

Union Calendar No. 407

116TH CONGRESS
2D SESSION

H. R. 5546

[Report No. 116–507]

To regulate monitoring of electronic communications between an incarcerated person in a Bureau of Prisons facility and that person’s attorney or other legal representative, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 7, 2020

Mr. JEFFRIES (for himself, Mr. COLLINS of Georgia, and Mr. NADLER) introduced the following bill; which was referred to the Committee on the Judiciary

SEPTEMBER 16, 2020

Additional sponsors: Mr. SENSENBRENNER, Ms. BASS, Mr. TAYLOR, Ms. CLARKE of New York, Mrs. WAGNER, Ms. NORTON, Mr. CLINE, Ms. ESHOO, Mr. COLE, Mr. NEGUSE, Mr. ARMSTRONG, Ms. SCANLON, Mr. CRENSHAW, Mr. COHEN, Mrs. RODGERS of Washington, Ms. JACKSON LEE, Mr. BACON, Ms. DEAN, Mr. JOHNSON of South Dakota, Mr. RICHMOND, Mr. CICILLINE, and Mr. BLUMENAUER

SEPTEMBER 16, 2020

Reported from the Committee on the Judiciary; committed to the Committee of the Whole House on the State of the Union and ordered to be printed

A BILL

To regulate monitoring of electronic communications between
an incarcerated person in a Bureau of Prisons facility
and that person's attorney or other legal representative,
and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Effective Assistance
5 of Counsel in the Digital Era Act”.

6 **SEC. 2. ELECTRONIC COMMUNICATIONS BETWEEN AN IN-**
7 **CARCERATED PERSON AND THE PERSON’S**
8 **ATTORNEY.**

9 (a) PROHIBITION ON MONITORING.—Not later than
10 180 days after the date of the enactment of this Act, the
11 Attorney General shall create a program or system, or
12 modify any program or system that exists on the date of
13 enactment of this Act, through which an incarcerated per-
14 son sends or receives an electronic communication, to ex-
15 clude from monitoring the contents of any privileged elec-
16 tronic communication. In the case that the Attorney Gen-
17 eral creates a program or system in accordance with this
18 subsection, the Attorney General shall, upon implementing
19 such system, discontinue using any program or system
20 that exists on the date of enactment of this Act through
21 which an incarcerated person sends or receives a privileged
22 electronic communication, except that any program or sys-
23 tem that exists on such date may continue to be used for
24 any other electronic communication.

1 (b) RETENTION OF CONTENTS.—A program or sys-
2 tem or a modification to a program or system under sub-
3 section (a) may allow for retention by the Bureau of Pris-
4 ons of, and access by an incarcerated person to, the con-
5 tents of electronic communications, including the contents
6 of privileged electronic communications, of the person
7 until the date on which the person is released from prison.

8 (c) ATTORNEY-CLIENT PRIVILEGE.—Attorney-client
9 privilege, and the protections and limitations associated
10 with such privilege (including the crime fraud exception),
11 applies to electronic communications sent or received
12 through the program or system established or modified
13 under subsection (a).

14 (d) ACCESSING RETAINED CONTENTS.—Contents re-
15 tained under subsection (b) may only be accessed by a per-
16 son other than the incarcerated person for whom such con-
17 tents are retained under the following circumstances:

18 (1) ATTORNEY GENERAL.—The Attorney Gen-
19 eral may only access retained contents if necessary
20 for the purpose of creating and maintaining the pro-
21 gram or system, or any modification to the program
22 or system, through which an incarcerated person
23 sends or receives electronic communications. The At-
24 torney General may not review retained contents
25 that are accessed pursuant to this paragraph.

1 (2) INVESTIGATIVE AND LAW ENFORCEMENT
2 OFFICERS.—

3 (A) WARRANT.—

4 (i) IN GENERAL.—Retained contents
5 may only be accessed by an investigative or
6 law enforcement officer pursuant to a war-
7 rant issued by a court pursuant to the pro-
8 cedures described in the Federal Rules of
9 Criminal Procedure.

10 (ii) APPROVAL.—No application for a
11 warrant may be made to a court without
12 the express approval of a United States
13 Attorney or an Assistant Attorney General.

14 (B) PRIVILEGED INFORMATION.—

15 (i) REVIEW.—Before retained con-
16 tents may be accessed pursuant to a war-
17 rant obtained under subparagraph (A),
18 such contents shall be reviewed by a
19 United States Attorney to ensure that
20 privileged electronic communications are
21 not accessible.

22 (ii) BARRING PARTICIPATION.—A
23 United States Attorney who reviews re-
24 tained contents pursuant to clause (i) shall
25 be barred from—

1 (I) participating in a legal pro-
2 ceeding in which an individual who
3 sent or received an electronic commu-
4 nication from which such contents are
5 retained under subsection (b) is a de-
6 fendant; or

7 (II) sharing the retained contents
8 with an attorney who is participating
9 in such a legal proceeding.

10 (3) MOTION TO SUPPRESS.—In a case in which
11 retained contents have been accessed in violation of
12 this subsection, a court may suppress evidence ob-
13 tained or derived from access to such contents upon
14 motion of the defendant.

15 (e) DEFINITIONS.—In this Act—

16 (1) the term “agent of an attorney or legal rep-
17 resentative” means any person employed by or con-
18 tracting with an attorney or legal representative, in-
19 cluding law clerks, interns, investigators, paraprofes-
20 sionals, and administrative staff;

21 (2) the term “contents” has the meaning given
22 such term in 2510 of title 18, United States Code;

23 (3) the term “electronic communication” has
24 the meaning given such term in section 2510 of title

1 18, United States Code, and includes the Trust
2 Fund Limited Inmate Computer System;

3 (4) the term “monitoring” means accessing the
4 contents of an electronic communication at any time
5 after such communication is sent;

6 (5) the term “incarcerated person” means any
7 individual in the custody of the Bureau of Prisons
8 or the United States Marshals Service who has been
9 charged with or convicted of an offense against the
10 United States, including such an individual who is
11 imprisoned in a State institution; and

12 (6) the term “privileged electronic communica-
13 tion” means—

14 (A) any electronic communication between
15 an incarcerated person and a potential, current,
16 or former attorney or legal representative of
17 such a person; and

18 (B) any electronic communication between
19 an incarcerated person and the agent of an at-
20 torney or legal representative described in sub-
21 paragraph (A).

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