

January 27, 2021

Office of Representative Hakeem Jeffries
2433 Rayburn House Office Building
Washington, DC 20515

Office of Representative Van Taylor
1404 Longworth House Office Building
Washington, DC 20515

Dear Representatives Jeffries and Taylor,

Our undersigned organizations write in support of your legislation, Effective Assistance of Counsel in the Digital Era Act. Confidentiality between the accused and their defense counsel is a core foundation of our legal system upon which the principles of fair trial, limited government, and adequate legal representation are built. This attorney-client privilege—with deep roots in English and American law—ensures men and women charged with or convicted of a crime have the confidence to “disclose everything, bad as well as good” to legal counsel and receive the best possible guidance and representation.¹ Your legislation ensures this essential civil liberty remains meaningful for incarcerated men and women in the Bureau of Prisons in the coming century.

Current law prohibits government monitoring within the Bureau of Prisons (BOP) of communications through mail, in person, or by phone between incarcerated individuals and their legal representatives. This broad protection of the attorney-client privilege, however, does not extend to correspondence within TRULINCS—the BOP’s email system—leaving a clear gap for constitutionally and legally dubious forms of government surveillance.² This concern is far from abstract; in *United States vs. Fumo*, prosecutors used a federal prisoner’s emails with his attorneys during incarceration as evidence in the government’s appeal for resentencing.³ Similar incidents have emerged in Georgia and New York.⁴ As a result, men and women in BOP custody lack assurance of an essential precondition for fair legal representation. For most federal prisoners, electronic communication with defense counsel is the most efficient, least costly means of discussing their case. Due to the modified operations of the Bureau prompted by COVID-19, individuals in BOP must rely even more correspondence via TRULINCS with legal representatives.⁵ Under the status quo, those individuals held by the Bureau of Prisons—particularly those with limited financial means—cannot access robust defense counsel.

This legislation helps ensure the attorney-client privilege is respected within BOP facilities by keeping up with technological change. Specifically, the Effective Assistance of Counsel Act mandates the Department of Justice’s prompt creation of a system to filter out communications over TRULINCS between incarcerated clients and their attorneys. The Act subjects such

¹ Christina Koningsor, *The De Facto Reporter’s Privilege*, 127 Yale L. J. 1176 (2018), https://www.yalelawjournal.org/pdf/Koningsor_ojr74u1a.pdf; Geoffrey C. Hazard, Jr., *A Historical Perspective on the Lawyer-Client Privilege*, 66Calif. L. Rev. 1061 (1978), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3288&context=fss_papers.

²Federal 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.

³ Complaint for Injunctive Relief at 1-11, *National Association of Criminal Defense Lawyers v. Federal Bureau of Prisons*, Civil Action No. 1:18-cv—2399 (D.D.C. Oct. 18, 2018), <https://www.nacdl.org/getattachment/93536fe3-bfef-48c5-bace-4ec018284e74/nacdlcomplaint.pdf>.

⁴ *United States v. Asaro*, 2014 U.S. Dist. LEXIS 97396, at *1-5 (E.D.N.Y. July 15, 2014); *Federal Trade Commission v. National Urological Group, Inc.*, 2012 U.S. Dist. LEXIS 6845, 2012 WL 171621, at *5-8 (N.D. Ga. Jan. 20, 2012).

⁵BOP, *BOP Modified Operations*, U.S. Department of Justice (November 25, 2020) https://www.bop.gov/coronavirus/covid19_status.jsp.

electronic correspondences to the “applicable protections or limitations on matters protected by attorney-client privilege.” The Act respects the legitimate needs of public safety by allowing law enforcement to access saved TRULINCS emails through a court-issued warrant; however, any emails determined by a United State Attorney to be privileged communications between a client and their legal representative will remain confidential.

Robust defense counsel and its core prerequisite—attorney-client privilege—honors the human dignity of men and women in the justice system. We urge members of the 117th Congress to cosponsor and support the Effective Assistance of Counsel in the Digital Era Act to ensure access to robust legal representation through the assurance of attorney-client privilege in the federal prison system.

Sincerely,

Derek Cohen
Director
Right on Crime



Mark Holden
Board Chairman
Americans for Prosperity



Shana-Tara O’Toole
President
Due Process Institute



DUE PROCESS
INSTITUTE

Patrick Purtill
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