



February 5, 2021

The undersigned organizations write in strong support of the bipartisan Effective Assistance of Counsel in the Digital Era Act (H.R. 546), recently reintroduced in the House by Congressman Jeffries (D-N.Y.). This bill ensures that email communications between people in Federal Bureau of Prisons (BOP) custody and their legal teams are protected with the same privilege as legal visits, letters, and phone calls. This legislation was reported out of the Judiciary Committee unanimously last Congress and was passed in the House twice – once as part of a COVID relief bill and later without objection on the House floor. Both of these actions by the House display the high level of support for this common-sense, bipartisan reform.

The principles of justice, fairness, and due process upon which our legal system is built necessitate confidentiality between the accused and their defense counsel. 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.¹ This privilege is critical when clients are in custody, and the form of communication—whether it be in person, by letter, by telephone, or by email – should have no bearing on that protection.

Currently, individuals held in BOP facilities are uniformly denied the ability to have privileged communications with their lawyers through TRULINCS, the only email system available to them. In order to use the BOP system, incarcerated individuals must

¹ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); see also, e.g., *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).

sign a waiver acknowledging that their communications may be monitored.² Without signing the waiver, they cannot use the email system, cutting off any opportunity to communicate electronically.

The need for access to privileged email is long overdue, and it is more critical than ever today. As the COVID pandemic has raged across the country and spread through detention facilities, BOP has restricted in-person visits, and unmonitored calls and legal mail are more difficult to use. But incarcerated clients' need to have access to their lawyers is undiminished, and in many instances is heightened by the delays and fears brought on by the pandemic. Email is the safest and most cost-effective means of communicating.

The Effective Assistance of Counsel in the Digital Era Act remedies many of these concerns by striking the right balance between the government's limited interest in accessing certain email communications with a warrant and the need to properly protect communications subject to the attorney-client privilege. This legislation will only require the Department of Justice to change procedures concerning attorney-client communications and still maintains the ability for United States Attorneys to access other emails.

Privileged communication is the cornerstone of attorney-client relationships and inseparable from the due process rights on which the U.S. legal system is founded. It is past time for BOP to bring its policies into the 21st century and ensure that electronic communications between people in custody and their legal teams are protected. We urge you to move quickly and pass the Effective Assistance of Counsel in the Digital Era Act (H.R. 546).

Respectfully submitted,

American Civil Liberties Union
Dream Corps
Fair and Just Prosecution
FAMM
Federal Public & Community Defenders
Law Enforcement Action Partnership
National Action Network
National Association of Criminal Defense Lawyers

² Federal Bureau of Prisons, Inmate Agreement for Participating in TRULINCS Electronic Messaging Program, U.S. Department of Justice (June 2010), https://www.bop.gov/policy/forms/BP_A0934.pdf.