



The Honorable Charles E. Schumer
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Richard Durbin
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, D.C. 20510

The Honorable Chuck Grassley
Ranking Member, Committee on the
Judiciary
United States Senate
Washington, D.C. 20510

December 15, 2022

NACDL Urges Passage of the Effective Assistance of Counsel in the Digital Era Act

Dear Majority Leader Schumer, Minority Leader McConnell, Chairman Durbin, and Ranking Member Grassley:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I urge you to pass the bipartisan Effective Assistance of Counsel in the Digital Era Act (EACDEA), H.R. 546/S. 3524, before the 117th Congress adjourns. The 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 passed in the House with overwhelming bipartisan support in a 414-11 vote. The action by the House and bipartisan sponsorship for the Senate bill indicates a high level of support for this common-sense 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 sign a waiver

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).

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.

Access to privileged email is long overdue, and it is more critical than ever today. As COVID-19 began to spread through detention facilities, BOP restricted in-person visits, and unmonitored calls and legal mail became more difficult to access. But incarcerated clients' need to have access to their lawyers was undiminished, and in many instances was heightened by the delays and fears brought on by the pandemic. Email remains 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. While we understand the numerous actions that must be taken by this Congress before it adjourns, we urge you to include EACDEA in an appropriate year-end bill and remedy this longstanding issue.

For more information on the issue, please see the report [*Preserving Incarcerated Persons' Attorney-Client Privilege in the 21st Century: Why the Federal Bureau of Prisons Must Stop Monitoring Confidential Legal Emails*](#) drafted by NACDL and The Samuelson Law, Technology and Public Policy Clinic at Berkeley Law. Please direct any questions to NACDL's Fourth Amendment Director Jumana Musa at jmusa@nacdl.org or (202) 669-0293.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lisa Monet Wayne". The signature is fluid and cursive, with a large initial "L" and "M".

Lisa Monet Wayne
Executive Director

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.