

EFFECTIVE ASSISTANCE OF COUNSEL IN THE DIGITAL
 ERA ACT

SEPTEMBER 16, 2020.—Committed to the Committee of the Whole House on the
 State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary,
 submitted the following

R E P O R T

[To accompany H.R. 5546]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5546) 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, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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Purpose and Summary

H.R. 5546, the “Effective Assistance of Counsel in the Digital Era Act,” would prohibit the Federal Bureau of Prisons (BOP) from monitoring privileged electronic communications between incarcerated individuals and their attorneys or legal representatives. The protections and limitations associated with the attorney-client

privilege—including the crime-fraud exception¹—would apply to electronic communications sent or received through the new (or modified) BOP email system. BOP would be permitted to retain the contents of electronic communications until the incarcerated person is released. Those contents would be accessible, but only under very limited circumstances. The bill would also allow a court to suppress evidence obtained or derived from access to the retained contents if such contents were accessed in violation of the procedures and rules set forth in the bill.

Background and Need for the Legislation

The Sixth Amendment to the U.S. Constitution provides that “in all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.”² Confidential communication between attorneys and their clients is an essential component of effective representation in a criminal prosecution. The principle of client-lawyer confidentiality is given effect by rules established in professional ethics, which generally prohibit a lawyer from revealing information relating to the representation of a client.³

There are over 130,000 individuals currently in BOP custody, many of whom are in pretrial detention and have not been convicted of a crime.⁴ Like any person involved in a criminal proceeding, these individuals need to be able to communicate confidentially with their attorneys. As technology has advanced, email has come to replace mail in many instances of daily life, and that is certainly the case for its use in the legal context. The increased use of email among legal counsel is in part due to the fact that it does not require another person’s availability, it provides a written version of a conversation, and it can be saved and easily accessed later.⁵

But many defense lawyers do not use the BOP email system to communicate with their clients because prosecutors have used attorney-client emails as evidence in court.⁶ Failing to extend the attorney-client privilege to the easiest, fastest and most efficient method of communication available to inmates and their lawyers places a significant burden on defense attorneys’ ability to represent incarcerated clients effectively.

At present, BOP regulations ensure protections for attorney visits, phone calls and mail in order to safeguard the attorney-client privilege, but no such protections exist in the context of email communications. BOP staff are prohibited from subjecting visits between an inmate and their attorney to auditory supervision⁷ or monitoring inmate calls to attorneys.⁸ Furthermore, BOP treats mail from an attorney as “Special Mail,” which may not be read or

¹ If a communication between a client and an attorney is made in furtherance of or in order to cover up a crime or fraud, it is not protected by the attorney-client privilege.

² U.S. Const. amend. VI.

³ MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2018).

⁴ *Population Statistics*, Fed. Bureau of Prisons, <https://www.bop.gov/mobile/about/population-statistics.jsp#pop-totals> (last updated July 9, 2020).

⁵ Robert E. Crotty, *Chapter 62: Litigation Management by Law Firms*, in 4A COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 62: 41 (Robert L. Haig ed., 3d ed. 2014).

⁶ Stephanie Clifford, *Prosecutors Are Reading Emails From Inmates to Lawyers*, N.Y. Times, July 22, 2014, <https://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html>.

⁷ 28 C.F.R. 543.13(e).

⁸ 28 C.F.R. 540.102.

copied if it is properly marked and the sender is adequately identified on the envelope.⁹

Although electronic mail serves the same function as traditional mail, no similar “special mail” regulation has been issued by BOP for emails between attorneys and their clients. Before using the Trust Fund Limited Inmate Computer System (TRULINCS)—BOP’s electronic mail service—inmates and their contacts must consent to monitoring.¹⁰ Despite the importance of the attorney-client privilege to an attorney’s ability to effectively represent an incarcerated client, BOP does not currently extend the privilege to electronic communications.

These limitations in attorney-client communications do not exist for out-of-custody defendants. Moreover, when out-of-custody defendants communicate with their attorneys via email, these are generally covered by the attorney-client privilege, even though the email provider can access the emails.¹¹ In the case of out-of-custody defendants, the attorney-client privilege is protected in three ways. First, the warrant requirement for law enforcement to obtain the contents of email communications—although not limited to attorney-client privileged communications—provides an independent check on the government’s ability to obtain privileged messages.¹² Second, the Department of Justice has a policy of obtaining high-level sign-off authority before seeking this type of privileged information.¹³ Finally, the Department of Justice might also use a “clean team” (or “taint team”) to review and segregate out communications that are privileged from the view of the prosecutors that are involved in a particular case.¹⁴ H.R. 5546 endeavors to extend these same protections to in-custody defendants.

Federal regulation has fallen behind technical developments in attorney-client communication to the detriment of BOP inmates. Moreover, the three methods of private communication currently available to inmates and their attorneys—in-person visits, phone calls, and mail—are inadequate because they are time-consuming and inefficient.

Even in metropolitan areas like Brooklyn, NY, it can take an attorney more than three hours round trip to travel to a detention facility to visit a client.¹⁵ Additionally, attorneys may have to wait hours for guards to bring a client from his or her cell to the room where visits take place.¹⁶ Time spent in transit or waiting at the prison reduces an attorney’s ability to work on the client’s case (or other clients’ cases). It goes without saying that the current pandemic has only exacerbated these problems—with frequent lockdowns and visitation restrictions often making it nearly impos-

⁹ 28 C.F.R. 540.18(a); 28 C.F.R. 540.2(c).

¹⁰ *Communications*, Fed. Bureau of Prisons, <https://www.bop.gov/inmates/communications.jsp> (last visited Dec. 2, 2019).

¹¹ See *Convertino v. U.S. Department of Justice*, 674 F.Supp.2d 97 (D.D.C. 2009), *rev’d on other ground*, 684 F.3d 93 (D.C. Cir. 2012).

¹² See, e.g., *United States v. Warshak*, 631 F.3d 266, 284–88 (6th Cir. 2010).

¹³ See U.S. Dep’t of Justice, *Justice Manual* 9–19.220; see also *id.* 9–13.420 (2018) (explaining the process for obtaining materials from an attorney who is a suspect, subject, or target of an investigation).

¹⁴ See, e.g., *In re Grand Jury Subpoenas*, 454 F.3d 511, 520 (6th Cir. 2006).

¹⁵ Joel Rose, *When Prisoners Email Their Lawyers, It’s Often Not Confidential*, NPR, Nov. 18, 2015, <https://www.npr.org/sections/alltechconsidered/2015/11/18/456496859/when-prisoners-email-their-lawyers-its-often-not-confidential>.

¹⁶ *Id.*

sible for attorneys to communicate with their client confidentially and reliably.

Confidential phone calls between an incarcerated person and their attorney are often limited in time and require advanced notice.¹⁷ Additionally, legal documents and other written materials cannot be shared over the phone, and postal mail can take up to two weeks to reach inmates. Such delays should be unnecessary in a prison system that permits electronic communication and would be if the attorney-client privilege were consistently applied. Failing to extend the attorney-client privilege to the easiest, fastest and most efficient method of communication available to inmates and their lawyers places a significant burden on defense attorneys' ability to represent incarcerated clients effectively. H.R. 5546 addresses this problem.

Hearings

On October 17, 2019, the Subcommittee on Crime, Terrorism, and Homeland Security held a hearing titled, "Oversight of the Federal Bureau of Prisons and Implementation of the First Step Act," which discussed various aspects of the operation of the Bureau of Prisons.

Committee Consideration

On March 11, 2020, the Committee met in open session and ordered the bill, H.R. 5546, favorably reported, by a voice vote, a quorum being present.

Committee Votes

No record votes occurred during the Committee's consideration of H.R. 5546.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report. These include conclusions by the Committee following the October 17, 2019, oversight hearing on the Federal Bureau of Prisons, including the testimony of the Honorable Kathleen Hawk Sawyer, Director of the Bureau of Prisons.

New Budget Authority and Tax Expenditures and Congressional Budget Office Cost Estimate

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of

¹⁷Gregory Sisk, Michelle King, Joy Nissen Beitzel, Bridget Duffus & Katherine Koehler, *Reading the Prisoner's Letter: Attorney Client Confidentiality in Inmate Correspondence*, 109 J. Crim. L. & Criminology 559 (2019) <https://scholarlycommons.law.northwestern.edu/jclc/vol1109/iss3/3/>.

1974, the Committee has requested but not received a cost estimate for this bill from the Director of Congressional Budget Office (CBO). The Committee has requested but not received from the Director of the CBO a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

Duplication of Federal Programs

No provision of H.R. 5546 establishes or reauthorizes a program of the Federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 5546 would facilitate the Federal government’s ability to comply with and facilitate the provision of confidential communications between attorneys and detained criminal defendants.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 5546 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short title. Section 1 sets forth the short title of the bill as the “Effective Assistance of Counsel in the Digital Era Act.”

Sec. 2. Electronic communications between an incarcerated person and the person’s attorney. Section 2 directs the Attorney General to create, within 180 days from enactment of the bill, a program or system (or to modify an existing program or system) for sending or receiving electronic communications used by persons in custody of the U.S. Marshals or the Bureau of Prisons that excludes from monitoring any privileged communications. Privileged communications are defined as those between an incarcerated person and a potential, current or former attorney, or legal representative or any agent of such. The bill would mandate that any existing program or system of electronic communication remain in place only for non-privileged communications. The bill would also allow BOP to retain the contents of the electronic communications of an incarcerated person (including privileged communications), and make these accessible to the person, only until the date they are released from prison. The attorney-client privilege—and any protections and limitations associated with it (such as the crime-fraud exception¹⁸) would apply to the new program or system established or modified. The contents of communications under this new or modified elec-

¹⁸ See *supra* note 1.

tronic communications system would only be accessible by the incarcerated person for whom they are retained, except also by (1) the Attorney General when creating, modifying, or maintaining the program or system of electronic communication (but the Attorney General may not review the accessed contents) or (2) an investigative or law enforcement officer pursuant to a warrant issued by a court following procedures set forth in the Federal Rules of Criminal Procedure, but only with the express approval of a U.S. Attorney or an Assistant Attorney General. The bill sets forth a procedure that would mandate review of contents by a U.S. Attorney before a warrant may be sought, in order to ensure that privileged communications are not accessible. The bill would further bar the particular U.S. Attorney who reviews retained contents from participating in any legal proceeding in which the person whose retained contents were reviewed is a defendant or from sharing the contents with an attorney participating in such legal proceedings. The bill would provide that a court may suppress evidence obtained or derived from access to contents that have been obtained in the violation of the procedures set forth in the bill.

Finally, the bill defines various terms used in the bill, including: “agent of an attorney or legal representative”, “contents”, “electronic communication”, “monitoring”, “incarcerated person”, and “privileged electronic communication.”