
Preserving Incarcerated Persons' Attorney-Client Privilege in the 21st Century:

Why the Federal Bureau of Prisons Must Stop Monitoring Confidential Legal Emails



Berkeley Law

Samuelson Law, Technology
& Public Policy Clinic



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About the Authors

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers (“**NACDL**”) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL envisions a society where all individuals receive fair, rational, and humane treatment within the criminal justice system. The NACDL Foundation for Criminal Justice (“**NFCJ**”) is a 501(c)(3) non-profit entity that supports NACDL’s charitable efforts to promote reform and to preserve core constitutional principles by providing resources, training, and advocacy tools for the public, the criminal defense bar, and all those who seek to promote a fair, rational, and humane criminal justice system. NACDL’s mission is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal justice system, and redressing systemic racism, and ensuring that its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level. Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America’s criminal defense bar, amicus curiae advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL’s many thousands of direct members—and 90 state, local and international affiliate organizations totaling up to 40,000 members—include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America’s criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

SAMUELSON LAW, TECHNOLOGY & PUBLIC POLICY CLINIC

The Samuelson Law, Technology & Public Policy Clinic at UC Berkeley School of Law trains the next generation of lawyers to advance the public interest in a digital age marked by rapid technological change. The Clinic focuses its work on three main areas: protecting civil liberties, ensuring a fair criminal justice system, and promoting balanced intellectual property laws and access to information. It advances these objectives through litigation, regulatory and legislative processes, and policy analysis.

Among other things, the Clinic’s work to ensure a fair criminal justice system focuses on the criminal trial process, working with public defender organizations to advise on technology issues arising in their cases. The Clinic provides strategic advice for systematic litigation, advises on case-specific issues, and conducts trainings for attorneys who do indigent defense work to help them become more fluent in digital surveillance topics and investigatory methods.

Foreword

Attorney-client privilege is essential to the integrity of the adversarial legal system. Effective assistance of counsel is a fundamental right guaranteed by the Sixth Amendment, and every experienced criminal defense attorney knows that gaining the trust of one's client is crucial to mounting an effective defense. The ability to communicate with one's client confidentially—and especially without the government listening in—is essential to gaining that trust.

That is why it is unacceptable that, in the 21st century, incarcerated persons still do not have the ability to send privileged email communications to their lawyers through the Federal Bureau of Prisons email system, TRULINCS.

Email has become an essential tool for providing legal services. It could be a particularly important tool for communicating with incarcerated clients, who can be especially challenging to reach. Postal mail takes weeks. Unmonitored phone calls can likewise take a great deal of time to arrange. In-person visits, while the gold standard in many respects because of the way they help build rapport, are time-consuming and expensive, and not every issue that arises in the course of a representation requires such a visit.

This report explains why Congress should pass legislation that would require the Federal Bureau of Prisons to stop monitoring emails between attorneys and their incarcerated clients. In fact, there is pending legislation that would do just that. The Effective Assistance of Counsel in the Digital Era Act, H.R. 5546, 116th Congress, would prohibit the Bureau of Prisons from monitoring emails between incarcerated persons and their attorneys except in certain limited cases. The Act passed the House during the 116th Congress.

This report is the product of a years-long collaboration between the NACDL and the Samuelson Law, Technology & Public Policy Clinic. Together, NACDL and the Clinic filed a federal lawsuit under the Freedom of Information Act to obtain records to better understand the government's practices regarding accessing the emails of those incarcerated in federal facilities. Calling on NACDL's national network of members, attorneys from around the country were interviewed to gain their perspective on the issue. Over the course of three years, multiple teams of Berkeley Law students worked on the litigation, the interviews, and most recently on drafting this report.

Christopher W. Adams, *NACDL President*

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Executive Summary

Attorney-client privilege* is an essential underpinning of the adversarial legal system. Without the ability to communicate with their clients confidentially, attorneys cannot build the necessary trust or obtain information needed to mount a successful defense.

This is as true for incarcerated clients as for those who retain their freedom. In fact, incarcerated clients may have more practical need for it than anyone else, given that they are being held in the custody of their litigation adversary and may even be seeking representation against the very guards who imprison them. Yet the fact of incarceration places severe limits on the ability of attorneys and incarcerated persons to communicate confidentially.

This report makes a simple argument: The Federal Bureau of Prisons (“**BOP**”) should cease its practice of requiring incarcerated persons to “voluntarily” agree that their email will be monitored and that attorney-client privilege will not apply to messages with their legal representatives as a condition of using the BOP-provided email system, TRULINCS. To that end, Congress should pass legislation requiring BOP to stop accessing attorney-client email communications absent extraordinary circumstances. The legislation should be explicit that attorney-client privilege applies to emails sent between lawyers and their incarcerated clients on BOP’s email system. Moreover, the government should be required to follow the same procedures for obtaining the privileged emails of incarcerated persons that it follows when obtaining the privileged emails of those who are not incarcerated.

There is already pending legislation that would take all of these steps. The Effective Assistance of Counsel in the Digital Era Act, H.R. 5546, 116th Congress, would prohibit the government from monitoring emails between incarcerated persons and their attorneys, with narrow exceptions. It would require federal prosecutors and investigators to follow the same sorts of procedures to obtain the emails of an incarcerated person that they currently follow when seeking the emails of someone not in government custody.

While there are ways other than email that attorneys can and do communicate with clients in BOP facilities, these methods are often resource-intensive and can be difficult to pursue. In-person visits, unmonitored calls, and legal mail often require significant time, administrative hassle, or expense. While each of these forms of communication has its place, the ability to send a simple email is also important. Nothing is as fast, cheap, or reliably available as email.

While the need for access to privileged email is longstanding, it is more necessary than ever today. While the country confronts an ongoing, large-scale public health crisis, BOP shut down in-person visits

*“Attorney-client privilege” as used throughout this report is intended to refer to situations where the privilege would normally apply. For example, the privilege covers communication between clients and all members of their defense teams, not just their attorney. This includes but is not limited to paralegals, investigators, and mitigation specialists.

except in extremely rare instances for several months. At the same time, unmonitored calls and legal mail have become more difficult to use. But incarcerated clients' need to have access to their lawyers is undiminished, and in many instances heightened by the delays and fears brought on by the pandemic.

BOP's decision to monitor emails causes concrete harms to incarcerated persons. The permitted methods of communication are insufficient on their own, given the extensive costs and administrative hassle they entail. Moreover, BOP's requirement that incarcerated persons "voluntarily" agree to monitoring and waiver of privilege means attorneys cannot ethically use the system for anything other than the most mundane emails. This is because lawyers are required to safeguard the confidences of their clients, and they cannot do so using a system that is monitored. In some cases, when incarcerated persons and their attorneys have gone ahead and used the system anyway, BOP has handed their emails over to prosecutors, who have used them against the clients in their legal cases. Finally, the harm of lack of access to a privileged email system falls disproportionately on certain incarcerated persons, such as those experiencing a disability, people of color, incarcerated persons who are seeking representation, and those relying on public defenders or who retain their own counsel but face funding limitations.

Attorneys who practice in the federal criminal system report that lack of access to a confidential email system impedes their clients' ability to speak freely with them, resulting in less communication and trust between lawyers and incarcerated clients. It also diminishes opportunities to discuss case strategies, prepare clients for hearings, and mount effective representation.

Moreover, the BOP policy undermines constitutional rights. Courts have held that incarcerated persons have the right to exchange confidential postal mail with their attorneys, grounding their decisions in the First Amendment right to free speech and the Sixth Amendment right to effective assistance of counsel. The same protections should extend to email, given its essential role in modern communication, and BOP should not be permitted to override these rights by seeking a "voluntary" agreement that attorney emails with incarcerated clients can be read.

BOP's justifications for monitoring these attorney-client emails are unconvincing. First, incarcerated persons do not "voluntarily" agree to monitoring in any meaningful sense. They are in custody, and

the government's email system is the only one available to them. Second, while BOP has the ability to filter out emails to and from attorneys before handing over the rest of an incarcerated person's emails to federal prosecutors, this does not solve the problem, because neither prosecutors nor BOP is obligated to filter out attorney-client emails when reviewing the contents of an incarcerated person's email account. Moreover, attorneys still will not be ethically able to use the system as long as BOP continues to insist on monitoring and waiver of privilege. Finally, BOP's concern that attorney-client email will be used to smuggle contraband or facilitate illegal acts is unfounded given that email is a purely digital medium and examples of attorneys facilitating unlawful behavior are rare; the same concern would apply equally to postal mail, which may not be examined. Particularly given how frequently other means of accessing in-custody clients can be cut off, incarcerated persons should have access to a privileged email system.

This report proposes a concrete solution to protect incarcerated persons' privileged email communications with their lawyers. Congress should pass legislation that includes five core elements:

- 1 a prohibition on monitoring and acknowledgment that incarcerated persons' attorney-client emails are privileged;**

- 2 reasonable retention limits on emails between in-custody clients and their legal teams;**

- 3 a requirement that the government obtain high-level sign-off and a warrant before accessing attorney-client emails;**

- 4 a limitation on access to attorney-client emails to only those who truly need it and requiring use of a clean team to review potentially privileged emails; and**

- 5 creation of a statutory suppression remedy for violations of attorney-client privilege in emails.**

● BOP monitors incarcerated persons' emails and makes them available to federal prosecutors.

There are approximately 155,000 people housed in BOP facilities.¹ All incarcerated persons in federal custody can have access to a BOP-provided email system with the approval of the warden of the facility where they are housed. However, as a condition of accessing the system, incarcerated persons must “voluntarily” agree that their emails will be monitored and that the emails they send to their attorneys will not be considered privileged.¹ BOP stores these emails and then shares them with federal prosecutors upon request. Although some prosecutors separate out emails between attorneys and incarcerated persons before reading them, others do not. Indeed, most United States Attorney’s Offices have no public policy stating that they will not read emails between attorneys and incarcerated persons, and federal prosecutors do sometimes access these emails and use them in their cases.²

A. The BOP email system.

In 2005, BOP began rolling out an email system for incarcerated persons to use.³ The system, called TRULINCS, is more limited than standard email applications available to those not in custody.⁴

To exchange email, an incarcerated person must first enter the recipient’s email address into their TRULINCS account and request to have the contact approved by the warden at their facility.⁵ Once the contact is approved, the system sends an introductory email to the recipient, prompting them to create an account on CorrLinks, a web portal where emails from incarcerated persons may be read.⁶ Once the CorrLinks account is activated, the recipient will become an approved contact who can send or receive email from incarcerated persons through CorrLinks.⁷

TRULINCS’s functionality is more limited than standard email applications.⁸ The system does not allow users to send images or attachments, and messages are limited to 13,000 characters.⁹ Additionally, incarcerated persons are charged by the minute for computer time, as well as for every message they send.¹⁰

¹While the focus of this report is on federal facilities, many state and local facilities—which may also house federal incarcerated persons before trial via contracts with the U.S. Marshals Service—that have email systems for incarcerated persons have similar monitoring policies in place.

Consent to monitoring. All TRULINCS users must “voluntarily consent” to terms of service before using the email system. These terms include an acknowledgment that all emails may be monitored, and that emails to their attorneys will not be treated as privileged:

I am notified of, acknowledge, and voluntarily consent to having my messages and transactional data (incoming and outgoing) monitored, read, retained by Bureau staff . . . and **voluntarily consent that this provision applies to messages both to and from my attorney or other legal representative, and that such messages will not be treated as privileged communications.**¹¹

CorrLinks likewise requires users to “expressly agree to the monitoring and review of all messages sent and received via the CorrLinks service,” although it does not mention attorney-client privilege.¹²

BOP’s policies for storing, reviewing, and sharing incarcerated persons’ emails. BOP keeps copies of incarcerated persons’ emails, as well as significant information about the communications, which is known as metadata (e.g., date sent, to/from information).¹³ Normally, BOP stores this information “for six months from the date created, at which time they are overwritten with new data.”¹⁴

The contents of all emails sent or received by an incarcerated person—including attorney-client email—may be reviewed by BOP officials as part of “monitoring of inmate electronic message activity” and “conducting investigations.”¹⁵ This review may occur before emails are delivered to their intended recipients.¹⁶ BOP officials may decline to deliver certain messages should their content “jeopardize the public or the safety, security, or orderly operation of the facility.”¹⁷ Alternatively, it can occur after the messages are delivered, for example, during an investigation.¹⁸

Email messages and related data may also be shared with other law enforcement entities, “whether federal, state, local territorial, tribal, or foreign,” if the “information is relevant to the recipient entity’s law enforcement responsibilities.”¹⁹ BOP may also share incarcerated persons’ email data “in an appropriate proceeding before a court, or administrative or adjudicative body” when either the Department of Justice (“DOJ”) or an adjudicator determines that such data is relevant to a proceeding.²⁰

Furthermore, BOP policy does not require a subpoena, let alone a warrant, to access these emails.²¹ BOP requires a written request explaining why the emails are relevant to a law enforcement function.²² Upon receiving such a request, BOP staff are authorized to release both transactional data and copies of the content of the messages.²³

Emails thus receive less protection than, for example, BOP’s copies of recorded telephone conversations, which BOP may only disclose when requested in an emergency situation, when criminal activity is discovered, when formally requested with a subpoena, or when requested by the FBI for national security or foreign intelligence purposes.²⁴

BOP's filtering capabilities. In June 2017, BOP added a feature to TRULINCS that allows BOP “to filter out specific emails when conducting a search of an inmate’s email activity.”²⁵ The filtering feature allows BOP’s staff to “produce emails for law enforcement while excluding specific email addresses from the requested search,” including email accounts that belong to attorneys.²⁶

This feature was outlined in an internal memorandum sent to all wardens, which NACDL obtained through Freedom of Information Act litigation.²⁷ This feature was developed as a result of concerns raised by district court judges regarding the fact that BOP does not offer confidential attorney-client email communication.²⁸

However, BOP continues to monitor and store all emails sent and received by incarcerated persons. BOP maintains its policy of requiring incarcerated persons to “voluntarily consent” to the monitoring and collection of emails, and asserts its right to use them, including attorney-client emails. The filtering feature merely enables certain emails to be identified or excluded when emails are produced to prosecutors, but there is no obligation that it actually be used.

BOP will filter out emails only upon explicit request from law enforcement officials. Thus, this filtering capability’s use is dependent upon individual law enforcement officials exercising discretion in their requests. Additionally, BOP states that it is not responsible for verifying that the email addresses provided to be filtered out are correct, leaving that responsibility to the requesting law enforcement official, who may have no idea which email addresses correspond to an incarcerated person’s attorney.²⁹ A prosecutor, for example, may not even know that an incarcerated person has counsel (or is seeking counsel) for a civil suit. Further, BOP has indicated that when law enforcement officials request not to receive emails between attorneys and incarcerated persons, it is these officials who are ultimately responsible for verifying that all attorney-client emails have actually been excluded from the production.³⁰

In addition, the fact that BOP itself still asserts the right to review emails between incarcerated persons and their attorneys is problematic. An incarcerated person could well be in contact with an attorney to file a civil suit challenging jail conditions. Such emails should not be read by the very guards whose actions might be the subject of the litigation.

The main problem is folks at BOP are reading the emails. For example, a client asked me if he can get his sentence reduced by offering cooperation after discovering that a prison guard was smuggling drugs into the institution. This is not the type of information that BOP should be able to read, out of concerns about retaliation. There are many other people in addition to the US Attorney’s Office that read these emails, so a US Attorney’s Office taking this position is just one little reform.
– Criminal Defense Attorney Peter Goldberger

B. There is no uniform policy for when federal prosecutors read emails between attorneys and incarcerated persons, and some federal prosecutors do read them.

Although NACDL and the Samuelson Clinic do not know how frequently it happens, United States Attorney's Offices ("USAOs") can and do read incarcerated persons' emails with their lawyers.

The reason NACDL and the Samuelson Clinic cannot know how frequently federal prosecutors read emails between incarcerated persons and attorneys is that federal prosecutors are rarely under an obligation to disclose this information. Unless federal prosecutors ultimately use these emails at trial, there is no mechanism in place that requires prosecutors to provide incarcerated persons with notice that the emails they exchanged with their attorneys have been read. Such disclosure is unlikely to occur very often, given a prosecutor's ability to use information gleaned from such emails without disclosing the source at trial, and the high rate of plea deals in the federal system.³¹

NACDL and the Samuelson Clinic nonetheless know that prosecutors do sometimes obtain emails sent between incarcerated persons and their attorneys through TRULINCS. On some occasions, prosecutors have disclosed this information either through formal notice that the prosecutor is planning to request the emails from BOP or through discovery after the prosecutor has already done so.³²

DOJ does not appear to have issued guidance to federal prosecutors about what legal standard they should meet when requesting attorney-client emails, or what precautions they should institute to avoid reading these emails without proper legal justification. In a Freedom of Information Act lawsuit, NACDL, represented by the Samuelson Clinic, sought records regarding any DOJ policies that federal prosecutors must follow when seeking emails between attorneys and incarcerated persons sent through the TRULINCS system. That lawsuit has yielded no records revealing the existence of any such guidance, supporting the conclusion that none exists.

DOJ has issued guidance on the form requests for emails can take, but, ironically, the guidance counsels prosecutors to *avoid* proceeding through formal legal channels to avoid disclosure and potential liability on behalf of DOJ. In a 2009 memo, DOJ stated that prosecutors should simply "ask[] BOP to voluntarily provide the contents of the emails" because obtaining a subpoena, as is required for written and telephone communications, may cause an "unwarranted civil action against the United States"—specifically, a claim that it has violated the federal statute that governs requests for electronic data from certain online service providers.³³

In general, then, the public has no information on what, if any, policies federal prosecutors must follow when seeking attorney-client emails.

A few individual USAOs have crafted their own policies and standard practices in the absence of broader DOJ guidance, but these appear to be few and far between. For example, in the Southern District of New York (which covers eight counties and includes Manhattan) ("SDNY"), prosecutors

have been directed to ask BOP to filter out attorney-client privileged communications when they seek incarcerated persons' emails.³⁴ Following this directive, the SDNY USAO has requested that the Metropolitan Correctional Center-New York and Metropolitan Detention Center-Brooklyn filter out emails between attorneys and incarcerated persons for counsel of record.³⁵ Thus, in SDNY, these emails will not be provided to the prosecuting attorneys—at least for attorneys who have entered a formal appearance in court.³⁶ Even this policy, however, will not filter out attorney-client communications between incarcerated persons and lawyers who are in the important pre-litigation stages of representation.

Records obtained through the NACDL and Samuelson Clinic lawsuit also show that a handful of other federal prosecutors' offices use "clean teams" to separate out privileged emails when filtering is not requested. A clean team sorts through communications and documents that might be privileged, passing only those materials that are not privileged on to the prosecuting attorneys. Clean team members are not prosecutors on that particular case. The idea is that this process will prevent privileged information from being used in the prosecution, thereby limiting the harms done to privilege.³⁷

For most of the country, though, there is simply no information at all. Or, the only available information is anecdotal reports demonstrating that emails between attorneys and incarcerated persons do get read. In the Eastern District of Pennsylvania (which covers nine counties and includes Philadelphia), for example, federal prosecutors obtained emails of an incarcerated former state senator, including those with his attorney, and used them to argue for a higher sentence.³⁸

I have a nationwide post-conviction practice with clients in nearly every district in the country. Policies and training aren't uniform across facilities. The lack of consistency makes it very difficult to navigate how to get in touch with clients confidentially because it's so locally specific.

– Criminal Defense Attorney MiAngel Cody

● The government’s email monitoring policies harm incarcerated persons in federal custody.

Incarcerated persons and their attorneys should be able to communicate confidentially using email. As one district court has written, “[e]mail is the primary and preferred method of communication in the legal profession, and has been for decades. Treating email attorney communications differently from attorney communications mailed through the post ‘snail mail’ makes no sense. It is a distinction without cause.”³⁹ Email allows for cheap, clear, and almost instantaneous communication. It can be used at the convenience of incarcerated persons and attorneys, without relying on BOP staff to coordinate a specific time and place for the communication.

The government’s current monitoring policy is objectionable for several reasons. It chips away at attorney-client privilege, undermining a fundamental attribute of the adversarial legal system. It also forces incarcerated persons to rely on costlier and less efficient means of communication; makes it difficult for attorneys to use email in ways that fulfill their ethical obligations to maintain client confidences; and put clients at risk of longer sentences and additional charges if their emails are, in fact, used against them. These harms may be more severe for people with disabilities, racial minorities, and those with budgetary constraints. Finally, depriving incarcerated persons of the ability to send confidential legal email undermines their First Amendment right to free speech and Sixth Amendment right to effective assistance of counsel.

One of the hardest things is getting the truth from the client. Not because they’re bad people, it’s just not normal for people to be open to relative strangers. It’s very rare that I get everything I need to know from clients in fewer than 4 to 6 meetings. There has to be a level of trust to see how important it is what I do for them. That’s why privilege is so important. Not being able to assure them that what they tell me is completely confidential and will be used only in their interest impedes building that trust and confidence. Knowing the facts and being able to assure clients that it is confidential is absolutely crucial. – Criminal Defense Attorney Ken White

A. The BOP policy chips away at attorney-client privilege.

The BOP policy is unacceptable for many reasons, but one of the most important is that it chips away at attorney-client privilege.

Attorney-client privilege is one of the “oldest . . . privileges for confidential communications” and has been an important part of the American legal system for hundreds of years.⁴⁰ This privilege is crucial when clients are in custody, and its importance does not diminish based on the medium through which a client consults with his or her attorney—whether it be in person, by letter, by telephone, or by email.

Attorney-client privilege is “the client’s right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.”⁴¹ In 1888, the United States Supreme Court explained that attorney-client privilege is “founded upon the necessity . . . of the aid of persons having knowledge of the law and skilled in its practice.”⁴² As the Court said, effective legal assistance “can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”⁴³ A hundred years later, the Supreme Court expressed the view that attorney-client privilege promotes the “public interest in the observance of law and administration of justice” by ensuring that lawyers can communicate freely with their clients.⁴⁴ These cases demonstrate that protecting attorney-client privilege has always been a fundamental value of the adversarial legal system.

The free flow of information with clients is paramount, especially when you are a public defender. Most clients come to us with a healthy degree of skepticism, so building a rapport with a client is vital. Being able to convince the client that everything we talk about can't be divulged to anyone else unless they approve is fundamental to doing our job.

– Federal Public Defender Michael Caruso

Attorney-client privilege is no less important in jails and prisons than in other settings. In *Lanza v. New York*, the Supreme Court explained that “[e]ven in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection.”⁴⁵ The Ninth Circuit Court of Appeals elaborated on this when it said:

[I]t takes no stretch of the imagination to see how an inmate would be reluctant to confide in his lawyer about the facts of the crime, perhaps other crimes, possible plea bargains, and the intimate details of his own life, and his family members’ lives if he knows that a guard is going to be privy to them, too.⁴⁶

Courts have fiercely protected attorney-client privilege, but they have also created some narrow exceptions to it.⁴⁷ For example, attorney-client privilege does not apply if the client is planning criminal or fraudulent activity with the attorney.⁴⁸ Despite the fact that the privilege may sometimes protect guilty people, the exceptions have remained limited because “open client and attorney communication” is central to “the proper functioning of our adversarial system of justice.”⁴⁹

Attorney-client privilege is rooted in history and remains essential today. Continued broad application of the privilege is necessary for ensuring equity in America's adversarial system because accused individuals who are not incarcerated pretrial can email with their lawyers without fear of monitoring. The fact that most attorney-client communication now takes place through email is a reason to protect the privilege in that context for all clients, not a reason to confine its scope to older forms of communication when engaged in by incarcerated persons.

The whole purpose of the privilege is so communication stays 100 percent open so I can deliver the best service to my clients. If our conversations are not protected that way, my clients might hold back. And then I can't fulfill the promise of the Sixth Amendment. Honesty is what's going to make that relationship work. – Assistant Federal Public Defender Francisco Morales

B. Permitted methods of communication are insufficient.

While the BOP does allow incarcerated persons and their attorneys to communicate through methods other than email, none of these methods is sufficient, singly or in combination. Currently, BOP permits incarcerated persons to communicate confidentially with their lawyers through three methods: postal mail, pre-scheduled unmonitored telephone calls, and in-person visits. The conditions it places on these methods are often restrictive and for that reason, among others, these options are far more burdensome than email. As the American Bar Association (“**ABA**”) has stated, these alternative methods can be “grossly inefficient and impose[] substantial burdens on attorneys, especially compared to the relative speed, ease, and low cost” of email for the purposes of day-to-day legal correspondence.⁵⁰

Postal mail. Legal mail in BOP facilities is not efficient for communicating in a timely manner. For example, it can take “two weeks or more for an inmate to receive postal mail sent from an attorney, and additional time to receive an inmate's response.”⁵¹ Thus, a simple back-and-forth discussion (question – answer – follow-up question – answer) that could be accomplished by email in a few minutes can take a month by postal mail. Court deadlines rarely allow the luxury of such snail-like communication.

Prison officials will deliver legal mail to prisoners only when there is a return address that the prison staff can verify as being from an attorney and some will then only deliver the mail when they have confirmed that the attorney listed on the return address actually sent that piece of mail. This often means a staff member will have to call the attorney to ask them to confirm they sent legal mail to the recipient before they actually deliver the mail to the prisoner. This process may take a few days or more, depending on whether the staff member is available and when they can reach the attorney.

– Civil Rights Attorney Danielle Jefferis

Telephone calls. Incarcerated persons are only allowed to make occasional unmonitored calls to their lawyers if they demonstrate that communication with their attorney by other means is not adequate (e.g., when there is an imminent court deadline).⁵²

There are prisons that we call and call and no one ever answers. We have to go through regional BOP counsel to even get a response.

– Federal Public Defender Melody Brannon

To facilitate a legal call, incarcerated persons must request an unmonitored attorney call from a prison official.⁵³ It can take “up to a month” to arrange an unmonitored telephone call, and such phone calls may often be prohibited or delayed at the discretion of the warden.⁵⁴ This process can make unmonitored calls an unrealistic option for attorney-client communication.⁵⁵

To schedule an unmonitored phone call, attorneys need to call, email, or write to a prison counselor to schedule a date and time. This could take 3 to 5 business days, but some counselors may not be as responsive or cooperative and will not facilitate calls for 2 weeks out or more. Some facilities, such as the supermax prisons that are used to dealing with attorneys, are more facilitative, but other facilities will strictly limit the call with attorneys to 15 minutes, despite what the policy allows. It is challenging to only be able to talk to my client for only 15 minutes every 2 to 3 weeks.

– Civil Rights Attorney Danielle Jefferis

In contrast, incarcerated persons may make normal telephone calls with approved contacts without showing any particular necessity.⁵⁶ Given the greater flexibility involved, clients sometimes use normal calls to contact their lawyers. Such calls are subject to monitoring, even if the call is to the incarcerated person's attorney.⁵⁷ Incarcerated persons are generally limited to 300 minutes of calls per calendar month,⁵⁸ and a call is ordinarily allowed for at least three minutes to a maximum of 15 minutes, at the warden's discretion,⁵⁹ meaning that a substantive call with a lawyer may eat into an

incarcerated person's time to speak with family. In any event, incarcerated persons are responsible for the expense of their telephone calls, including unmonitored calls with their lawyers.⁶⁰ That expense can be prohibitive, as incarcerated persons can be charged up to \$0.25 per minute for telephone calls.⁶¹

There is nothing more arbitrary and variable from institution to institution than the setting up and carrying out of unmonitored phone calls. Within BOP, there are places you will call your client's counselor to talk to an inmate, and they just call that inmate into their office and let them use their phone. Others ask you to fax them a request, demonstrating that you have a deadline less than two weeks away, that you live more than a hundred miles away, a copy of your driver's license, your bar number, etc., and maybe you'll get a call a week later.

Most often when I make calls, it's to my clients who are hundreds of miles away from my office. When the call is finally scheduled and carried out, sometimes the inmate is in a separate phone booth-like arrangement, with more privacy, but more often the call occurs on the counselor's office phone, with the inmate sitting right in front of the counselor. Oftentimes the counselor can hear everything, although sometimes they put ear plugs on. Whenever I get on the phone with my client, I first ask how much privacy they have. They often answer carefully, which tells me they don't have much privacy. – Criminal Defense Attorney Peter Goldberger

In-person visits. In-person visits can be especially burdensome for incarcerated clients and their lawyers.⁶² When clients are detained pretrial, attorneys may have to travel great distances, but even if the jail is relatively nearby, they may wait for hours to get through security and for clients to be brought to a meeting room.⁶³ In some cases, an attorney may be representing clients in another district or the lawyer may live hundreds of miles from where their clients are being held, making the visit to the facility more time-consuming and costly.

It's a huge logistical problem to visit clients and it adds a lot of hours to an attorney's schedule that can't be productive. In my district, the Metropolitan Detention Center is close to the courthouse, so it's an easy to walk to the facility. But, to see your client, you have to go there and put in your name and wait until your client is made available, which can take a long time. To get to the point of talking to clients, you have to go through an elaborate security process. Just meeting with a client for 15 minutes is often at least a 2-hour affair. You can imagine how difficult it would be having to meet with multiple clients under that setup. – Criminal Defense Attorney Ken White

II. The government's email monitoring policies harm incarcerated persons in federal custody.

Post-conviction, incarcerated persons may be housed thousands of miles away from their attorneys, so an in-person visit with a lawyer could cost thousands of dollars.⁶⁴ Few clients or defense attorneys have the time or resources to engage in substantial travel to faraway facilities.⁶⁵ The lack of affordable and efficient communication limits the available time for strategic preparation for incarcerated clients and their lawyers.

Costs and travel time aside, in-person visits themselves can be a complicated endeavor. Upon arriving at a BOP facility, in-person visits can be unpredictable even if they were pre-scheduled. Facilities may be in unexpected lockdown or it may take hours for the client to be made available. Additionally, there can be significant restrictions on what material a lawyer can bring into the facility. For example, policies at some federal jails prohibit lawyers from bringing laptops into the facility.⁶⁶ Not only does this mean that attorneys cannot be productive for the hours they may spend waiting, but it also makes it challenging for attorneys to show their clients legal materials relevant to their cases, particularly now that these materials are often voluminous and primarily stored in digital form. Despite the advantages of in-person visits, they are simply impractical in many situations.

Without the availability of quick, accessible communication, attorneys are less likely to be able to engage their clients in moderately lengthy discussions concerning defense strategy or preparation, and may be effectively barred from consulting with clients on time-sensitive matters.⁶⁷

Organizing an in-person visit to a federal prison may take 10 to 14 days, and it is usually time-consuming to get a signature from the warden to approve the visit. The BOP also has the ability to transfer prisoners to other facilities and does so routinely, usually without notice to the attorney until the prisoner arrives at the new prison. This makes it difficult for attorneys to visit clients, especially when BOP moves them to a distant facility, which could be thousands of miles away. Some states also cover a large area, and it may be a 5-hour round-trip drive to the facility, and then longer to undergo searches and paperwork, before meeting the client. Although an in-person meeting may last for a longer duration compared to telephone calls, such as from 9am to 2:30pm, this can be draining to both attorneys and client as no food or drinks are allowed and in some circumstances clients are shackled at the wrists and feet for the duration of the visit. – Civil Rights Attorney Danielle Jefferis

With email being the *de facto* standard for legal communications, denying incarcerated persons the ability to email confidentially with their attorneys both presents a major impediment to defense preparation⁶⁸ and disadvantages those who are most in need of legal assistance. Without privileged email communication, BOP is effectively preventing defense counsel from being adequately prepared and increasing the risk that defendants will receive inadequate representation.⁶⁹

It is crucial at this time that Mr. Walia not be restricted from actively participating with counsel to prepare his defense. . . . [T]here is no meaningful substitute [for access to privileged email]. . . . It is simply not feasible to physically travel to the jail to inform a client of a date change, or ask a one sentence question about a piece of discovery that's been turned over, or to get a phone number for a family member

– Letter from Defense Counsel in *United States v. Walia*⁷⁰

C. Lawyers' ethical obligation to maintain their clients' confidences makes it impossible for them to use the existing email system for all but the most mundane communications.

By monitoring incarcerated persons' emails, BOP places lawyers in an ethical bind that drastically reduces the ability of lawyers to communicate with their clients through TRULINCS. Lawyers have a strict duty to maintain their clients' confidences, but they cannot do that in a system monitored by the government.

The ABA's model rules and every state's ethical code for lawyers require attorneys to maintain the confidentiality of client information.⁷¹ While attorneys in most circumstances can ethically use email for confidential client communications,⁷² because BOP is the service provider for incarcerated clients' emails and it monitors their email, lawyers cannot ethically use the system for confidential communications. As discussed above, TRULINCS affords no expectation of privacy, and BOP notes that the contents of all emails sent or received by incarcerated persons, including attorney-client emails, may be reviewed by prison officials.⁷³ Further, email messages are regularly shared with other entities, including law enforcement agencies.⁷⁴ Emails with incarcerated persons are placed directly into the hands of the client's adversary (i.e., the government), and the TRULINCS terms of service are explicit that BOP will monitor communications and refuse to treat emails with lawyers as privileged.⁷⁵

On the other hand, lawyers have an ethical obligation to diligently represent their clients and maintain communication regarding their cases.⁷⁶ Fulfilling these duties requires actively "maintaining an effective and regular relationship with all clients."⁷⁷ This obligation is not "diminish[ed] by the fact that the client is in custody."⁷⁸ And as discussed above, legal mail, unmonitored calls, and in-person visits rarely enable effective and regular communication.

Thus, the government's policies put attorneys in an ethical bind. They can choose to use email to facilitate communication as part of their diligent representation, knowing that the opposing party will monitor their communications. Or, as most lawyers do, they can forego using email for confidential conversations, thereby putting off important communications until they can be had in what is usually a far less timely and far more costly way. Confidential email would offer clients and attorneys a valuable method of secure communication, thus helping lawyers meet their professional duties, and helping clients fully participate in their own representation.

A confidential BOP email system would help tremendously with the attorney-client relationship because attorneys would be able to have meaningful communication with their clients on a more regular basis. For example, at times, when an attorney is working diligently on a case—investigating the case or writing and filing motions, oppositions, and replies—the client, who is in custody, may not be aware that the attorney is working on his or her case because the client does not hear from the attorney for a short period of time. Privileged email would help attorneys communicate more effectively with clients. With a confidential email system, the attorney could send quick messages to check in more frequently and update the client as the case progresses, rather than needing to wait for an in-person meeting or unmonitored call. – Senior Litigator Callie Glanton Steele, Office of the Federal Public Defender, Central District of California

D. Prosecutors may use emails as evidence against clients.

Under BOP’s policy, prosecutors can request and receive all of an incarcerated person’s email communications, including emails with their lawyers.⁷⁹ Attorney-client emails can include a wide variety of information, from a client’s frustrations with their situation, to details about the facts of a case, to discussion of legal strategy. BOP may also share incarcerated persons’ emails in proceedings “before a court, or administrative or adjudicative body” when either DOJ or an adjudicator determines they are relevant.⁸⁰ As a result, information in incarcerated persons’ attorney-client emails may be offered into evidence against that person, including at trial, sentencing, and BOP disciplinary proceedings.

Take the case of *United States v. Fumo*.⁸¹ Vincent Fumo, a well-known Pennsylvania state senator, was convicted in 2011 of fraud, tax evasion, obstruction of justice, and conspiracy.⁸² Prosecutors introduced over 12,000 pages of Mr. Fumo’s TRULINCS emails—including some with his lawyers—during a re-sentencing hearing to argue that he lacked remorse and had not accepted responsibility for his crimes.⁸³ In his attorney-client emails, Mr. Fumo had said that he was “convicted of technical bullshit,” compared his predicament to the trials of Jesus Christ and the plight of the Jews during the Holocaust, and expressed tentative plans to publish a book describing the “travesty of justice” in his case.⁸⁴ The court added six months to Mr. Fumo’s original sentence and said that Mr. Fumo’s emails, particularly those in which he criticized the jury, demonstrated “his unwillingness even today to acknowledge that his acts were wrong.”⁸⁵

Mr. Fumo’s comments are not necessarily less remorseful than what other clients might express to their attorneys behind closed doors. In fact, such expressions of raw emotion, in the wake of an adverse outcome, are arguably natural byproducts of a healthy attorney-client relationship.⁸⁶

II. The government's email monitoring policies harm incarcerated persons in federal custody.

Similarly, emails between attorneys and incarcerated persons have been used in civil proceedings that are only tangentially related to the person's incarceration. For example, in *FTC v. National Urological Group*, Jared Wheat, a person incarcerated for conspiracy to import and sell prescription drugs, continued to play a managerial role in his pharmaceutical company.⁸⁷ As part of a civil case brought by the Federal Trade Commission, Mr. Wheat's company was enjoined from making broad, scientifically unsubstantiated claims in their product advertisements.⁸⁸ Mr. Wheat's attorneys expressed "grave concerns" about his proposed marketing strategy via email, which he nonetheless pursued.⁸⁹ In proceedings about violating the injunction, the court allowed the emails in to be used as evidence that Mr. Wheat took action that his counsel "believed [was] prohibited."⁹⁰ Though the case involves civil contempt, it is easy to see how this set of facts could apply in pretrial criminal proceedings, during trial, or during the appeals process. In any event, the fact that the attorneys' advice to their client was used in contempt proceedings is no less troubling.

Given the current lack of confidentiality, I have a strict rule against using the email system for advice or to discuss strategy. For ethical reasons, I only use it for routine communication. The biggest problem is that clients don't grasp the line between routine communication and privileged communication.

I regularly ask my new clients to create an account on the TRULINCS system and send me an email so we can connect. My initial message to them is always something along the lines of "thanks for connecting with me, but please people understand that we will only use TRULINCS for routine communication, not to discuss strategy or legal advice." However, most clients disregard my message and still want to discuss case strategy. I respond by saying "this is not appropriate, I'll send you a letter about it." But they don't always listen. – Criminal Defense Attorney Peter Goldberger

E. Some incarcerated persons are disproportionately harmed by the government's email policies.

The government's policy of monitoring privileged emails harms some groups more than others. Certain incarcerated persons who are experiencing disabilities, people of color, those who are seeking representation, and those who rely on public defenders or retain their own counsel but face funding limitations all would particularly benefit from access to confidential email.

Disability. Incarcerated persons are more likely than members of the general population to be experiencing a disability,⁹¹ but BOP has not factored this into its email policy.

According to one nationwide survey of local, state, and federal institutions, 7.1% of incarcerated persons have a vision disability, 6.2% have a hearing impairment, and 19.5% have a cognitive disability.⁹² Many others have learning disabilities or chronic medical conditions,⁹³ and BOP's lead psychologist has estimated that 40% of people in BOP's custody have a mental illness.⁹⁴

II. The government's email monitoring policies harm incarcerated persons in federal custody.

The experience of incarcerated persons with disabilities is exemplified by those who are deaf or hearing-impaired. Incarcerated persons who are deaf and hard of hearing often have greater difficulty communicating with their lawyers than the general prison population. These incarcerated persons often cannot use standard phones, so BOP may provide text telephone machines (“**TTY**”) as an accommodation.⁹⁵ TTY machines are extremely slow and are so outdated that “most deaf and hard of hearing households have never seen a TTY machine.”⁹⁶ BOP could easily implement common, newer technology like videophones, but few facilities have done so.⁹⁷ Given this, email is particularly important for incarcerated persons who are deaf or hard of hearing.

Email monitoring harms more people than just those with physical disabilities. It also hurts people with learning disabilities and mental illnesses that impair focus and information retention. People with information processing difficulties often need to review information multiple times and may not easily understand what their attorneys tell them over the phone or in-person.⁹⁸ Having access to a fast and efficient method of written communication, like email, would help these clients better understand their cases.

Race. As is well established, people of color are more likely to be detained before their trial than their white counterparts.⁹⁹ Accused persons can be held pretrial if they are deemed to be a flight risk or a danger to the community, and people of color are disproportionately found to meet these criteria.¹⁰⁰ The greatest of these burdens falls on Black men, who are twice as likely to be detained pretrial than white males.¹⁰¹ Because people of color are more likely to be detained pretrial, they are also more likely to be denied access to confidential email.

Income. The BOP policy harms incarcerated persons who are either defended by publicly funded lawyers or who are not wealthy but are still paying for their own defense. In the federal system, individuals accused of crimes who cannot pay for adequate representation have publicly funded attorneys appointed for them.¹⁰² For people with publicly funded counsel—whether that is a Federal Public Defender, an attorney at a Community Defender Office, or counsel appointed under the Criminal Justice Act¹⁰³—resources are often constrained. A recent two-and-a-half year study of public defense in the federal system raised significant concerns about “both the perception and realization of unfairness... in federal criminal proceedings when there are such clear disparities between the quality of representation and resources the government can bring to bear in a case, as compared to the resources a defendant without financial means can access.”¹⁰⁴ Requiring publicly funded counsel to rely on inefficient and costlier means of confidential communication with their clients further burdens the public defense system, which already has fewer resources to expend on clients’ cases than the government.

When a person does not qualify for appointed counsel or decides to hire their own attorney, they pay the costs of representation. As discussed above, even short in-person visits take a significant amount of attorney time, and a client must pay for the time the attorney spends on the visit, not just the time the meeting takes. This may be prohibitively expensive for all but the very wealthy. Sixty percent of Americans cannot afford an unexpected \$1,000 expense,¹⁰⁵ much less than the cost of a private attorney.¹⁰⁶ Access to confidential email would allow more defendants to communicate with their lawyers without going broke, and would be an important step towards equalizing their access to justice.

Providing quality representation requires resources, the most critical of which is the attorney's time. As the work measurement study conducted by the Judicial Resources Committee showed, [public] defenders have been chronically understaffed. – 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (Cardone Report)¹⁰⁷

Seeking representation. Email monitoring also hurts incarcerated persons who are seeking representation for their civil rights claims or appeals or who want a second opinion about their trial representation. For example, incarcerated persons may seek a lawyer to challenge their conditions of confinement or abuse suffered while in custody.¹⁰⁸ Experts argue “no one has a greater need to be able to engage in the uninhibited discussion of highly personal matters, tragic events, and official misconduct” confidentially, and with an attorney, than incarcerated persons.¹⁰⁹

*For my clients on appeal, email would help a lot. Appeals are usually very complicated, and they involve a lot of interaction between the client and the attorney. Postal mail is usually too slow for me to have these conversations. It can take a week for a letter to get to my incarcerated clients, a week for them to respond, and another week for them to get my reply. That's three weeks to have just one part of a conversation when we need to be talking regularly to develop the appeal. Privileged email would be extremely beneficial in these complicated appeals, so attorneys could send documents, answer questions quickly, and cut down on in-person visits.
– Criminal Defense Attorney Ken White*

F. BOP's policy undermines constitutional rights.

Finally, although it is mostly untested in courts, there is a persuasive argument that monitoring incarcerated persons' legal emails violates the Constitution, specifically the Sixth Amendment right to effective assistance of counsel and the First Amendment right to free speech.

The Supreme Court has never addressed whether incarcerated persons are entitled to exchange confidential legal emails. While the Supreme Court has also not squarely ruled on whether incarcerated persons are entitled to exchange confidential postal communications with their lawyers, its closest decision on point has led most lower courts to conclude that they do have this right. In *Wolff v. McDonnell*, the Supreme Court upheld a prison policy that allowed incoming and outgoing legal mail to be scanned for contraband in the presence of the incarcerated recipient.¹¹⁰ Although the Court did not rule on whether prison guards could read an incarcerated person's legal mail, the Court relied on the fact that mail was **not** being read in reaching its decision, explaining that scanning would not “chill such communications, since the inmate's presence insures that prison officials will not read the mail.”¹¹¹

The overwhelming majority of appellate courts have interpreted *Wolff* to bar prison officials from opening an incarcerated person's incoming legal mail outside of their presence, and to prohibit those officials from reading correspondence between attorneys and incarcerated persons.¹¹² Courts have grounded these opinions in a wide array of constitutional provisions, including the First Amendment rights to freedom of expression and to access the courts, and due process.¹¹³ Where cases involve those accused or convicted of crimes whose Sixth Amendment rights have attached, courts have also grounded the right to confidential legal mail in the Sixth Amendment right to counsel.¹¹⁴ For example, in striking down an Arizona Department of Corrections policy that "call[ed] for page-by-page content review of inmates' confidential outgoing legal mail," the U.S. Court of Appeals for the Ninth Circuit wrote:

A criminal defendant's ability to communicate candidly and confidentially with his lawyer is essential to his defense. In American criminal law, the right to privately confer with counsel is nearly sacrosanct. It is obvious to us that a policy or practice permitting prison officials to not just inspect or scan, but to *read* an inmate's letters to his counsel is highly likely to inhibit the sort of candid communications that the right to counsel and the attorney-client privilege are meant to protect.... It takes no stretch of imagination to see how an inmate would be reluctant to confide in his lawyer about the facts of the crime, perhaps other crimes, possible plea bargains, and the intimate details of his own life and his family members' lives, if he knows that a guard is going to be privy to them, too.¹¹⁵

These cases dealt with postal mail, not email. But the same result should be reached for email, given that email is the modern equivalent means of communication. The scope of what forms of confidential communication are protected by the Sixth Amendment has changed as technology evolves. The Sixth Amendment predates telephones being installed in jails and prisons by well over a century, but courts and even DOJ recognize that the Sixth Amendment right to counsel now includes unmonitored calls.¹¹⁶ It should also extend to email.

To be sure, a handful of courts to consider challenges to BOP's legal email monitoring have rejected them, generally relying on the waiver provision in the BOP terms of service.¹¹⁷ These decisions fail to appreciate the importance of confidential legal communications to the integrity of the judicial system, and the coercive nature of requiring incarcerated persons to agree to having their legal email monitored as a condition of having any email access at all.

The Supreme Court is increasingly recognizing the centrality of digital technologies in everyday life.¹¹⁸ In decisions extending constitutional protections to cover intrusions from new technologies, the Court has emphasized that constitutional protections must keep pace with changing technologies.¹¹⁹ These decisions further bolster the conclusion that incarcerated persons should have a constitutionally protected right to exchange confidential emails with their attorneys, as it has long been recognized that they do with postal mail.



BOP’s reasons for monitoring attorney-client email are unconvincing.

The government has attempted to justify the practice of monitoring attorney-client emails in several ways. The government points to the provision in the TRULINCS terms of service that provides incarcerated persons with notice that monitoring may occur; argues that BOP’s ability to filter out email exchanges with specific senders before handing over incarcerated persons’ emails to federal prosecutors cures the problem; and asserts that unmonitored email may lead to increased unlawful conduct. As explained below, these arguments are unavailing.

A. Incarcerated persons’ agreement that their email may be monitored is not meaningfully “voluntary.”

When defense counsel argue that federal prosecutors should not read incarcerated persons’ emails to their attorneys, federal prosecutors sometimes point out that incarcerated persons have “voluntarily” consented to monitoring.¹²⁰

But common sense dictates that incarcerated persons do not “voluntarily” consent to their emails being monitored. The terms of service are non-negotiable. Incarcerated persons who do not agree to them cannot use email at all. There is no choice. Also, as discussed above, alternative communication methods are not adequate, and sometimes—as with in-person visits for more than six months during the pandemic—they are not available at all.

Beyond this, even if the waiver was actually voluntary, it would simply not be in the public’s interest. Depriving one side of a legal case of an essential tool for confidential communication with a lawyer undermines the integrity of the legal system as a whole. The legal system recognizes that someone accused of a crime and facing incarceration requires the assistance of adequate legal counsel. The adequacy of counsel depends on the lawyer’s ability to build rapport with a client and gather relevant facts. This in turn depends on confidentiality. Depriving the accused of the ability to communicate with their attorneys via email is a serious blow to confidentiality for incarcerated clients.

Even trial courts that have felt compelled to find that incarcerated persons have waived attorney-client privilege in their emails have said much the same. One judge wrote:

Email is the primary and preferred method of communication in the legal profession, and has been for decades. Treating email attorney communications differently from attorney communications mailed through the post “snail mail” makes no sense. It is a distinction without cause. That BOP cannot implement, or simply has not implemented, procedures to allow privileged attorney-client email communication is troubling, to say the least.¹²¹

You don't have the right to eavesdrop on an attorney-client meeting in a prison or out of a prison, and it seems to me that you don't have the right to open up mail between counsel and an inmate or an inmate and counsel. . . . I don't see why it should make a difference whether the mode of communication is more modern or more traditional.

– United States District Court, Southern District of New York¹²²

B. BOP's email filtering capability does not help if it is not used.

Although TRULINCS now has a feature that allows the government to separate out emails to and from specific email addresses before forwarding an incarcerated person's emails to prosecutors, this does not make the BOP monitoring policy acceptable. A number of problems remain.

First, BOP retains the right to monitor emails between attorneys and incarcerated persons itself. As stated in an internal memorandum to all wardens that NACDL and the Samuelson Clinic obtained via Freedom of Information Act litigation, BOP's view is that the filtering feature “does NOT affect the Bureau of Prisons' authority, or an institution's ability to monitor all email exchanges.”¹²³ To the extent that incarcerated persons are concerned that the very guards who control them will read what they say in their emails to their attorneys—and may pass that information along to others—BOP's refusal to use its filtering software renders it worthless.

Second, because BOP still requires incarcerated persons to “voluntarily” consent to monitoring and to agree that their emails will not be considered privileged, attorneys will still be in an impossible ethical quandary when deciding whether to use the email system with their clients. As discussed above, lawyers are required to maintain the confidentiality of client information and it is unclear how a lawyer can do that while using a system that requires those clients to waive confidentiality in all information communicated through the system.

Third, even when it comes to protecting attorney-client communications from being handed over to prosecutors, the system falls short. Use of the filtering system is entirely discretionary. It is up to individual prosecutors' offices—and sometimes the line-prosecutors themselves—to decide whether to ask BOP to use the filtering capability at all. There does not appear to be any publicly available information about how many offices elect to use the filtering option to set aside attorney-client communications, and in what circumstances.

III. BOP's reasons for monitoring attorney-client email are unconvincing.

In addition, BOP has disclaimed responsibility for ensuring filtering is used or accurate. It has written that “BOP staff will not be expected to determine or verify the email address provided by the requesting law enforcement official. In addition, the requesting law enforcement entities will be responsible for verifying that no emails from the attorney were included in the production.”¹²⁴ Thus, unless federal prosecutors set up “clean teams”—a separate group of people isolated from those conducting an investigation or prosecution—to manually check the documents provided by BOP, there is still a chance that emails between attorneys and incarcerated persons will be handed over to prosecuting attorneys.

C. BOP's concerns about contraband and unlawful activity are insubstantial.

While some may argue that BOP should monitor emails between incarcerated persons and their attorneys to protect public safety, this is unnecessary given the ethical guidelines governing attorneys and the limits of email as a communication medium.

First, BOP retains the ability to strictly manage an incarcerated person's approved contacts. Just as it does for postal mail, BOP can develop a system to verify that a particular correspondent is, in fact, a member of the bar or part of the defense team. Moreover, attorneys are under strict professional and ethical obligations to not engage in illegal conduct.¹²⁵ When it comes to other forms of attorney-client communications, BOP acknowledges that monitoring is inappropriate. BOP has provided for confidential legal visits, legal mail, and unmonitored legal phone calls.¹²⁶ BOP offers no justification beyond its own convenience for why email should be treated differently than these other communications.¹²⁷

Also, the nature of email itself significantly reduces the risks posed by unmonitored communication. The government justifies manual searches of physical mail on the grounds of checking for contraband, for example, drugs or weapons or escape tools.¹²⁸ But it is simply not possible to conceal such things in an email.

With respect to the public safety concerns that led to monitoring, I don't see that as a persuasive issue for the government. They already don't normally record or listen to attorney-client visits—they don't worry about the danger there. The instances where attorneys are genuinely causing a risk (e.g., passing along instructions for witness intimidation) are extremely far-fetched. – Criminal Defense Attorney Ken White

They say that privileged email would be risky, impossible to verify, but that risk is already there with privileged phone, in-person, and mail communication. We decided to keep phone, in-person visits, and mail confidential and privileged because the Sixth Amendment is important. Emails should not be treated differently. – Criminal Defense Attorney Peter Goldberger

BOP does not seem to think that it has an obligation to provide protected attorney-client communication, and that doing so is a special accommodation. That is why the structure was not in place, and why our clients were and are at such a disadvantage, when the pandemic hit. Going forward, a system of protected communication would benefit everyone, including BOP, simply because they won't be scrambling to arrange legal phone calls. – Federal Public Defender Melody Brannon

D. All too often, email is one of the limited communication methods reliably available to incarcerated persons and attorneys.

In the past, federal prosecutors have argued that access to confidential email is unnecessary because incarcerated persons have other means of communication available to them.¹²⁹ This underestimates the frequency with which other methods of communications are in fact unavailable and the consequences of such unavailability.

The best example of this occurred with the ongoing Covid-19 pandemic. In March 2020, BOP facilities went into lockdown to restrict incarcerated persons' movements in hopes of limiting the spread of the coronavirus.¹³⁰ Legal visits were suspended for months on end, notwithstanding that incarcerated clients' cases continue to move forward, albeit generally more slowly.¹³¹ Although incarcerated persons were allowed increased telephone access while visits were suspended,¹³² BOP never adequately resolved the urgent need for access to their lawyers that clients faced during the period when in-person visits were suspended.

Since the pandemic struck, we've been struggling to talk to our clients in the federal jail. We can arrange a phone call on occasion, but getting a private line in the best of times is difficult. And these are far from the best of times. – Federal Public Defender Michael Caruso

III. BOP's reasons for monitoring attorney-client email are unconvincing.

Another example occurred in January 2019. At that time, the Metropolitan Detention Center (“MDC”) in Brooklyn curtailed nearly all attorney visits in light of the then-ongoing government shutdown caused by the lack of an approved budget.¹³³ Shortly thereafter, a fire caused a power outage that lasted a full week.¹³⁴ The jail lost heat in the midst of a significant cold snap.¹³⁵ MDC-Brooklyn responded by again suspending all legal visits, without even notifying lawyers.¹³⁶ Shortly after this incident, all visitations were unexpectedly suspended a third time until further notice, after a confrontation between BOP staff and individuals in the MDC’s lobby.¹³⁷

The availability of a confidential email system would help facilitate the continued provision of legal services despite disruptions to legal visitations or other methods of communication. While the government sometimes characterizes email as a luxury, given the fragility of other forms of communication, email is often a vital communication method. And even when other forms of communication are available, they may be too burdensome and too slow to permit *effective* communication.

We currently have better access to our clients in local facilities. In theory, BOP is more sophisticated and has much greater resources, but we can't reach our clients for confidential communications.

– Federal Public Defender Melody Brannon

IV. Recommendations

BOP's email monitoring policy harms incarcerated persons in federal custody in many ways. Congress could prevent this harm by passing a statute that would protect attorney-client privilege in email. This would help defense attorneys communicate with their clients more effectively, help them to gain the trust of their clients, and ultimately facilitate higher quality representation at a lower cost. NACDL and the Samuelson Clinic recommend that Congress adopt a legislative proposal with the elements described below.

Thankfully, most of these elements are already contained in an existing bill with wide bi-partisan support: H.R. 5546 in the 116th Congress, also known as the Effective Assistance of Counsel in the Digital Era Act. The House of Representatives passed this bill during the 116th Congress under a procedure reserved for non-controversial bills. Final passage is vitally important.

1 Prohibit monitoring of—and protect attorney-client privilege in—federal incarcerated persons' emails to their legal teams.

- The centerpiece of any legislative solution must be a **prohibition on monitoring attorney-client email communications**. BOP should be required to modify TRULINCS, or provide a new system, so as to allow emails to be exchanged between defense teams and their clients without BOP monitoring.
- One way to do this would be for BOP to collect names of attorneys and other individuals on the defense team representing incarcerated clients, and then to filter out communications to or from those people prior to reviewing an incarcerated person's emails.
- The statute should also be explicit that **attorney-client privilege applies to emails** sent between lawyers and their incarcerated clients on BOP's email system, to the same extent as it would to emails sent through a private email provider. For example, attorney-client privilege should apply to the entire legal team, including any lawyers, paralegals, investigators, law clerks, or administrative staff working on the case. On the other hand, current exceptions to the attorney-client privilege would also apply.

2 Establish reasonable limits on retention of emails between incarcerated persons and their legal teams.

- When it comes to how long the BOP should retain an incarcerated person's emails, there are two key questions any piece of legislation must answer. First, how long BOP can keep copies of attorney-client emails while the client is still in custody. And second, how long BOP can retain copies of attorney-client emails after the client leaves a BOP facility.

- On the first question, any statutory solution to BOP's current practices should require that BOP **retain emails for no more than six months**. This is BOP's own policy and practice.¹³⁸ Legislation should put that six-month limit into the statute.
- On the second question, BOP should **delete emails upon an individual's release from a BOP facility**. From a logical standpoint, there is no need for retention beyond that time. Once a person leaves a BOP facility, they no longer have access to TRULINCS to communicate with their lawyers, and BOP no longer has an interest in retaining the communications.

3 Require a warrant with high-level sign off before the government can access attorney-client emails.

- When clients are out of custody, law enforcement must get a warrant to obtain the content of their emails, regardless of who the emails are to or from.¹³⁹ Per DOJ's own policies, when materials are sought from an attorney about a client, the warrant application requires high-level sign-off (i.e., from a United States Attorney or Assistant Attorney General).¹⁴⁰
- Thus, any statutory fix to BOP's and DOJ's email monitoring policies should **require a warrant** issued by a neutral and detached magistrate judge. Additionally, a prosecutor should be required to **obtain sign-off from either the United States Attorney or Assistant Attorney General** before requesting a warrant for attorney-client emails held by BOP.

4 Limit access to attorney-client privileged emails to only those who need access and require a clean team to review any emails obtained with a warrant.

- Any legislation should establish strict restrictions on who can access attorney-client privileged emails and when. That includes **restricting access to the system within BOP or DOJ** to only necessary functions. For example, access should be permitted for system updates and maintenance.
- In a similar vein, DOJ should be **required to use a clean team** any time attorney-client emails are obtained from BOP. That team should consist of attorneys who are not involved in prosecuting the case, and any privileged material should not be shared with the prosecutors. This requirement mirrors what many prosecutors' offices currently do, either pursuant to formal policies or as a matter of practice, but legislation should be explicit to create uniformity around the country. Even if BOP uses a filtering mechanism as described above, using a clean team is still necessary because no filtering mechanism is perfect.

5 Create a statutory suppression remedy for violations of attorney-client privilege in emails.

- Any solution to this problem must contain a remedy. There should be a **statutory right to suppression** if evidence was obtained by improperly accessing privileged communications. Additionally, it is possible to impose civil penalties similar to those under privacy laws as a consequence for improperly providing, accessing, or using privileged communications.

Endnotes

¹ See Fed. Bureau of Prisons, *About Our Agency*, <https://www.bop.gov/about/agency/> (last visited Oct. 29, 2020), archived at <https://perma.cc/ZT77-HGBX>. Some of these individuals are in BOP custody while others are in the custody of the United States Marshals Service for pretrial detention. U.S. Marshals Serv., *Defendant and Prisoner Custody and Detention*, <https://www.usmarshals.gov/prisoner/detention.htm> (last visited May 18, 2020), archived at <https://perma.cc/KL7A-MFVD>.

² See, e.g., Craig R. McCoy, *The Sorrow and the Self-Pity: Fumo Lashes out in E-mails from Prison*, Phila. Inquirer (Oct. 30, 2011), https://www.inquirer.com/philly/news/homepage/20111030_The_sorrow_and_the_self-pity_Fumo_lashes_out_in_e-mails_from_prison.html, archived at <https://perma.cc/8VD7-R9Q8>.

³ *The Cost of Crime: Understanding the Financial and Human Impact of Criminal Activity: Hearing Before the S. Comm. on Judiciary*, 109th Cong. at 11 (Sept. 19, 2006) (statement of Harley Lappin, Director, Fed. Bureau of Prisons) (Sept. 19, 2006), https://www.judiciary.senate.gov/imo/media/doc/lappin_testimony_09_19_06.pdf, archived at <https://perma.cc/38AH-UYHE>; see also Fed. Bureau of Prisons, *Program Statement for Trust Fund Limited Inmate Computer System (TRULINCS)—Electronic Messaging 3* (Feb. 19, 2009), https://www.bop.gov/policy/progstat/5265_013.pdf, archived at <https://perma.cc/LE2W-3CQ9>.

⁴ TRULINCS is a multi-purpose platform with an email application that enables approved incarcerated persons to exchange emails with authorized members of the public. See Fed. Bureau of Prisons, *Stay in Touch*, <https://www.bop.gov/inmates/communications.jsp> (last visited June 17, 2020), archived at <https://perma.cc/R9R7-RXQJ>. The system does not allow for direct access to the internet. *Id.*

⁵ See Christopher Zoukis, *How to Email with Federal Inmates: An Introduction to CorrLinks*, Zoukis Prisoner Resources (Feb. 17, 2015), <http://www.prisonerresource.com/inmates/how-to-email-with-federal-inmates-an-introduction-to-corrlinks/>, archived at <https://perma.cc/H3RM-3FZ2>.

⁶ See *id.*; see also Fed. Bureau of Prisons, *Program Statement for Trust Fund/Deposit Fund Manual*, No. 4500.12, at 134 (Mar. 14, 2018) [hereinafter *BOP Trust Fund Manual*], <https://www.bop.gov/policy/progstat/4500.12.pdf>, archived at <https://perma.cc/BU25-KLLL>; Memorandum from David Shinn, Complex Warden, to Victorville Inmate Population Regarding Inmate TRULINCS Services (Jan. 23, 2018), <https://assets.documentcloud.org/documents/4448009/Victorville-Memos.pdf>, archived at <https://perma.cc/HYH3-2MH6> (indicating that incarcerated persons cannot have overlapping contacts).

⁷ See, e.g., Zoukis, *supra* note 5; Ingrid Burrington, *The Banality of Prison Email*, Mozilla Internet Citizen Blog (Aug. 8, 2018), <https://blog.mozilla.org/internetcitizen/2018/08/08/the-banality-of-prison-email/>, archived at <https://perma.cc/HE5A-BA97>.

⁸ See *Stay in Touch*, *supra* note 4.

⁹ See *id.*

¹⁰ See Burrington, *supra* note 7.

¹¹ Fed. Bureau of Prisons, *Inmate Agreement for Participating in TRULINCS Electronic Messaging Program* (June 2010) [hereinafter TRULINCS Terms of Service] (emphasis added), https://www.bop.gov/policy/forms/BP_Ao934.pdf, archived at <https://perma.cc/X8ZF-QU5N>.

¹² CorrLinks, *Terms and Conditions*, <https://www.corrlinks.com/Login.aspx> (follow “Terms and Conditions” hyperlink) (last modified Mar. 15, 2017) (stating that CorrLinks users must agree that “[a]ll information and content about messages sent and received using CorrLinks are accessible for review and/or download” by BOP).

¹³ See Privacy Act of 1974; System of Records, 70 Fed. Reg. 69594, 69594 (Nov. 16, 2005).

¹⁴ *Id.* at 69595.

¹⁵ *Id.* at 69594.

¹⁶ See *BOP Trust Fund Manual*, *supra* note 6, at 126.

¹⁷ See *id.*

¹⁸ See, e.g., Ex. A to Def. Counsel’s Letter to Court Regarding Emails 2, *United States v. Walia*, No. 14-cr-213-MKB (E.D.N.Y. July 9, 2014), ECF No. 34-1 [hereinafter *Walia Gov’t Ltr.*] (indicating the government obtained Mr. Walia’s attorney-client emails while investigation continued after charges were brought).

¹⁹ 70 Fed. Reg. at 69594.

²⁰ *Id.*

²¹ See *BOP Trust Fund Manual*, *supra* note 6, at 138.

²² See *id.*

²³ See *id.*

²⁴ See Fed. Bureau of Prisons, *Release of Information*, No. 1351.05, CN-2, at 1–2 (Mar. 9, 2016), https://www.bop.gov/policy/progstat/1351_005_CN-2.pdf, archived at <https://perma.cc/N4NT-ECEW>.

²⁵ Memorandum from Ken Hyle, Acting Asst. Dir./Gen. Counsel of Fed. Bureau of Prisons et al. to All Wardens Regarding Prisoner E-Mail Accounts (June 20, 2017), <https://www.nacdl.org/getattachment/1bb15bb2-cc24-435e-828b-8b80cd851b24/2017-06-20-memoretrulincsfilterspecificemails.pdf>, archived at <https://perma.cc/7KNY-BDEY>.

²⁶ *Id.*

²⁷ *Id.* All of the records obtained in NACDL’s Freedom of Information Act litigation can be found at <https://www.nacdl.org/Content/NACDL-v-BOP-and-DOJ>.

²⁸ See, e.g., Email from Kathleen M. Kenney to Michael Carjaval re: CEO Memo - regarding TRULINCS Filter for Specific Emails (Apr. 27, 2017), https://www.nacdl.org/getattachment/25bba275-bc63-44bf-bd30-f3aa09853dfc/2017-04-27_emailexplainingfilter.pdf, archived at <https://perma.cc/JN2S-HRNL>.

²⁹ See Memorandum from Ken Hyle, *supra* note 25.

³⁰ *Id.*

³¹ See U.S. Courts, *Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending December 31, 2019* (Dec. 31, 2019), https://www.uscourts.gov/sites/default/files/data_tables/stfj_d4_1231.2019.xlsx, archived at <https://perma.cc/2GRN-QCT7>.

³² See, e.g., Def. Counsel’s Letter to Court Regarding Emails (“Walia Def. Letter”) 2, *United States v. Walia*, No. 14-cr-213-MKB (E.D.N.Y. July 9, 2014), ECF No. 34 (indicating notice of email surveillance was provided via discovery when attorney-client emails were disclosed to the defense); Def. Counsel’s Letter Regarding Emails Sent Through the Bureau of Prison’s Email System (“Ahmed Def. Letter”) 1–2, *United States v. Ahmed*, No. 1:14-cr-277-DLI (E.D.N.Y. June 20, 2014), ECF No. 38 (discussing government informing both the Court and defense counsel of its intent to read attorney-client emails in the case).

³³ Memorandum from H. Marshall Jarrett, Dir., Exec. Office of U.S. Attorneys, Dep’t. of Justice, to All U.S. Attorneys, All First Assistant U.S. Attorneys, All Criminal Chiefs, and All Civil Chiefs Regarding Prisoner E-mail Accounts (May 4, 2009), https://www.nacdl.org/getattachment/do5d5489-562b-4e3d-9460-d63107835c8a/2009-05-04_eousapolicymemo.pdf, archived at <https://perma.cc/3WJK-6RQW>.

³⁴ E-mail from Chief, Crim. Div., U.S. Attorney’s Office, SDNY to Executive Director and Attorney-in-Chief, Federal Defenders of New York (Oct. 6, 2017 7:23 AM), https://www.nacdl.org/getattachment/79decb95-dbea-4734-95a7-f48fbb9d487/2017-10-06_emailsresdnyuseofrulincsfitering.pdf, archived at <https://perma.cc/MB4J-N4VM>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ USAOs that employ clean teams do so with varying levels of formality behind their policies. For example, as a matter of practice, the USAO in the Central District of California employs clean teams. See, e.g., Email from redacted official, C.D. Cal. U.S. Attorney’s Office, to redacted recipient (Nov. 3, 2015 12:26 PM), https://www.nacdl.org/getattachment/232co324-9a9a-4e85-a9ef-976f10459f91/2015-11-03_inmateemail_cdcaemails.pdf, archived at <https://perma.cc/5RCC-J8GC>; see also, e.g., U.S. Attorney, D. Kan. Procedure for Requesting Inmate Phone Calls, Videos and Emails in Criminal and Civil Cases (rev. Dec. 2018) (indicating the District of Kansas has formal policies for clean teams in place), https://www.nacdl.org/getattachment/e8050824-792e-4ca8-bofc-96b24de40666/2018-12_dkanpolicy.pdf, archived at <https://perma.cc/4WN6-WCNV>. Similarly, the USAO in the Eastern District of Kentucky has a written clean team policy, but it relies more heavily on the discretion of individual prosecutors. See Memorandum from Robert M. Duncan, Jr., U.S. Attorney, U.S. Attorney’s Office E.D. Ky., to All Employees Regarding Office Policy on Implementation and Use of Filter Teams (Dec. 21, 2018), https://www.nacdl.org/getattachment/72c56e65-9574-4ee9-beb3-c9dba7591b6c/2018-12-21_edkypolicyonfilterteams.pdf, archived at <https://perma.cc/5ETR-MS77>.

³⁸ McCoy, *supra* note 2.

³⁹ *Mapuatuli v. Holder*, No. 14-cv-506-LEK-BMK, 2015 WL 5769223, at *6 (D. Haw. Sept. 30, 2015).

⁴⁰ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); see also *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (discussing foundational importance of attorney-client privilege); *In re Search Warrant Issued June 13, 2019*, 942 F. 3d 159, 167, 172–73 (4th Cir. 2019) (discussing attorney-client privilege as “the oldest of the privileges” for confidential communications). For a practical guide on attorney-client privilege, see David M. Greenwald & Michele L. Slachetka, *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine* (2015), https://jenner.com/system/assets/publications/14637/original/2015Jenner_26BlockAttorney-ClientPrivilegeHandbook.pdf, archived at <https://perma.cc/M4ZA-XNN5>.

⁴¹ *Privilege*, Black’s Law Dictionary (11th ed. 2019).

⁴² *Blackburn*, 128 U.S. at 470.

⁴³ *Id.*

⁴⁴ *Upjohn Co.*, 449 U.S. at 389.

⁴⁵ *Lanza v. New York*, 370 U.S. 139, 143–44 (1962).

⁴⁶ *Nordstrom v. Ryan*, 762 F. 3d 903, 910 (9th Cir. 2014).

⁴⁷ See Greenwald & Slachetka, *supra* note 40, at 177–99.

⁴⁸ See, e.g., *United States v. Zolin*, 491 U.S. 554, 562–63 (1989).

⁴⁹ See *id.* at 562.

⁵⁰ See Am. Bar Ass’n, *Resolution 10A and Report 3* (Feb. 8, 2016) [hereinafter ABA Resolution], <https://www.law.berkeley.edu/wp-content/uploads/2020/05/2016-Midyear-ABA-Resolution-10A-Report-Proposed-Resolution.pdf>, archived at <https://perma.cc/9H8R-2QD6>.

⁵¹ See *id.* at 3.

⁵² See Fed. Bureau of Prisons, *Inmate Telephone Regulations*, No. P5264.o8, at 11 (Feb. 11, 2008) [hereinafter *BOP Telephone Program Statement*], https://www.bop.gov/policy/progstat/5264_008.pdf, archived at <https://perma.cc/39AH-XVEE>.

⁵³ See Fed. Bureau of Prisons, *Acknowledgment of Inmate, Part 3 & 4*, Form No. BP-Ao4o8, at 1 (Apr. 2010), https://www.bop.gov/policy/forms/BP_Ao4o8.pdf, archived at <https://perma.cc/U3YN-EUZY>.

⁵⁴ See, e.g., Def. Counsel’s Reply Ltr. to Court Regarding Emails (“*Walia* Def. Reply”) 2–3, *United States v. Walia*, No. 14-cr-213-MKB (E.D.N.Y. Jul. 22, 2014), ECF. No. 57; see also ABA Resolution, *supra* note 50, at 3.

⁵⁵ *Walia* Def. Reply, *supra* note 54, at 3.

⁵⁶ See *BOP Telephone Program Statement*, *supra* note 52, at 7.

⁵⁷ See *id.*

⁵⁸ *Id.* at 9.

⁵⁹ *Id.*

⁶⁰ See *id.*, at 11.

⁶¹ See Fed. Comm’n Comm’n, *Inmate Telephone Service* (Mar. 23, 2020), <https://www.fcc.gov/consumers/guides/inmate-telephone-service>, archived at <https://perma.cc/V7T3-BTTY>; see also 47 CFR § 64.6030.

⁶² Matt Kaiser, *DOJ Says They Can No Longer Afford to Respect Attorney-Client Privilege*, Above the Law (July 24, 2014), <https://abovethelaw.com/2014/07/doj-says-they-can-no-longer-afford-to-respect-the-attorney-client-privilege/>, archived at <https://perma.cc/N6JA-NW5Q> (discussing cuts to indigent defense travel budgets).

⁶³ See, e.g., ABA Resolution, *supra* note 50, at 3; see also *Walia* Def. Letter, *supra* note 32, at 3 (thirty minutes to an hour travel time, plus up to two additional hours to have client brought down); *Ahmed* Def. Letter, *supra* note 32, at 3 (over two hours to travel to and from the prison facility); Def. Counsel’s Letter Requesting to Preclude Government from Reading Attorney-Client Emails at 4, *United States v. Asaro*, No. 14-cr-26 (E.D.N.Y. Jul. 11, 2014), ECF No. 96 (“significant time” to travel to and from the prison facility); Martin Austermuhle, *D.C. Inmates Serve Time Hundreds of Miles From Home. Is It Time to Bring Them Back?*, WAMU (Aug. 10, 2017), <https://wamu.org/story/17/08/10/d-c-inmates-serving-time-means-hundreds-miles-home-time-bring-back/>, archived at <https://perma.cc/A3WL-LHNU> (criticizing BOP’s policy of incarcerating people far from where they live and noting that D.C.-based incarcerated persons “can be housed as close to the city as Cumberland, Maryland (136 miles from D.C.), as far as Victorville, California (2,586 miles), or anywhere in between”).

⁶⁴ Kaiser, *supra* note 62; see also Austermuhle, *supra* note 63.

⁶⁵ See, e.g., Kaiser, *supra* note 62 (noting that judges are probably unwilling to pay for extensive travel for CJA attorneys since they are publicly funded).

⁶⁶ See, e.g., Fed. Bureau of Prisons, *FDC Philadelphia Visiting Regulations: Institution Supplement*, No. PHL 5267.09C, at 8 (Apr. 30, 2018) https://www.bop.gov/locations/institutions/phl/PHL_visit_hours.pdf, archived at <https://perma.cc/23FT-7HT5> (allowing attorney laptops only with permission); Fed. Bureau of Prisons, *MCC Chicago Visiting Regulations: Institution Supplement*, No. CCC 5267.09D, at 3 (Mar. 6, 2018), https://www.bop.gov/locations/institutions/ccc/CCC_visit_hours.pdf, archived at <https://perma.cc/QWF8-P3XD> (allowing attorney laptops only with advance permission); Fed. Bureau of Prisons, *FDC Honolulu Visiting Regulations: Institution Supplement*, No. HON 5267.08J, at 11 (Aug. 29, 2015) https://www.bop.gov/locations/institutions/hon/HON_visit_reg.pdf, archived at <https://perma.cc/NU8Y-F3NL> (prohibiting attorney laptops); Fed. Bureau of Prisons, *MCC San Diego Visiting Regulations: Institution Supplement*, No. SDC 5267.08C, at 6 (Feb. 2012) https://www.bop.gov/locations/institutions/sdc/SDC_visit_hours.pdf, archived at <https://perma.cc/J4CM-N3MZ> (prohibiting attorney laptops); Fed. Bureau of Prisons, *Legal Visiting Booklet: MDC Guaynabo*, at 4 (last visited May 22, 2020), https://www.bop.gov/locations/institutions/gua/GUA_legal_visiting_guide.pdf, archived at <https://perma.cc/RW94-YJXH> (prohibiting attorney laptops).

⁶⁷ See, e.g., *Walia* Def. Letter, *supra* note 32, at 3.

⁶⁸ See ABA Resolution, *supra* note 50, at 4–5.

⁶⁹ See *id.* at 5; see also Mark Walsh, *Fifty Years After Gideon, Lawyers Still Struggle to Provide Counsel to the Indigent*, A.B.A. J. (Mar. 2013), http://www.abajournal.com/magazine/article/fifty_years_after_gideon_lawyers_still_struggle_to_provide_counsel, archived at <https://perma.cc/B7GG-CA8V> (arguing that privileged email is a cost-effective solution for improving the representation of indigent criminal defendants in federal court).

⁷⁰ *Walia* Def. Letter, *supra* note 32, at 2–3.

⁷¹ See, e.g., Model Rules of Prof'l Conduct R. 1.6, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/ (last visited May 22, 2020), archived at <https://perma.cc/JQ55-EE63>.

⁷² See, e.g., Am. Bar Ass'n, Formal Op. 477R (2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_477.pdf, archived at <https://perma.cc/83MR-F6RP>.

⁷³ See 70 Fed. Reg. at 69594.

⁷⁴ *Id.*

⁷⁵ See TRULINCS Terms of Service, *supra* note 11.

⁷⁶ See, e.g., Model Rules of Prof'l Conduct R. 1.3, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/ (last visited May 22, 2020), archived at <https://perma.cc/6BSM-4DR8>; Model Rules of Prof'l Conduct R. 1.4, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/ (last visited May 22, 2020), archived at <https://perma.cc/99KR-3QMR>.

⁷⁷ Am. Bar Ass'n, Std. Crim. Def. Function § 4-3.1(f) (4th ed.), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/, archived at <https://perma.cc/3L7D-AHLL>.

⁷⁸ ABA Stand. Crim. Def. Function § 4-3.1(f).

⁷⁹ See Memorandum from H. Marshall Jarrett, *supra* note 33.

⁸⁰ See 70 Fed. Reg. at 69594.

⁸¹ See *United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011), as amended (Sept. 15, 2011).

⁸² See *Fumo*, 655 F.3d at 296–97.

⁸³ Suppl. Reply Sentencing Memo. as to Vincent J. Fumo 3, *United States v. Luchko*, No. 2:06-cr-319 (E.D. Pa. Oct. 28, 2011), ECF No. 906; see also *Fumo*, 655 F.3d at 294.

⁸⁴ Tr. of Sentencing Hr'g Held on 11/10/11 at 55, *United States v. Luchko*, No. 2:06-cr-319 (E.D. Pa. Nov. 17, 2011), ECF No. 925.

⁸⁵ *Id.* at 47–48.

⁸⁶ See, e.g., ABA Stand. Crim. Def. Function § 4-3.1(f) (defense counsel must “actively work to maintain an effective and regular relationship with all clients,” an obligation that is not “diminish[ed] by the fact that the client is in custody”).

- ⁸⁷ See *FTC v. Nat'l Urological Grp., Inc.*, No. 1:04-cv-3294, 2014 WL 3893796, at *5 (N.D. Ga. May 14, 2014), *vacated and remanded on other grounds*, 785 F.3d 477 (11th Cir. 2015); see also Stephanie Clifford, *Prosecutors Are Reading Emails from Inmates to Lawyers*, N.Y. Times (July 22, 2014) (discussing Mr. Wheat's case), <https://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html> archived at <https://perma.cc/4HW7-HWTP>.
- ⁸⁸ See *FTC v. Nat'l Urological Group., Inc.*, 645 F. Supp. 2d 1167, 1177 (2008).
- ⁸⁹ See *Nat'l Urological Grp.*, 2014 WL 3893796, at *4-5.
- ⁹⁰ See *id.* at *5.
- ⁹¹ See, e.g., U.S. Dep't of Justice, Bureau of Justice Statistics, *Disabilities Among Prison and Jail Inmates, 2011-12*, at 3 (2015) <https://www.bjs.gov/content/pub/pdf/dpji1112.pdf>, archived at <https://perma.cc/52CM-A4WC>.
- ⁹² *Id.* at 3.
- ⁹³ Margo Schlanger, *Prisoners with Disabilities*, in *Reforming Criminal Justice: Punishment, Incarceration, and Release* 295 (E. Luna ed., 2017).
- ⁹⁴ See Dep't of Justice, Office of the Inspector Gen., *Review of the Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness* (July 2017), <https://oig.justice.gov/reports/2017/e1705.pdf>, archived at <https://perma.cc/M67L-9525>.
- ⁹⁵ Susan Mizner, *Prisons' Outdated Technology Prevents Those with Disabilities from Communicating with Their Loved Ones*, ACLU (Mar. 26, 2013), <https://www.aclu.org/blog/smart-justice/mass-incarceration/prisons-outdated-technology-prevents-those-disabilities>, archived at <https://perma.cc/GK9J-VLLZ>.
- ⁹⁶ *Id.*
- ⁹⁷ *Id.*
- ⁹⁸ See, e.g., Devon Fry & Linda Karanzalis, *What Is Nonverbal Learning Disorder*, ADDitude (Nov. 5, 2019), <https://www.additudemag.com/what-is-nonverbal-learning-disorder-symptoms-and-diagnosis>, archived at <https://perma.cc/Q6AD-APL4>.
- ⁹⁹ See Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 Kansas L. Rev. 879, 889 (2009); see also Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, Prison Policy Init. (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/, archived at <https://perma.cc/EW24-ALLT>.
- ¹⁰⁰ See Spohn, *supra* note 99, at 889.
- ¹⁰¹ See *id.* at 895.
- ¹⁰² 18 U.S.C. § 3006A.
- ¹⁰³ *Id.*

¹⁰⁴ Ad Hoc Comm. to Review the Crim. Justice Act, 2017 *Report of the Ad Hoc Committee to Review the Criminal Justice Act* (“Cardone Report”), at 148 (rev. Apr. 2018) [hereinafter *Cardone Report*], <https://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf>, archived at <https://perma.cc/RR96-VZDQ>.

¹⁰⁵ Annie Nova, *A \$1000 Emergency Would Push Many Americans Into Debt*, CNBC (Jan. 23, 2018, 9:41 EST), <https://www.cnbc.com/2019/01/23/most-americans-dont-have-the-savings-to-cover-a-1000-emergency.html>, archived at <https://perma.cc/8EYE-ZCQ7>.

¹⁰⁶ See, e.g., Sarah J. Berman, *Paying a Private Criminal Defense Attorney*, Nolo <https://www.nolo.com/legal-encyclopedia/paying-private-criminal-defense-attorney.html> (last visited May 23, 2020), archived at <https://perma.cc/P6F2-P5EG>.

¹⁰⁷ *Cardone Report*, *supra* note 104, at 167.

¹⁰⁸ See 28 C.F.R. § 542.16 (indicating *incarcerated persons* are permitted to seek and obtain legal assistance in filing complaints regarding any aspect of their confinement).

¹⁰⁹ Gregory Sisk et al., *Reading the Prisoner’s Letter: Attorney-Client Confidentiality in Inmate Correspondence*, 109 J. Crim. Law & Criminology 559, 559 (2019).

¹¹⁰ 418 U.S. 539, 575–76 (1974).

¹¹¹ *Id.* at 577.

¹¹² See, e.g., *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) (holding that the reading of incarcerated persons’ legal mail violates the Sixth Amendment right to counsel); *Guajardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010) (“A practice of prison officials reading mail between a prisoner and his lawyer in a criminal case would raise serious issues under the Sixth Amendment”); *Merrweather v. Zamora*, 569 F.3d 307, 317 (6th Cir. 2009) (“[O]pening properly marked legal mail alone, without doing more, implicates both the First and Sixth Amendments because of the potential for a ‘chilling effect.’”); *Al-Amin v. Smith*, 511 F.3d 1317 (11th Cir. 2008) (indicating that “inmates have a constitutionally protected right to have their properly marked attorney mail opened in their presence”); *Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006) (finding that inadequately protecting an incarcerated person’s right to legal mail “interferes with protected communications, strips those protected communications of their confidentiality, and accordingly impinges upon the inmate’s right to freedom of speech”); *Sallier v. Brooks*, 343 F.3d 868, 877 (6th Cir. 2003) (relying on First Amendment and right to access courts); *Altizer v. Deeds*, 191 F.3d 540, 549 n.14 (4th Cir. 1999) (“Inspecting an inmate’s legal mail may implicate the inmate’s Sixth Amendment right to communicate freely with his attorney in a criminal case.”); *but see Brewer v. Wilkinson*, 3 F.3d 816, 825 (5th Cir. 1993) (holding that opening legal mail outside the presence of an incarcerated person did not violate his right to free speech and access to the courts).

¹¹³ See e.g., *Al-Amin*, 511 F.3d at 1332–34 (invoking First Amendment and right of access to courts); *Jones*, 461 F.3d at 359 (finding that inadequately protecting incarcerated person’s right to legal mail “interferes with protected communications, strips those protected communications of their confidentiality, and accordingly impinges upon the inmate’s right to freedom of speech”); *Sallier*, 343 F.3d at 877 (relying on First Amendment and right to access courts).

¹¹⁴ See e.g., *Nordstrom*, 762 F.3d at 903 (holding that the reading of legal mail violates incarcerated person’s Sixth Amendment right to counsel); see also *Guajardo-Palma*, 622 F.3d at 803 (“A practice of prison officials reading mail between a prisoner and his lawyer in a criminal case would raise serious issues under the Sixth Amendment . . .”); *Merriweather*, 569 F.3d at 317 (“[O]pening properly marked legal mail alone, without doing more, implicates both the First and Sixth Amendments because of the potential for a ‘chilling effect.’”); *Altizer*, 191 F.3d at 549 n.14 (“Inspecting an inmate’s legal mail may implicate the inmate’s Sixth Amendment right to communicate freely with his attorney in a criminal case.”); but see *Brewer*, 3 F.3d at 825 (holding that opening legal mail outside the presence of an incarcerated person did not violate his right to free speech and access to the courts).

¹¹⁵ *Nordstrom*, 762 F.3d at 910.

¹¹⁶ See, e.g., *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir. 1991) (indicating that there is a Sixth Amendment right to telephone communication with lawyers and stating that “prisoners of course must be permitted to confer with counsel”); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) (implying there is a Sixth Amendment right to telephone calls with lawyer); see also *Bureau of Prisons Disclosure of Recorded Inmate Telephone Conversations*, 21 Op. O.L.C. 11, 20 (1997), <https://www.justice.gov/file/19876/download>, archived at <https://perma.cc/R84J-L6NV> (conceding incarcerated clients have a Sixth Amendment right to telephone calls with their lawyers).

¹¹⁷ See, e.g., *Mapuatuli v. Holder*, No. 14-cv-506-LEK-BMK, 2015 WL 5769223 (D. Haw. Sept. 30, 2015); *United States v. Asaro*, No. 14-cr-26-ARR, 2014 WL 12828985 (E.D.N.Y. July 17, 2014); *United States v. Walia*, No. 14-CR-213 (MKB), 2014 WL 3734522, at *16 (E.D.N.Y. July 25, 2014); *F.T.C. v. Nat’l Urological Grp., Inc.*, Case No. 1:04-CV-3294-CAP, 2012 WL 171621, at *1 (N.D. Ga. Jan. 20, 2012); see also *Sebolt v. Samuels*, 749 Fed. App’x 458 (7th Cir. 2018) (rejecting an incarcerated person’s *pro se* challenge to a federal correctional institution’s decision to deny him access to TRULINCS on the grounds that such denial was reasonable given his conviction for using a computer to commit federal crimes involving child pornography, and his prior use of the prison mail system to advertise child pornography).

¹¹⁸ See, e.g., *Riley v. California*, 573 U.S. 373, 385 (2014) (describing cell phones as “a pervasive and insistent part of daily life”).

¹¹⁹ See *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (describing how, as technology has advanced the government’s capacity to engage in surveillance, the Court has worked to preserve the quantum of privacy available when the Fourth Amendment was adopted).

¹²⁰ See, e.g., *Walia Gov’t Ltr.*, *supra* note 18, at 2.

¹²¹ *Arciero*, 2015 WL 5769223, at *6.

¹²² Tr. of Proceedings on Sept. 26, 2011 at 10:8–12, *United States v. Saade*, No. 1:11-cr-00111 (S.D.N.Y. Sept. 26, 2011), ECF No. 42.

¹²³ Memorandum from Ken Hyle, *supra* note 25.

¹²⁴ *Id.*

- ¹²⁵ See e.g., Model Rules of Prof'l Conduct R. 1.2(d), 1.16(b)(2), 1.16(b)(3), 8.4(a), 8.4(b) (stating that lawyers may not counsel clients or participate in crime or fraud, must withdraw from representations if the client uses lawyer's services to commit a crime or fraud, and that lawyers commit misconduct for violating the professional rules or engaging in criminal activity "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects").
- ¹²⁶ See, e.g., Brandon P. Ruben, *Should the Medium Affect the Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, 83 *Fordham L. Rev.* 2131, 2148 (2015).
- ¹²⁷ See, e.g., Tr. of Proceedings on June 27, 2014 at 21:8–10, *United States v. Ahmed*, No. 1:14-cr-277-DLI (E.D.N.Y. July 11, 2014), ECF No. 47 (trial judge stating "I see absolutely no reason why the government should have any interest in this case to look at the attorney-client e-mails other than it's easier for the government and it's more cost-efficient for the government").
- ¹²⁸ See, e.g. *Nordstrom*, 856 F.3d at 1269 (indicating the government justified policy of inspecting outgoing legal mail as necessary to detect contraband).
- ¹²⁹ See, e.g., *Walia Gov't Ltr.*, *supra* note 18, at 2.
- ¹³⁰ See Fed. Bureau of Prisons, *Federal Bureau of Prisons COVID-19 Action Plan* (Mar. 13, 2020), https://www.bop.gov/resources/news/20200313_covid-19.jsp, archived at <https://perma.cc/CB8M-D6VL>.
- ¹³¹ BOP's default policy restricting visitations was in place from mid-March 2020 until October 8, 2020. Compare *id.*, with Fed. Bureau of Prisons, *BOP Implementing Modified Operations* (Oct. 8, 2020) [hereafter Oct. 8, 2020 BOP Visiting Policy], https://www.bop.gov/coronavirus/covid19_status.jsp, archived at <https://perma.cc/4DRC-6WLH>. As of October 8, 2020, the central policy for legal visits as BOP stated that "[c]onsistent with standing guidance, in-person legal visits are accommodated upon request, based on local resources, and will follow preventative protocols (e.g. face coverings required)." Oct. 8, 2020 BOP Visiting Policy.
- ¹³² See Oct. 8, 2020 BOP Visiting Policy, *supra* note 131.
- ¹³³ See *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 123 (2d Cir. 2020).
- ¹³⁴ *Id.* at 123.
- ¹³⁵ Dep't of Justice, Office of the Inspector Gen., *Review and Inspection of Metropolitan Detention Center Brooklyn Facilities Issues and Related Impacts on Inmates 1* (Sept. 2019), <https://oig.justice.gov/reports/2019/e1904.pdf>, archived at <https://perma.cc/SVA7-T9Z2>.
- ¹³⁶ *Id.* at 1.
- ¹³⁷ *Fed Defs. of New York*, 954 F.3d at 123.
- ¹³⁸ See 70 Fed. Reg. at 69594.
- ¹³⁹ See, e.g., *United States v. Warshak*, 631 F.3d 266, 285–86 (6th Cir. 2010).
- ¹⁴⁰ See Dep't of Justice, *Justice Manual* § 9.13-420 (Jan. 2020), <https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.420>, archived at <https://perma.cc/Q9DG-NPMD>.

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