

117TH CONGRESS
2D SESSION

S. 3524

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.

IN THE SENATE OF THE UNITED STATES

JANUARY 19 (legislative day, JANUARY 18), 2022

Mr. WYDEN (for himself and Ms. LUMMIS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

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,*

3 **SECTION 1. SHORT TITLE.**

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

1 **SEC. 2. ELECTRONIC COMMUNICATIONS BETWEEN AN IN-**
2 **CARCERATED PERSON AND THE PERSON'S**
3 **ATTORNEY.**

4 (a) DEFINITIONS.—In this section—

5 (1) the term “agent of an attorney or legal rep-
6 resentative” means any person employed by or con-
7 tracting with an attorney or legal representative, in-
8 cluding law clerks, interns, investigators, paraprofes-
9 sionals, and administrative staff;

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

12 (3) the term “electronic communication”—

13 (A) has the meaning given such term in
14 section 2510 of title 18, United States Code;
15 and

16 (B) includes the Trust Fund Limited In-
17 mate Computer System;

18 (4) the term “incarcerated person” means any
19 individual in the custody of the Bureau of Prisons
20 or the United States Marshals Service who has been
21 charged with or convicted of an offense against the
22 United States, including such an individual who is
23 imprisoned in a State institution;

24 (5) the term “monitoring” means accessing the
25 contents of an electronic communication at the time

1 that, or anytime after, such communication is sent;
2 and

3 (6) the term “privileged electronic communica-
4 tion” means—

5 (A) an electronic communication between
6 an incarcerated person and a potential, current,
7 or former attorney or legal representative of the
8 incarcerated person that falls within the legally
9 recognized scope of attorney-client privilege and
10 is subject to the limitations or exceptions asso-
11 ciated with such privilege; and

12 (B) an electronic communication between
13 an incarcerated person and the agent of an at-
14 torney or legal representative described in sub-
15 paragraph (A).

16 (b) PROHIBITION ON MONITORING.—Not later than
17 2 years after the date of enactment of this Act, the Attor-
18 ney General shall issue a report, establish guidelines, and
19 create a program or system, or modify a program or sys-
20 tem that exists on the date of enactment of this Act,
21 through which an incarcerated person may send or receive
22 an electronic communication that excludes from moni-
23 toring the contents of any privileged electronic commu-
24 nication.

1 (c) FEATURES OF PROGRAM OR SYSTEM.—The pro-
 2 gram or system created or modified under subsection (b)
 3 shall comply with the following:

4 (1) RETENTION OF CONTENTS.—The Bureau of
 5 Prisons may retain, and provide access by an incar-
 6 cerated person to, the contents of electronic commu-
 7 nications, including the contents of privileged elec-
 8 tronic communications, of the incarcerated person
 9 until the date on which the incarcerated person is
 10 released from the custody of the Bureau of Prisons
 11 or the United States Marshals Service.

12 (2) ATTORNEY-CLIENT PRIVILEGE.—Attorney-
 13 client privilege, and the protections and limitations
 14 associated with such privilege (including the crime
 15 fraud exception), shall apply to electronic commu-
 16 nications sent or received through the program or
 17 system.

18 (d) ACCESSING RETAINED COMMUNICATIONS.—

19 (1) IN GENERAL.—Privileged electronic commu-
 20 nications retained under subsection (c)(1) may only
 21 be accessed by or provided to a person other than
 22 the incarcerated person for whom such privileged
 23 electronic communications are retained in accord-
 24 ance with paragraphs (2) and (3) of this subsection.

1 (2) ATTORNEY GENERAL.—The Attorney Gen-
2 eral, or a designee, may only access such privileged
3 electronic communications if necessary for the pur-
4 pose of creating and maintaining the program or
5 system created or modified under subsection (b), or
6 any modification to the program or system. The At-
7 torney General may not review the contents of privi-
8 leged electronic communications pursuant to this
9 paragraph.

10 (3) INVESTIGATIVE AND LAW ENFORCEMENT
11 OFFICERS.—

12 (A) WARRANT.—

13 (i) IN GENERAL.—Such privileged
14 electronic communications may only be
15 accessed and the contents of such privi-
16 leged electronic communications may only
17 be reviewed by an investigative or law en-
18 forcement officer pursuant to a warrant
19 issued by a court pursuant to the proce-
20 dures described in the Federal Rules of
21 Criminal Procedure.

22 (ii) WAIVER.—An incarcerated person
23 may waive the requirement to obtain a
24 warrant under clause (i).

1 (iii) APPROVAL.—No application for
2 such a warrant may be made to a court
3 without the express approval of a United
4 States attorney, an Assistant Attorney
5 General, or a designee thereof.

6 (B) PRIVILEGED INFORMATION.—The At-
7 torney General shall establish procedures con-
8 cerning the review of privileged electronic com-
9 munications under subparagraph (A), which
10 shall include the following:

11 (i) REVIEW.—Before the contents of
12 such privileged electronic communications
13 may be reviewed by an investigative or law
14 enforcement officer pursuant to a warrant
15 described in subparagraph (A), the privi-
16 leged electronic communications shall be
17 reviewed by a United States attorney, an
18 Assistant Attorney General, or a designee
19 to determine if a limitation or exception to
20 the attorney-client privilege applies to any
21 of the privileged electronic communica-
22 tions.

23 (ii) BARRING PARTICIPATION.—A
24 United States attorney, an Assistant At-
25 torney General, or a designee who reviews

1 privileged electronic communications pur-
2 suant to clause (i) shall be barred from—

3 (I) participating in a legal pro-
4 ceeding in which an individual who
5 sent or received such a privileged elec-
6 tronic communication is a defendant;
7 or

8 (II) sharing with an attorney who
9 is participating in such a legal pro-
10 ceeding such a privileged electronic
11 communication.

12 (4) MOTION TO SUPPRESS.—Upon motion of a
13 defendant, a court may suppress evidence obtained
14 or derived from accessing privileged electronic com-
15 munications or reviewing the contents of privileged
16 electronic communications in violation of this sub-
17 section.

18 (e) NOTICE UNTIL PROGRAM OR SYSTEM IS OPER-
19 ATIONAL.—The Attorney General shall provide written no-
20 tice to each individual who is an incarcerated person at
21 any time during the period beginning on the date of enact-
22 ment of this Act and ending on the date on which the
23 program or system created or modified under subsection
24 (b) is operational that the privileged electronic commu-
25 nications of the individual are subject to monitoring.

1 (f) RULES OF CONSTRUCTION.—

2 (1) INAPPLICABILITY TO NON-PRIVILEGED
3 ELECTRONIC COMMUNICATIONS.—Nothing in this
4 section shall be construed to limit the ability of in-
5 vestigative or law enforcement officers to monitor,
6 record, access, review, or retain nonprivileged elec-
7 tronic communications of an incarcerated person.

8 (2) VERIFICATION OF AGENT OF AN ATTORNEY
9 OR LEGAL REPRESENTATIVE.—Nothing in this sec-
10 tion shall limit the authority of the Bureau of Pris-
11 ons to establish policies that require a potential, cur-
12 rent, or former attorney or legal representative to
13 verify their identity, employment status, or licensure
14 to practice law prior to being granted authorization
15 to receive or send electronic communications from or
16 to an incarcerated person.

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