged electronic communications, of the person
3 until the date on which the person is released from prison.

4 (c) ATTORNEY-CLIENT PRIVILEGE.—Attorney-client
5 privilege, and the protections and limitations associated
6 with such privilege (including the crime fraud exception),
7 applies to electronic communications sent or received
8 through the program or system established or modified
9 under subsection (a).

10 (d) ACCESSING RETAINED CONTENTS.—Contents re-
11 tained under subsection (b) may only be accessed by a per-
12 son other than the incarcerated person for whom such con-
13 tents are retained under the following circumstances:

14 (1) ATTORNEY GENERAL.—The Attorney Gen-
15 eral may only access retained contents if necessary
16 for the purpose of creating and maintaining the pro-
17 gram or system, or any modification to the program
18 or system, through which an incarcerated person
19 sends or receives electronic communications. The At-
20 torney General may not review retained contents
21 that are accessed pursuant to this paragraph.

22 (2) INVESTIGATIVE AND LAW ENFORCEMENT
23 OFFICERS.—

24 (A) WARRANT.—

1 (i) IN GENERAL.—Retained contents
2 may only be accessed by an investigative or
3 law enforcement officer pursuant to a war-
4 rant issued by a court pursuant to the pro-
5 cedures described in the Federal Rules of
6 Criminal Procedure.

7 (ii) APPROVAL.—No application for a
8 warrant may be made to a court without
9 the express approval of a United States
10 Attorney or an Assistant Attorney General.

11 (B) PRIVILEGED INFORMATION.—

12 (i) REVIEW.—Before retained con-
13 tents may be accessed pursuant to a war-
14 rant obtained under subparagraph (A),
15 such contents shall be reviewed by a
16 United States Attorney to ensure that
17 privileged electronic communications are
18 not accessible.

19 (ii) BARRING PARTICIPATION.—A
20 United States Attorney who reviews re-
21 tained contents pursuant to clause (i) shall
22 be barred from—

23 (I) participating in a legal pro-
24 ceeding in which an individual who
25 sent or received an electronic commu-

1 nication from which such contents are
2 retained under subsection (b) is a de-
3 fendant; or

4 (II) sharing the retained contents
5 with an attorney who is participating
6 in such a legal proceeding.

7 (3) MOTION TO SUPPRESS.—In a case in which
8 retained contents have been accessed in violation of
9 this subsection, a court may suppress evidence ob-
10 tained or derived from access to such contents upon
11 motion of the defendant.

12 (e) DEFINITIONS.—In this Act—

13 (1) the term “agent of an attorney or legal rep-
14 resentative” means any person employed by or con-
15 tracting with an attorney or legal representative, in-
16 cluding law clerks, interns, investigators, paraprofes-
17 sionals, and administrative staff;

18 (2) the term “contents” has the meaning given
19 such term in 2510 of title 18, United States Code;

20 (3) the term “electronic communication” has
21 the meaning given such term in section 2510 of title
22 18, United States Code, and includes the Trust
23 Fund Limited Inmate Computer System;

10 (6) the term “privileged electronic communica-
11 tion” means—

(B) any electronic communication between an incarcerated person and the agent of an attorney or legal representative described in subparagraph (A).

Attest: **CHERYL L. JOHNSON,**
Clerk.