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Inmate emails deserve privacy

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The pendulum appears to be swinging. For the last 15 years, and particularly at the height of the war on terrorism, the government demanded the right to monitor communications between inmates and their lawyers. In California, as well as elsewhere in the nation, phone conversations by inmates and

outside persons were regularly monitored or recorded. Inmates were advised of this policy and, therefore, made calls, including to their legal representatives, at their own risk. In those facilities where inmates had email access, their communications would also be monitored.

Defense lawyers have chafed at this practice for years. Representing an incarcerated client is by no means an easy feat. It can take days to get in to see a client and, even when access is permitted, lawyers have limited ability to review evidence and communicate confidentially with their clients. To see a client, a lawyer may need to spend the better part of a day going to the facility, being screened, and then having a limited visit with the inmate. Simple questions go unanswered because lawyers cannot pick up the phone (or vice versa) and have a confidential communication regarding the case.

On the other hand, government officials have been reluctant to end their practice of monitoring calls and emails because there are lawyers and inmates who will abuse this privilege. Phone calls and emails have been used for drug deals, "hits" on witnesses or opposing gang members, and efforts to deter witnesses from testifying. Law enforcement officials have a legitimate interest in preventing such activities, even if it means impinging on an inmate's access to his lawyer.

In general, the courts have deferred to prison officials to determine what security measures they must implement to protect the public and provide safe, operating correctional facilities. In *Florence v. Board of Chosen Freeholders*, 132 S.Ct. 1510 (2012), the Supreme Court recognized the significant security challenges in operating local jails. Because of those challenges, it authorized prison officials to routinely use strip searches when an inmate is admitted to the general population. Thus far, the Supreme Court has likewise refused to overturn the practice of monitoring inmates' calls and electronic communications, including to their lawyers.

Yet, the pendulum appears to be swinging enough for Republicans and Democrats to support legislation that would protect attorney-client communications. Last week,

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congressmen from both parties - Hakeem Jeffries (D-N.Y.) and Doug Collins (R-Ga.) - introduced H.R. 3864, the Effective Assistance of Counsel in the Digital Era Act. The bill would end the practice of federal prosecutors reading emails between inmates and their lawyers. By its terms, "it shall be unlawful for a person acting under the authority of the United States to monitor any electronic communication ... to which a prisoner in a Bureau of Prisons correctional facility is a party, if that communication is subject to attorney-client privilege." The bill provides an exception for "a communication the Attorney General has reason to believe poses a threat to national security."

Even former federal prosecutors have embraced the change as "sensible" and welcome change. They, too, recognize that in the ordinary case there is little or no reason for the government to be monitoring inmate email communications with counsel regarding privileged matters. Although judges have generally backed government monitoring efforts, some federal judges, like U.S. District Judge Dora L. Irizarry of the Eastern District of New York, have instructed prosecutors to stop the practice because it gives them an unwarranted strategic advantage in their prosecutions.

The new federal bill will only affect inmates in federal institutions. However, it might provide guidance for local and state institutions whose inmate populations greatly surpasses that of federal authorities. At minimum, it is certain to spark a new round of calls for reform by defendants and their lawyers.

Ultimately, the best answer to the problem may be a technological one. Emails and calls to and from legal counsel could be saved to a confidential data file. Prosecutors could then seek access to this information through a court order or via a court-appointed special master or monitor. In that manner, defendants would be deterred from using communications to engage in unlawful conduct, but defense counsel would have some assurance that their regular conversations with clients to prepare for trial would not be provided to their government opponents.

The Sixth Amendment right to counsel is perhaps the most important right that a defendant has in our criminal justice system. Once the right to counsel attaches, the government is not entitled to interfere with that right. *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977). As it stands, monitoring inmate communications with counsel poses a significant risk of interfering with the attorney-client relationship because it forces defense counsel to use a system that is much less likely to provide regular, immediate and effective communication with a client. Going to jail to talk to a client is not easy and, as a result, lawyers regularly forego that option. The net result is that there is precious little interaction between defendants and their clients before trials or plea negotiations.

There are no guarantees, but a system that allows defense lawyers and their clients to have effective communications is more likely to lead to case resolutions that are not second-guessed by defendants and trials where defendants are competently represented. The new congressional bill deserves our attention, not because inmate emails should go unmonitored, but because the current system is more than a monitoring system. It is a constant roadblock to an effective lawyer-client relationship.

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