

The Pandemic of Intrusion into Privileged Communications between Incarcerated Clients and Their Attorneys

ELIZABETH CHOI*

INTRODUCTION

The ability of a client to communicate confidentially with their attorney is a cornerstone in any effective attorney-client relationship. A client is more willing to share information relevant to their representation if they are able to rely on this privilege.¹ Disclosure of such information is often necessary for, and at the very least aids, a lawyer to provide fair and competent representation for their client.² Yet, incarcerated clients and their attorneys are routinely subjected to policies and practices that intrude on this sacred privilege. These intrusions are wide-reaching to the point that almost every form of communication is placed under some form of monitoring. The level of intrusion varies amongst the different forms of communication, but the effect is the same: an erosion of confidentiality, trust, and communication between the attorney and their client. This is especially concerning given the current COVID-19 pandemic that has forced incarcerated clients and their attorneys to increasingly rely on more heavily monitored forms of communication.³

Proponents of these policies point to the valid and considerable governmental interests in ensuring safety and enforcing the law.⁴ Intrusion, therefore, is argued to be necessary in order to effectuate these interests. However, these policies are rife with cases of abuse. Moreover, even when these policies are being solely used for their stated reasons, it is difficult to imagine how an incarcerated client, knowing that they are being monitored to any extent, can reasonably feel secure that their communications with their attorney will remain confidential.

* J.D., Georgetown University Law Center (expected May 2022); B.A., Fordham University (2019). © 2021, Elizabeth Choi.

1. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (emphasizing the importance of attorney-client privilege in encouraging “full and frank communication”).

2. See *id.*

3. *Lawyers can't visit clients in prison, so quit monitoring their emails*. THE DAILY NEWS (Jul. 9, 2020), https://tdn.com/opinion/editorial/lawyers-cant-visit-clients-in-prison-so-quit-monitoring-their-emails/article_3a814d10-4fc0-57d8-a3a3-6fab922eb3e8.html [<https://perma.cc/6V2R-BGWE>].

4. See *Protect the Attorney-Client Privilege and Right to Effective Counsel*, AM. BAR ASS'N (Mar. 31, 2020), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/march-washington-letter-2020/bop-032020/ [<https://perma.cc/E35U-LLG8>].

The Effective Assistance of Counsel in the Digital Era Act (H.R.5546) was passed by the House of Representatives in September of 2020.⁵ The bill's main objective is to protect certain electronic communications between an attorney and their incarcerated client from unreasonable governmental intrusion.⁶

This Note will argue that H.R.5546, while a step in the right direction, falls exceedingly short of providing the necessary protection for communications between an attorney and their incarcerated client. Part I will explore the background of the various policies and practices of federal prisons that have negatively impacted the attorney-client privilege for incarcerated clients and their resulting ethical implications. This problem is prevalent in other institutions, but the scope for this Note is limited to solely federal prison policies. Part II will analyze H.R.5546, its failures in light of the current COVID-19 pandemic, and how to improve its effectiveness in protecting confidentiality without negatively impacting relevant governmental interests.

I. THE ONGOING BATTLE BETWEEN INTRUSION AND CONFIDENTIALITY

A. LEGAL HISTORY OF GOVERNMENTAL INTRUSION INTO PRIVILEGED COMMUNICATIONS

In 1974, the Supreme Court ruled in *Procunier v. Martinez* that a prison policy that censored personal mail was unconstitutional.⁷ The Court employed a test that considered two questions in order to reach their holding: (1) whether the policy furthers a substantial government interest and (2) whether the policy is tailored to effectuate that interest.⁸ In *Procunier*, the relevant government interest behind the mail censorship policy was prison security.⁹ Ultimately, the Court found that the policy was too broad and therefore upheld the lower court's decision to invalidate the policy.¹⁰ At the same time, the Court acknowledged that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."¹¹

Unlike the holding in *Procunier*, maintaining prison security has served as the basis for upholding prison policies monitoring communications. For example, in *Wolff v. McDonnell*, the Supreme Court upheld a prison policy which allowed prison authorities to inspect privileged mail for contraband in the presence of the incarcerated client.¹² The *Wolff* Court reasoned that the "possibility that contraband will be enclosed in letters, even from apparent attorneys, surely warrants prison officials' opening the letters."¹³ Furthermore, the Court argued that the

5. The Effective Assistance of Counsel in the Digital Age Act, H.R. 5546, 116th Cong. (2020).

6. *Id.* § 2(a).

7. *Procunier v. Martinez*, 416 U.S. 396 (1974).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

13. *Id.*

policy would not “chill such communications, since the inmate’s presence insures that prison officials will not read the mail.”¹⁴ The Court’s opinion on this issue, therefore, stands in diametric opposition to the opinion of the district court which had argued that inspecting attorney-prisoner mail violated incarcerated clients’ rights of access to the courts.¹⁵ The *Wolff* Court’s holding has been routinely defended. For example, in 2010, the Seventh Circuit in *Guajardo-Palma v. Martinson*, argued:

“Protection of the privacy of attorney mail in this fashion is imperfect; the prison employee who opens the letter will have to glance at the content to verify its bona fides. But the imperfection is necessary to protect the prison’s interest in security — and is lessened by allowing prisoners to engage in unmonitored phone conversations with their lawyers. . . . The approach sketched in *Wolff* to lawyer-prisoner mail may not be ideal, but it is the best that has been suggested, and that’s good enough.”¹⁶

The Seventh Circuit includes in its reasoning that “[m]ost attorney-client communications consist of the client’s describing what happened to him and the lawyer’s explaining what legal theories might fit the client’s factual narrative. Much of this material will find its way into the pleadings and briefs and thus be shared with the opponent.”¹⁷ Thus, unlike in *Procunier* and *Wolff* which focused their analysis on whether a government interest validated the prison policies in question, the Seventh Circuit seems to justify the prison policy here because they reason that incarcerated clients’ interests are relatively unharmed.¹⁸ This marks an even more damaging shift away from protecting incarcerated client’s rights to communicate confidentially with their attorneys and towards validating prison policies.

Around a decade later, another test of determining whether a prison policy is constitutional was put forth by the Supreme Court in *Turner v. Safley*.¹⁹ The *Turner* test looked to see if the policy was rationally connected to the governmental interest underlying it, whether there were alternative means available to prisoners for exercising or accessing the right that the policy restricted, and the effect the policy would have on the relevant parties.²⁰ In its formulation of this test, the *Turner* Court extended considerable deference to prison officials. The Court reasoned:

“Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly

14. *Id.*

15. *Id.*

16. *Guajardo-Palma v. Martinson*, 622 F.3d 801 (7th Cir. 2010).

17. *Id.*

18. *See id.*; *see also supra* note 7 and note 12.

19. *Turner v. Safley*, 482 U.S. 78 (1987).

20. *Id.*

within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.”²¹

A notable distinction between the *Procurier* test and the *Turner* test is that the *Turner* test includes as a factor the “alternatives” available to prisoners.²² Including this as a factor in the test has led to certain prison policies that are incredibly broad to be upheld so long as there are “alternatives.” For example, in *United States v. Asaro*, the Court held that a prison policy of monitoring every email, including privileged emails, was acceptable because prisoners could still meet with their attorneys in-person or use telephone calls and mail to communicate.²³ Similarly, the United States Court of Appeals for the Second Circuit held that an incarcerated client waives their attorney-client privilege when communicating with their attorney over a recorded telephone line largely because the client “... ‘just as easily’ could have, and should have contacted his attorney directly. . . .” using other available forms of communication such as legal mail or a scheduled unrecorded phone call with the attorney.²⁴ The court did not examine the actual availability of these “alternative” unmonitored forms of communication despite the evidence that prisons routinely “... fail to provide adequate scheduling and priority to attorney-client meetings and mail.”²⁵

As exemplified by these cases, the validation of certain prison policies has continuously required courts to balance governmental interests and the interests of prisoners, lawyers, and the overall justice system in maintaining the confidentiality of privileged communications. Over time, courts seem to have trended towards upholding prison policies to the detriment of incarcerated individuals.

B. CURRENT FEDERAL PRISON POLICIES REGARDING PRIVILEGED COMMUNICATION

Federal prisoners currently have various forms of communication available to them to speak with their legal counsel. First and foremost, they may meet with their attorneys in person. Attorneys are typically able to visit their clients during normal visitation hours and are given accommodations that afford a “reasonable degree of privacy.”²⁶ However, the visit might be monitored visually although

21. *Id.*

22. *Id.*

23. Melissa Wen, *Extending Attorney-Client Privilege to Prison Email*. HARV. CIV. RTS. – C.L.L. REV. (Feb. 20, 2020), <https://harvardcrcl.org/extending-attorney-client-privilege-to-prison-email/> [<https://perma.cc/D9SR-84X9>].

24. *U.S. v. Meija*, 655 F.3d 126, 133 (2d Cir., 2011).

25. Danielle Burkhardt, *Read, White, and Blue: Prosecutors Reading Inmate Emails and the Attorney-Client Privilege*. 48 JOHN MARSHALL LAW REVIEW 1119, 1136–1137 (2015).

26. FEDERAL BUREAU OF PRISONS, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 36, (2019), https://www.bop.gov/resources/pdfs/legal_guide_march_2019.pdf [<https://perma.cc/XH6Y-9NGL>].

not auditorily.²⁷ Supporters of this monitoring policy argue that it is necessary for security reasons.²⁸ Yet, it appears that the policy is capable of being abused to the detriment of incarcerated individuals. In 2016, federal agents obtained video recordings of meetings between attorneys and their incarcerated clients in a federal prison in Kansas.²⁹ Although the videos did not have audio, the lawyers for the incarcerated clients argued that the videos could “show documents, reveal inmate body language, or allow agents to read prisoners’ lips.”³⁰ Persuaded by the lawyers’ argument, a U.S. district court judge ordered a stop to all recordings of such meetings and for the prosecutors to surrender the footage.³¹ However, the Federal Bureau of Prison (BOP)’s policy remains unchanged: only auditory supervision continues to be generally proscribed.³²

Moreover, not only is the prohibition of only audio recordings overly limited, but this prohibition has been also completely ignored. There have been instances in which video recordings of attorney-client meetings have included audio. For example, in 2003, the U.S. Department of Justice’s Office of the Inspector General reported that in the Metropolitan Detention Center, a federal detention center in New York, they found that “[n]early every time we saw a detainee escorted to an attorney visit, his visit was videotaped.”³³ Most alarmingly, the report states that for “. . . many video tapes, we were able to hear significant portions of what the detainees were telling their attorneys. . . .”³⁴

Next, incarcerated clients can use the emailing system called Trust Fund Limited Inmate Computer System (TRULINGS) to communicate with their attorneys.³⁵ However, all emails sent and received through TRULINGS are subject to monitoring.³⁶ Incarcerated clients are notified of this monitoring and must consent before being able to use the system.³⁷

Critics of this policy point out that the justification for opening and inspecting physical mail to prevent contraband from entering the prison does not apply in the case of e-mails.³⁸ In response, prison officials maintain that monitoring

27. *Id.*

28. *See supra* note 4.

29. Kevin Murphy, *U.S. prison recordings of attorney-client meetings spur legal fight*, Reuters, (Aug. 16, 2016), <https://www.reuters.com/article/kansas-prison/u-s-prison-recordings-of-attorney-client-meetings-spur-legal-fight-idUKL1N1AX10P>.

30. *Id.*

31. *Id.*

32. *See supra* note 22.

33. U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES’ ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 31 N.24 (Dec. 2003), <https://oig.justice.gov/sites/default/files/legacy/special/0312/final.pdf> [<https://perma.cc/R3HE-Z9CP>].

34. *Id.* at 31.

35. *See supra* note 14, at 34.

36. *Id.*

37. *See supra* note 14, at 33.

38. *See supra* note 22.

emails, including privileged emails, is necessary for prison security.³⁹ The question of how attorney-client emails may contain something that amounts to a prison security threat remains unanswered.

Furthermore, prison officials point to the fact that there is currently no mechanism in the TRULINGS system for prison officials to filter out privileged mail and non-privileged mail.⁴⁰ Thus, every e-mail must be subjected to the same level of monitoring. However, this reasoning for violating attorney-client confidentiality is incredibly weak. An article in *The John Marshall Law Review* points out that “[a] simple Google search reveals endless ways to easily implement such a feature, and a Gmail account follows the same general setup of the TRULINGS email system.”⁴¹ The article concludes, “[t]he attorney-client privilege needs to evolve with technology in order to survive and provide clients with protection, and therefore must be extended to inmate emails. Extending this privilege to inmate emails is cost efficient, effective, and convenient.”⁴²

Finally, prison officials justify this policy by pointing out that incarcerated clients are notified of monitoring and voluntarily consent before using the system.⁴³ The National Association of Criminal Defense Lawyers on the other hand argues that there is “nothing voluntary about it. Unless incarcerated people agree to monitoring, they’re locked out of email communications.”⁴⁴ Not being able to access emails is particularly troubling for incarcerated individuals because “email is one of the few ways attorneys can reliably communicate with their clients when they’re in custody.”⁴⁵

Another form of communication is telephone calls. Incarcerated clients receive 300 minutes of monitored telephone calls per month, however if they receive permission, they may place calls to their attorney that do not count towards their 300-minute limit and is supposedly unmonitored.⁴⁶ In practice however, calls between incarcerated individuals and their attorneys have indeed been recorded, archived, and used against them by prosecutors.⁴⁷ In some instances, judges have held that although such actions by prosecutors are clearly against stated policy, no violation of the attorney-client privilege had occurred.⁴⁸ The basis for this

39. *Id.*

40. *Id.*

41. *See supra* note 24.

42. *Id.*

43. Carrie Johnson, *When It Comes To Email, Some Prisoners Say Attorney-Client Privilege Has Been Erased*, NPR, (Mar. 31, 2021), <https://www.npr.org/2021/03/31/982339371/when-it-comes-to-email-some-prisoners-say-attorney-client-privilege-has-been-era>

44. *Id.*

45. *Id.*

46. *Id.* at 33–34.

47. Richard A. Oppel Jr., *Calling Your Lawyer’s Cell From Jail? What You Say Can and Will Be Used Against You.*, N.Y. TIMES, (May 22, 2018), <https://www.nytimes.com/2018/05/22/us/new-orleans-jail-call-lawyer.html> [<https://perma.cc/Y9WJ-5BUG>].

48. Annie Gilbertson & Mary Knauf, *The Government Is Barred from Taping Attorneys’ Talks With Inmates. So Why Is It Happening In SoCal?* LAIST, (Aug. 29, 2018), https://laist.com/2018/08/29/la_county_law_enforcement_under_scrutiny_for_attorney-client_recordings.php [<https://perma.cc/9EXK-P9ZG>].

conclusion relies on the automated message before any prison phone call that notifies the parties that their conversation is being recorded.⁴⁹ Since the attorney and their client had heard the message, they were deemed to have received sufficient notice of the monitoring and by proceeding, waived their attorney-client privilege.⁵⁰ Even when prison officials and prosecutors are not actively recording and listening in on phone conversations, inadvertent eavesdropping can occur simply due to the physical structure of the prison that allows prison staff and/or other incarcerated individuals to overhear.⁵¹ Furthermore, requests for prison phone calls are facilitated by a counselor who is then available during the call.⁵²

Lastly, incarcerated clients can resort to using letters to communicate with their attorneys. These letters are considered “special mail” and are opened in the presence of the incarcerated individual to inspect for contraband.⁵³ Prison staff are not allowed to review the contents of the actual letter.⁵⁴ However, federal prisons may and have introduced policies that allow them to photocopy personal mail, store the original letter, and give the incarcerated individual the photocopied version.⁵⁵ BOP spokespeople argue that this is a necessary measure to counter the smuggling of contraband into prisons.⁵⁶ No information is provided on where the original letters are stored, who has access to the letters, and how they would be disposed of later on.⁵⁷ Although BOP spokespeople stress that this policy has not been extended to privileged mail, it remains in question if the erosion of privacy regarding mail could eventually reach legal mail as well.

C. ETHICAL IMPLICATIONS OF FEDERAL PRISON POLICIES

Rule 1.4 of the ABA *Model Rules of Professional Conduct* covers a lawyer’s duty of communication to their client.⁵⁸ Subsection (3) of the rule instructs a lawyer to keep their client reasonably informed in a timely manner about matters involving their representation.⁵⁹ Rule 1.4 has considerable overlap with Rule 1.1 which mandates a lawyer to provide competent representation and Rule 1.3 which states that the lawyer must behave “with reasonable diligence and

49. Theresa Concepcion, *Federal Court Rules that Recorded Prison Calls by Inmates to Attorneys are Not Privileged*. NATHAN & KAMIONSKI LLP (Apr. 2, 2020), <http://nklawllp.com/federal-court-rules-that-recorded-prison-calls-by-inmates-to-attorneys-are-not-privileged/> [<https://perma.cc/TD3W-W46E>].

50. *Id.*

51. *See supra* note 4.

52. *Id.*

53. *See supra* note 14, at 34.

54. *Id.* at 37; *see also* Wolff v. McDonnell, 418 U.S. 539 (1974) (holding that mail, including correspondence between a prisoner and their attorney, may be inspected for contraband but cannot be read).

55. Alaina Demopoulos, *Inmates Love Their Handwritten Mail. This Federal Prison Gives Them Photocopies*. DAILY BEAST (Apr. 23, 2020), <https://www.thedailybeast.com/inmates-love-their-handwritten-mail-this-federal-prison-gives-them-photocopies> [<https://perma.cc/9WZY-2PTW>].

56. *Id.*

57. *Id.*

58. Model Rules of Prof’l Conduct R. 1.4 (2009) [hereinafter Model Rules].

59. Model Rules R. 1.4.

promptness.”⁶⁰ One way of interpreting these rules might suggest that a lawyer’s best course of action in representing an incarcerated client would be to continue to use available forms of communication, regardless of the potential for being monitored or overheard, in order to keep their client reasonably informed.

On the other hand, Rule 1.6(c) provides that a lawyer must make “reasonable efforts to prevent . . . unauthorized access to, information relating to the representation of a client.”⁶¹ Comment 19 to Rule 1.6 qualifies this requirement by stating that a lawyer does not need to use “special security measures” so long as “the method of communication affords a reasonable expectation of privacy.”⁶² To determine whether there was a “reasonable expectation of privacy,” Comment 19 lists several factors to be considered: “the sensitivity of the information” and “the extent to which the privacy of the communication is protected by law or by a confidential agreement.”⁶³ Finally, a client may give their “informed consent” to use a form of communication that would have otherwise been prohibited by Rule 1.6.⁶⁴

This fundamental conflict between the ethical duties that a lawyer owes their incarcerated client has been the subject of numerous articles that all call for greater protection of attorney-client confidentiality. An article in the *Journal of Criminal Law and Criminology* states that “. . . when confidentiality is compromised by invasive prison rules or practices, the attorney may face an ethical dilemma . . . forced to limit the number and scope of communications, to speak indirectly and avoid sensitive subjects, to leave much unsaid altogether, and to discourage the client from saying or writing anything that might be used by the opposing side.”⁶⁵ The end result of these prison policies, the article argues, is that “. . . the inmate client may actually or effectively be deprived of legal representation.”⁶⁶ Another document, cited by the article, that stresses this conflict is an amicus brief from the Ethics Bureau of Yale which asserts that these prison policies preclude “. . . lawyers from fulfilling four additional ethical duties: to communicate openly with clients, to respect clients’ autonomy, and to provide competent as well as diligent representation.”⁶⁷

Furthermore, lawyers have voiced their concerns over this conflict and expressed how they feel constrained in their ability to offer legal advice to their incarcerated clients.⁶⁸ A defense lawyer in California stated that he “tries to limit his communications on the BOP email system, using it to notify incarcerated

60. Model Rules R. 1.1 & R. 1.3.

61. Model Rules R. 1.6(c).

62. Model Rules R. 1.6 cmt. 19.

63. Model Rules R. 1.6 cmt. 19.

64. *Id.*

65. Gregory Sisk, et al., Reading the Prisoner’s Letter: Attorney-Client Confidentiality in Inmate Correspondence, 109 *J. OF CRIM. L. & CRIMINOLOGY* 559, 568 (2019).

66. *Id.*

67. *Id.* at 567.

68. See *supra* note 42.

clients about the dates of their next hearings but not for strategy or the facts of their case.”⁶⁹ Another defense lawyer in Pennsylvania recalled how prosecutors had used emails that his client had sent via the TRULINGS system against his client in court.⁷⁰ The lawyer pointed out that even if lawyers warn their clients about the potential for monitoring and the dangers that such monitoring poses, “[c]lients want to communicate with their lawyers, and it’s easy to forget their lawyers’ warnings.”⁷¹

Thus, lawyers are faced with conflicting ethical duties in their representation of their incarcerated client. Is the duty of competent, diligent representation better served when a client can communicate with their attorney often and be reasonably and promptly informed about important matters regarding their case or when sensitive information is not put at risk of being overheard, monitored, and/or used against the client? If a lawyer does choose to communicate with their incarcerated client via email or telephone/video conferencing calls, there appears to be no reasonable expectation of privacy given the lack of protection by law of these forms of communication. These forms of communication are still technically available since, as previously mentioned, clients give their “informed consent” by being notified of monitoring and proceeding to use these forms of communication. However, it seems instructing a client to use such forms of communication would run against the principles underlying the duties of confidentiality, diligence, and competent representation. The more historically protected form of communication, legal mail, takes a considerably longer amount of time to exchange information and is, out of all the other forms of communication, the least like an in-person conversation.

II. H.R.5546: WHAT IT IS AND WHAT IT SHOULD BE

A. OVERVIEW OF H.R.5546

On January 7th, 2020, a bill called The Effective Assistance of Counsel in the Digital Age Act (H.R. 5546) was introduced to Congress.⁷² The bill’s stated purpose was “[t]o 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.”⁷³ In February of 2021, H.R. 5546 passed the House of Representatives with overwhelming support in a vote of 414 to 11.⁷⁴ Representative Hakeem Jeffries, H.R. 5546’s sponsor, emphasized the overwhelming bipartisanship support for the bill.⁷⁵ Jeffries stated that “[t]he

69. *Id.*

70. *Id.*

71. *Id.*

72. GovTrack, <https://www.govtrack.us/congress/bills/116/hr5546> (last visited April 11, 2021).

73. *Id.*

74. *See supra* note 42.

75. *Id.*

time has arrived for us to address this egregious practice, lift up the presumption of innocence, facilitate due process and allow fundamental fairness to permeate all aspects of our judicial system.”⁷⁶

The Act as it currently exists calls for the Attorney General to modify or create a system in which incarcerated people’s “electronic communications” to their attorneys are excluded from monitoring and to discontinue any existing system that monitors such communications.⁷⁷ “Electronic communications” include “any transfer of . . . writing” transferred partly or wholly by “. . . wire, radio, electromagnetic.”⁷⁸ Thus, under H.R. 5546, email communications between an incarcerated person and their attorney would be excluded from monitoring. However, H.R.5546 retains a certain amount of power for prison officials to monitor, if necessary, for governmental interests.⁷⁹ For example, under H.R. 5546 authorities can still monitor privileged e-mails so long as they have a warrant or if there is a suspicion that an attorney and their incarcerated client are working together to commit crimes.⁸⁰ Thus, the ban on the monitoring of privileged email communications is subject to exceptions.

B. FAILURES OF H.R.5546 IN LIGHT OF COVID-19

Notably in H.R.5546, there is an absence of protection for other forms of communication including phone conversations and video conferencing calls. This is particularly worrisome given the long history of intrusion into these forms of communication as well as the reliance of lawyers and their incarcerated clients on phone calls and video conferencing calls. As previously mentioned, although there are certain policies, in place that purport to protect privileged phone conversations and video conferencing calls, the numerous cases in which such policies are ignored and abused to the detriment of incarcerated individuals highlights the desperate need for increased and comprehensive legislative protection.

Furthermore, in the era of COVID-19, incarcerated clients and their attorneys are less likely to be able to meet in person and therefore have no choice but to use other forms of communication such as e-mails, letters, phone calls, and video conference calls.⁸¹ Given that video conference calls are the closest substitution for an in-person visit from an attorney, H.R.5546 falls exceptionally short of providing comprehensive protection of privileged communications that are especially necessary during the coronavirus pandemic. A recent case, *Criswell v. Boudreaux* highlights this need for aggressive legislative protection of various forms of communication between an attorney and their client.⁸² In *Criswell*, a jail

76. *Id.*

77. The Effective Assistance of Counsel in the Digital Age Act, H.R. 5546, 116th Cong. (2020).

78. 18 U.S.C. § 2510 (12) (2002).

79. *See supra* note 4.

80. *See supra* note 42.

81. *See supra* note 3.

82. *Criswell v. Boudreaux*, No. 1:20-cv-01048-DAD-SAB, 2020 WL 5235675 (E.D. Cal. Sep. 2, 2020).

implemented a new legal visitation policy in light of COVID-19 that effectively blocked attorneys from visiting their clients who were then left unsavory methods of communication: “short phone calls on recorded phone lines” and “recorded video feeds.”⁸³ The court ultimately ordered the jail to “ensure” that the attorneys can confidentially communicate with their clients via video conference calls, however it is unclear what the jail ultimately did to remedy the situation.⁸⁴

Another case, *Banks v. Booth*, also emphasizes the lack of protection for privileged video and phone calls.⁸⁵ In *Banks*, the ACLU, on behalf of class-action plaintiffs proposed an injunction in which prison officials would be ordered to:

“17. Provide access to unmonitored, confidential legal calls and video visits with counsel to reduce the need for defense teams to enter into the facility and meet with clients in dangerously close quarters; and 18. Facilitate video conferencing and telephonic conferencing, when requested, as an alternative to in-person court appearances.”⁸⁶

Notably, the ACLU’s proposed injunction also orders prison officials to “provide an anonymous mechanism for residents to report staff who violate these guidelines so that appropriate corrective action can be taken to ensure staff compliance.”⁸⁷ Although the case is still ongoing, the D.C. District Court has granted the preliminary injunction.⁸⁸ These judicial interventions of violative prison policies should alert the legislature that in light of the current pandemic, it is time to finally provide meaningful protection to all forms of privileged communication.

C. IMPROVING H.R.5546

H.R. 5546 deserves its recognition as an important effort in protecting the privileged communications between an incarcerated individual and their attorney. However, the bill can be and should be improved in three major ways. First, more forms of communication that are heavily used and relied upon, especially during the pandemic, should be included in this effort. Video conferencing calls and telephone calls between an attorney and their client are too important as meaningful, useful, and reliable forms of communication to not be afforded the protection that H.R. 5546 seeks for e-mails. Courts, like the courts in *Criswell* and *Banks*, can of course intervene by ordering jails to provide confidential video conference calls but judicial “medicine” for the illness of invasion is far less desirable than simply avoiding the illness altogether by legislative action.

Next, H.R. 5546 and proponents of the bill should devote considerable time and effort to stress the various ways in which the relevant governmental interests

83. *Id.* at 3.

84. *Id.* at 27.

85. *Banks v. Booth*, No. CV 20-849(CKK), 2020 WL 1914896 (D.D.C. Apr. 19, 2020).

86. *Id.*

87. *Id.*

88. *Id.*

can still be effectuated. For example, should the protections of H.R. 5546 be expanded to video conferencing calls and phone calls, the government can still obtain a search warrant to review privileged communications.⁸⁹ Furthermore, attorneys themselves have various duties that prevent them from engaging in any sort of criminal activity or assisting their clients in their crimes.⁹⁰ It is imperative that prison officials, prosecutors, and the general public are reminded that ethical duties prevent attorneys from communicating with their incarcerated clients in any way that may cause prison safety to be jeopardized or crimes to be committed.

Finally, one of the overarching purposes behind protecting attorney-client communications is to allow for full and fair disclosure. Protections from prison officials' monitoring privileged communications will not be properly effective if incarcerated clients do not believe their conversations with their attorneys are truly not being monitored. H.R. 5546 should therefore endeavor to create a policy that would be able to successfully communicate to incarcerated clients the privacy that they may enjoy in their correspondence with their attorneys. Furthermore, H.R. 5546 should draw inspiration from the *Banks* court by providing incarcerated clients means to anonymously report complaints about any abusive intrusion into their privileged communications. Complaints should be handled by an independent third-party to ensure objectivity and lend reassurance to incarcerated individuals and their attorneys.

CONCLUSION

As advocates of their clients, attorneys are faced with strong ethical duties to diligently provide competent representation. One of the most effective tools in doing so is the formation of trust between an attorney and their client. Prison policies that monitor communications between an incarcerated individual and their attorney erode any trust that may remain in the relationship. Considering the alternative means that the government could use to effectuate their interest, such policies must be scaled back to allow for protection of privileged communications in the form of telephone calls and video conferencing calls. To do otherwise would deprive a prisoner of effective counsel, an attorney of their ability to perform their ethical duties, and society of a fair justice system.

89. ACLU, ET AL, REGARDING EAVESDROPPING ON CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS, 66 Fed. Reg. 55062 at 10 (Oct. 31, 2001) (arguing that government officials have other means of effectuating their interests without intruding on privileged communications and using as an example *Andersen v. Maryland*, 427 U.S. 463 (1976), in which the Court upheld the search of a law office pursuant to a warrant).

90. See *id.* at 10; MODEL RULE 1.6.