

116TH CONGRESS
2D SESSION

H. R. 5546

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

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”.

1 **SEC. 2. ELECTRONIC COMMUNICATIONS BETWEEN AN IN-**
2 **CARCERATED PERSON AND THE PERSON'S**
3 **ATTORNEY.**

4 (a) PROHIBITION ON MONITORING.—Not later than
5 180 days after the date of the enactment of this Act, the
6 Attorney General shall create a program or system, or
7 modify any program or system that exists on the date of
8 enactment of this Act, through which an incarcerated per-
9 son sends or receives an electronic communication, to ex-
10 clude from monitoring the contents of any privileged elec-
11 tronic communication. In the case that the Attorney Gen-
12 eral creates a program or system in accordance with this
13 subsection, the Attorney General shall, upon implementing
14 such system, discontinue using any program or system
15 that exists on the date of enactment of this Act through
16 which an incarcerated person sends or receives a privileged
17 electronic communication, except that any program or sys-
18 tem that exists on such date may continue to be used for
19 any other electronic communication.

20 (b) RETENTION OF CONTENTS.—A program or sys-
21 tem or a modification to a program or system under sub-
22 section (a) may allow for retention by the Bureau of Pris-
23 ons of, and access by an incarcerated person to, the con-
24 tents of electronic communications, including the contents
25 of privileged electronic communications, of the person
26 until the date on which the person is released from prison.

1 (c) ATTORNEY-CLIENT PRIVILEGE.—Attorney-client
2 privilege, and the protections and limitations associated
3 with such privilege (including the crime fraud exception),
4 applies to electronic communications sent or received
5 through the program or system established or modified
6 under subsection (a).

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

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

19 (2) INVESTIGATIVE AND LAW ENFORCEMENT
20 OFFICERS.—

21 (A) WARRANT.—

22 (i) IN GENERAL.—Retained contents
23 may only be accessed by an investigative or
24 law enforcement officer pursuant to a war-
25 rant issued by a court pursuant to the pro-

cedures described in the Federal Rules of Criminal Procedure.

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

(B) PRIVILEGED INFORMATION.—

(i) REVIEW.—Before retained contents may be accessed pursuant to a warrant obtained under subparagraph (A), such contents shall be reviewed by a United States Attorney to ensure that privileged electronic communications are not accessible.

(ii) BARRING PARTICIPATION.—A United States Attorney who reviews retained contents pursuant to clause (i) shall be barred from—

(I) participating in a legal proceeding in which an individual who sent or received an electronic communication from which such contents are retained under subsection (b) is a defendant; or

1 (II) sharing the retained contents
2 with an attorney who is participating
3 in such a legal proceeding.

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

9 (e) DEFINITIONS.—In this Act—

10 (1) the term “agent of an attorney or legal rep-
11 resentative” means any person employed by or con-
12 tracting with an attorney or legal representative, in-
13 cluding law clerks, interns, investigators, paraprofes-
14 sionals, and administrative staff;

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

17 (3) the term “electronic communication” has
18 the meaning given such term in section 2510 of title
19 18, United States Code, and includes the Trust
20 Fund Limited Inmate Computer System;

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

24 (5) the term “incarcerated person” means any
25 individual in the custody of the Bureau of Prisons

1 or the United States Marshals Service who has been
2 charged with or convicted of an offense against the
3 United States, including such an individual who is
4 imprisoned in a State institution; and

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

7 (A) any electronic communication between
8 an incarcerated person and a potential, current,
9 or former attorney or legal representative of
10 such a person; and

11 (B) any electronic communication between
12 an incarcerated person and the agent of an at-
13 torney or legal representative described in sub-
14 paragraph (A).

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