

September 23rd, 2020

The Honorable Mitch McConnell
Senate Majority Leader
United States Senate
Washington, DC 20510

The Honorable Chuck Schumer
Senate Minority Leader
United States Senate
Washington, D.C. 20510

Re: Allow Floor Consideration of Effective Assistance of Counsel in the Digital Era Act

Dear Senator McConnell and Senator Schumer,

The undersigned organizations write to request that the Effective Assistance of Counsel in the Digital Era Act (H.R. 5546) be placed on the Senate calendar for consideration. This legislation was reported unanimously by the House Judiciary Committee and passed 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. With both the 2020 elections and the end of the 116th Congress quickly approaching, it is imperative that this bill is considered by the full Senate.

The principles of justice, fairness, and due process upon which our legal system is built necessitate confidentiality between the accused and their defense counsel. The concept of attorney-client privilege has existed since common law and was recognized by early American jurists as essential to a just society.¹ This legislation will ensure this important protection for those in our federal prisons.

Current law prohibits the federal government from monitoring communications between incarcerated individuals and their attorney by mail, phone, or in-person verbal communication but fails to protect communications sent through the Bureau of Prisons' (BOP) email communication platform.² For most individuals currently incarcerated in our federal prisons, email communication is currently the safest, least costly, and most efficient means to communicate with their attorney but the status quo poses a major barrier to many receiving effective legal representation. Particularly given COVID-19, individuals who are incarcerated have been unable to meet with their attorneys in person

¹ Christina Koningsor, *The De Facto Reporter's Privilege*, 127 Yale L. J. 1176 (2018); Geoffrey C. Hazard, Jr., *A Historical Perspective on the Lawyer-Client Privilege*, 66 Calif. L. Rev. 1061 (1978).

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.

and the failure to protect their email communications undermines the strength of attorney-client privilege in our justice system during this uncertain time.³

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 to access certain 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 current procedures concerning attorney-client communications and still maintains the ability for United States Attorneys to access other emails.

Robust legal defense and the protections inherent in the attorney-client privilege are necessary to prevent arbitrary prosecutions and ensure true justice. We urge you to place the Effective Assistance of Counsel in the Digital Era Act (H.R. 5546) on the Senate calendar and allow these protections to be considered by the entire membership of your chamber.

Sincerely,

Americans for Prosperity

#cut50, a program of Dream Corps

Due Process Institute

Fair and Just Prosecution

Faith & Freedom Coalition

FAMM

Federal Public and Community Defenders

FreedomWorks

Law Enforcement Action Partnership

National Association of Criminal Defense Lawyers

³ Bureau of Prisons, BOP Implementing Modified Operations, Bureau of Prisons (2020), https://www.bop.gov/coronavirus/covid19_status.jsp.