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Cover Page Footnote

J.D. Candidate, May 2016, The Catholic University of America, Columbus School of Law; B.A., 2009, Hamilton College. The author would like to thank Professor Cara H. Drinan for her invaluable edits. The author would also like to thank her colleagues on the Catholic University Law Review for their work on this Comment.

INMATES' E-MAILS WITH THEIR ATTORNEYS: OFF-LIMITS FOR THE GOVERNMENT?

Amelia H. Barry⁺

It is commonly understood that a conversation with one's attorney is protected.¹ This attorney-client privilege is one of the oldest evidentiary privileges in the common law.² It exists to incentivize lawyers and their clients to have forthcoming conversations, which furthers the truth-seeking function of the legal system.³

The attorney-client privilege is especially important for inmates, who otherwise have very little power to communicate privately, free from government surveillance.⁴ An inmate's right to speak privately with counsel during a legal proceeding is a "fundamental right."⁵ Therefore, when a

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1. See *Gennusa v. Shoar*, 879 F. Supp. 2d 1337, 1349 (M.D. Fla. 2012) ("[P]eople generally believe conversations with their attorneys will be kept privileged and confidential."); see also *Fisher v. United States*, 425 U.S. 391, 403 (1976) (citing 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton rev. ed. 1961)) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged."); Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469, 474–75 (2003) (explaining that the attorney-client privilege exists in both the federal jurisdiction and all state jurisdictions, and that it is rooted in the idea that the lawyer owes his client loyalty and cannot testify against his client).

2. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 WIGMORE, *supra* note 1); see also Cole, *supra* note 1, at 474 (describing the age of the history of the privilege).

3. *Upjohn*, 449 U.S. at 389 ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."); see also *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991) (explaining that the attorney-client privilege furthers "the functioning of our legal system, by protecting the confidentiality of communications between clients and their attorneys").

4. See *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984) (stating that inmates are not entitled to a "subjective expectation of privacy" in their prison cells); Laurie L. Levenson, LEVENSON ON CALIFORNIA CRIMINAL PROCEDURE § 5:76 (Thomson West 2014) (2011) ("[E]lectronic surveillance or eavesdropping does not make overheard statements of prisoners inadmissible."); 1 JAMES G. CARR & PATRICIA L. BELLIA, LAW OF ELECTRONIC SURVEILLANCE § 3:6 (2015) (noting an inmate's "diminished privacy expectation" while incarcerated); 72 C.J.S. *Prisons* § 57 (2014) ("[A] prisoner generally cannot expect to enjoy the same right to privacy that a person in free society does, and with the exception of limited circumstances involving a special relationship, an inmate has no reasonable expectation of privacy in jailhouse conversations."); see also *United States v. DeFonte*, 441 F.3d 92, 94 (2d Cir. 2006) (explaining that although there is a diminished expectation of privacy for inmates, they still have the protection of the attorney-client privilege).

5. *Coplon v. United States*, 191 F.2d 749, 758–59 (D.C. Cir. 1951). The *Coplon* court held:

conversation between an attorney and his client was overheard or intercepted, courts have found it necessary to vacate the judgment against the client.⁶

However, recently, courts have determined that the privilege protects an inmate's in-person, telephonic, or mail correspondence with his attorney, but not communications transmitted via e-mail.⁷ E-mail is quickly replacing other forms of communication between inmates and attorneys because of its ease and efficiency.⁸ However, despite its growing use, e-mails do not receive the same

The sanctity of the constitutional right of an accused privately to consult with counsel is generally recognized and zealously enforced by state as well as federal courts. The court said in *Ex parte Rider*: "The right of an accused, confined in jail or other place of detention pending a trial of the charge against him, to have an opportunity to consult freely with his counsel without any third person, whose presence is objectionable to the accused, being present to hear what passes between the accused and his counsel, is one of the fundamental rights guaranteed by the American criminal law—a right that no Legislature or court can ignore or violate."

Id. at 758 (citation omitted).

6. *See id.* at 759 (explaining that the defendant and his lawyer had a right not to have their phone call monitored by the prosecution and that even if they had ample opportunity to communicate via in-person communications, that would not "erase the blot of unconstitutionality from the act of intercepting other consultations"). *See also* *O'Brien v. United States*, 386 U.S. 345, 345–46 (1967) (Harlan, J., dissenting) (explaining that the Court vacated the petitioner's conviction and remanded for a new trial where the government introduced evidence that had been obtained through eavesdropping on the petitioner and his attorney); *Black v. United States*, 385 U.S. 26, 26–29 (1966).

7. Stephanie Clifford, *Prosecutors Are Reading Emails From Inmates to Lawyers*, N.Y. TIMES (July 22, 2014), http://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html?_r=0. *See* *United States v. Walia*, No. 14–CR–213, 2014 U.S. Dist. LEXIS 102246, at *47–50 (E.D.N.Y. July 25, 2014) (holding that the petitioner-inmate's e-mail connection with his attorney was not protected by the attorney-client privilege and that the myriad of alternative means of confidential communication weigh against e-mail as a fundamental right); *United States v. Asaro*, No. 14–Cr–26, 2014 U.S. Dist. LEXIS 97396, at *3–4 (E.D.N.Y. July 17, 2014) (stating that an inmate's e-mail increased access to the outside, but the lack of protected communication "d[id] not rise to the level of a Sixth Amendment violation"); *see also* *F.T.C. v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP, 2012 WL 171621, at *5–6 (N.D. Ga. Jan. 20, 2012) (holding that the defendants waived the attorney-client privilege with respect to e-mail communications because the prison facility e-mail system required users to consent to monitoring and warned that communications with attorneys were not privileged).

8. Robert E. Crotty, *Chapter 62: Litigation Management by Law Firms*, in 4A COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 62:41 (Robert L. Haig ed., 3d ed. 2014) ("Communication via e-mail avoids some of the limitations of telephonic communication and is increasingly becoming the standard method of communication between inside and outside counsel."); Matthew A. Piekarski, Note, *E-Mail Content's Brush with the Reasonable Expectation of Privacy: The Warshak Decision*, 47 U. LOUISVILLE L. REV. 771, 771 (2009) (noting that changes in the communications world often begot "allegations that the government is violating its citizens' Fourth Amendment rights," and attributing these disputes to the government's failure to adapt); Sean M. O'Brien, Note, *Extending the Attorney-Client Privilege: Do Internet E-Mail Communications Warrant A Reasonable Expectation of Privacy?*, 4 SUFFOLK J. TRIAL & APP. ADVOC. 187, 187 (1999) (explaining e-mail users' expectations of privacy).

protection as traditional attorney-client communication.⁹ To understand this inconsistency, it is necessary to analyze the attorney-client privilege's general underpinnings.

The attorney-client privilege exists to facilitate the open and free exchange of information between attorneys and their clients so that attorneys are able to provide the best legal advice possible.¹⁰ The privilege applies to instances when an attorney and his client intend their communication to be confidential.¹¹ Every state recognizes an attorney-client privilege,¹² and the federal judiciary includes the privilege in the Federal Rules of Evidence.¹³

When applied to inmates, the attorney-client privilege has historically existed for three forms of communication: in-person visits, letters, and phone calls.¹⁴ First, with regard to the privilege for in-person visits, inmates and their attorneys are entitled to a reasonable expectation of privacy, even when interviews are conducted in a police interview room.¹⁵ Therefore, prisons must provide an adequate environment for a private conversation to take place.¹⁶

9. See *Walia*, 2014 U.S. Dist. LEXIS 102246, at *47–50; *Asaro*, 2014 U.S. Dist. LEXIS 97396, at *3–4; *F.T.C.*, 2012 WL 171621, at *7–8.

10. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (explaining that a client has a privilege of “secrecy upon communications between client and attorney” to facilitate the “administration of justice”).

11. *In re Colton*, 201 F. Supp. 13, 17 (S.D.N.Y. 1961) (stating that the attorney-client privilege only exists for communications that the parties intend to be confidential). In *United States v. Fisher*, the court said that the privilege applies when,

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. Fisher, 692 F. Supp. 488, 491 (E.D. Pa. 1988) (citing *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950)).

12. William P. Matthews, Comment, *Encoded Confidences: Electronic Mail, the Internet, and the Attorney-Client Privilege*, 45 U. KAN. L. REV. 273, 280 (1996) (noting that most codifications of the attorney-client privilege “offer[] the same protection the common law afforded”).

13. FED. R. EVID. 501.

14. See *Gennusa v. Shoar*, 879 F. Supp. 2d 1337, 1349 (M.D. Fla. 2012) (dealing with visits); *United States v. Korbe*, 2:09-CR-05, 2010 WL 2776337, at *3 (W.D. Pa. July 14, 2010) (regarding phone calls); *Mitchell v. Untreiner*, 421 F. Supp. 886, 902 (N.D. Fla. 1976) (covering mail communications).

15. *Gennusa*, 879 F. Supp. 2d at 1349 (explaining that the recording of the conversation between the client and his attorney violated the Fourth Amendment and the Wiretapping Act because the parties had a reasonable expectation of privacy).

16. See *Mitchell*, 421 F. Supp. at 891, 902. In *Mitchell*, the prison had provided “inadequate facilities which [were] devoid of privacy” for attorney meetings and the hours were also very restricted for these meetings. *Id.* at 891. The court ordered the jail to provide normal visiting hours

Second, based on the Supreme Court's application of the privilege to mail, lower courts require inmates and their lawyers to specifically mark communications to each other as "privileged."¹⁷ Lower courts generally agree that prisons cannot open mail from an inmate's attorney unless the inmate is present.¹⁸

Third, with regard to phone calls, many prison phone systems do not record conversations with an attorney.¹⁹ Prisons often maintain lists of local attorneys, allowing inmates to add their attorney to the list so that calls with that attorney are not monitored.²⁰ However, when a warning that the prison is monitoring the phone call is played, the call is not protected by the attorney-client privilege because the parties cannot reasonably expect privacy.²¹

Recently, there have been two major changes to the attorney-client privilege in the context of inmates' communications. The first occurred after the September 11, 2001 terrorist attacks.²² The attacks prompted the Federal Bureau of Prisons to change its guidelines to allow for the monitoring and review of certain communications between inmates and their attorneys.²³ Under the new regulations, if the Attorney General certifies that there is "reasonable suspicion" that the communications are being used to facilitate terrorism, then the government may view the communications.²⁴

The second development centered on inmates' use of e-mail to communicate with their attorneys.²⁵ Outside of the inmate context, courts have found that e-

for attorneys and a space for these meetings that could provide for a confidential conversation. *Id.* at 902.

17. See, e.g., *Stover v. Carlson*, 413 F. Supp. 718, 721 (D. Conn. 1976) ("[A]ttorney-client mail is not treated as privileged unless it is specially stamped 'attorney-client' by the sender.").

18. *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974). In *Wolff*, the Supreme Court acknowledged a state interest in ensuring that mail between an attorney and inmate did not contain contraband material, and upheld a statute allowing the mail to be opened and inspected with the inmate present. *Id.* at 576-77; see also 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 12:26 (4th ed. 2014) (noting that other lower courts have agreed with the *Wolff* court on the standard for confidentiality of attorney mail).

19. See, e.g., *Korbe*, 2010 WL 2776337, at *3 (analyzing a prison system that automatically excluded phone conversations with an attorney from monitoring).

20. *United States v. Mitchell*, No. 3:11-CR-248(S1)-J-34TEM, 2013 WL 3808152, at *10 (M.D. Fla. July 22, 2013) (citing *United States v. Novak*, 531 F.3d 99, 100-01 (1st Cir. 2008)) (discussing the practice of having a list of all local attorneys to prevent recording phone calls between an inmate and attorney).

21. See *United States v. Lentz*, 419 F. Supp. 2d 820, 828-29 (E.D. Va. 2005).

22. Heidi Boghosian, *Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 15, 19-21 (2003). See 28 C.F.R. § 501.3 (2014); 66 Fed. Reg. 55,062, 55,063-64 (Oct. 31, 2001) (to be codified at 28 C.F.R. pt. 500-01) (discussing the changes to § 501.3 with respect to the attorney-client privilege).

23. See 28 C.F.R. § 501.3; see also 66 Fed. Reg. at 55,062-03.

24. 28 C.F.R. § 501.3(d).

25. Christopher Zoukis, *Federal Bureau of Prisons Allows Inmates to Utilize Monitored Email Service*, PRISON LAW BLOG (Apr. 5, 2013), http://www.prisonlawblog.com/blog/federal-bureau-of-prisons-allows-inmates-to-utilize-monitored-email-service#.VHC_govF9ig.

mail is protected by the attorney-client privilege because it carries a reasonable expectation of privacy.²⁶ However, this same standard does not always apply for inmates because inmates are forced to waive their right to privacy when they use the prison e-mail system.²⁷

This Comment suggests that an e-mail between an inmate and his or her attorney should be treated as a privileged communication that is not discoverable by the government so long as it otherwise meets privilege requirements. Part I surveys the historic origins of the attorney-client privilege, both inside and outside of the prison context. Specifically, it addresses federal cases dealing with different forms of communication in prison, including in-person visits, letters, and phone calls. Then, Part I also discusses the recent federal cases in which courts examined the use of e-mails in prisons. In Part II, this Comment analyzes the different reasons that e-mails between an inmate and his or her attorney should be privileged, including constitutional protections and efficiency. Finally, in Part III, this Comment suggests that the attorney-client privilege for inmate-attorney communications must adapt in order to apply the privilege to e-mails in the same way as traditional forms of communication.

I. A HISTORY OF THE ATTORNEY-CLIENT PRIVILEGE

A. *The Oldest Privilege: The Attorney-Client Privilege*

As the oldest privilege, there is a vast amount of federal case law that tracks the development of the attorney-client privilege.²⁸ As the Supreme Court discussed in *Upjohn Company v. United States*,²⁹ the “purpose [of the privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”³⁰ The Supreme Court further observed that providing an attorney with *all* the facts allows that attorney to provide better legal advice

26. See *Curto v. Med. World Commc'ns, Inc.*, No. 03CV6327(DRH)(MLO), 2006 WL 1318387, at *7 (E.D.N.Y. May 15, 2006) (employing the Fourth Amendment privacy analysis to determine the existence of the attorney-client privilege in e-mail communications and finding that the plaintiff had a reasonable expectation of privacy in her e-mail communication). See also Megan E. McEnroe, *E-Mail in Attorney-Client Communications: A Survey of Significant Developments April 2009–June 2010*, 66 BUS. LAW. 191, 192 (2010) (“The U.S. District Court for the District of Columbia held that the party asserting the attorney-client privilege had shown an objectively reasonable, subjective expectation of privacy when an e-mail was transmitted.”).

27. See, e.g., *United States v. Walia*, No. 14-CR-213 (MKB), 2014 U.S. Dist. LEXIS 102246, at *50–51 (E.D.N.Y. July 25, 2014) (noting that inmates’ use of TRULINCS prison e-mail system is conditioned on consent to monitoring); *F.T.C. v. Nat’l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP, 2012 WL 171621, at *7–8 (N.D. Ga. Jan. 20, 2012) (finding that the defendant had waived the attorney-client privilege for e-mails sent through TRULINCS).

28. See *supra* note 2 and accompanying text.

29. 449 U.S. 383 (1981).

30. *Id.* at 389.

to his client.³¹ Later, in *Trammel v. United States*,³² the Court further extrapolated that lawyers are better able to achieve their “professional mission” when they have all of the facts.³³

In *Hunt v. Blackburn*,³⁴ the Supreme Court recognized that the privilege was necessary because legal assistance can only be provided when there was no “apprehension of disclosure.”³⁵ In addition, the Court stated that this privilege belonged to the client, and once waived voluntarily by the client, could not be used to prevent the attorney from divulging information.³⁶

In determining the applicability of attorney-client privilege, the Supreme Court looks to “the nature of the privilege, its central purpose, the need for certainty as to the applicability of the privilege, and/or the costs that would be imposed if the privilege were held to apply to the situation at hand.”³⁷ For the privilege to apply:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.³⁸

The need for this privilege must be weighed against the competing need for the public to know the truth in an investigation.³⁹

Despite its importance to the proper function of the judicial system, the attorney-client privilege promotes “withholding relevant information from the fact-finder,” and, therefore, must be narrowly applied.⁴⁰ As the Supreme Court discussed in *Fisher v. United States*,⁴¹ the privilege only covers information that is necessary for a client to obtain legal advice.⁴²

31. *Id.*

32. 445 U.S. 40 (1980).

33. *Id.* at 51 (“The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”); *see also* *Fisher v. United States*, 425 U.S. 391, 403 (1976) (“The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.”).

34. 128 U.S. 464 (1888).

35. *Id.* at 470.

36. *Id.*

37. Brian Sheppard, Annotation, *Views of United States Supreme Court as to Attorney-Client Privilege*, 159 A.L.R. Fed. 243, 253 (2000).

38. *Matthews*, *supra* note 12, at 281 (quoting 8 WIGMORE, *supra* note 1, § 2285, at 527).

39. *United States v. Lentz*, 419 F. Supp. 2d 820, 826 (E.D. Va. 2005).

40. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

41. 425 U.S. 391 (1976).

42. *Id.* at 403.

B. The Attorney-Client Privilege in the Prison Context

The attorney-client privilege is especially important when the client is an inmate. Inmates do not have the same right to privacy that free individuals do.⁴³ To counteract their lack of individual freedom, inmates must be able to communicate with legal professionals.⁴⁴ As a result, rules and practices that unnecessarily restrict an inmate's access to his attorney violate his constitutional right to access effective counsel.⁴⁵ Furthermore, not only do inmates need access to attorneys, but this access must also be free from intrusion by a third party.⁴⁶

Inmates have historically been able to communicate with their attorneys in-person, via written letters, or on the phone.⁴⁷ While federal courts prefer to abstain from adjudicating issues of prison administration, they have weighed in on cases dealing with attorney-client communications.⁴⁸ As the Supreme Court discussed in *Procunier v. Martinez*,⁴⁹ "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," but this "judicial restraint" cannot keep the Court from dealing with "valid constitutional claims."⁵⁰ For example, in *Coplon v. United States*,⁵¹ the U.S. Court of Appeals for the District of Columbia addressed an inmate's inability to have a private conversation and held that inmates had a constitutional right to have private conversations with an attorney.⁵²

1. Attorney-Client In-Person Conversations in Prisons Are Generally Privileged

Inmates have a constitutional right to speak to an attorney in private.⁵³ For in-person conversations, inmates and their legal representatives may reasonably

43. See *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984) (deciding that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell"); *Levenson*, *supra* note 4, § 5:76 (noting that in a jail cell inmates are generally not entitled to privacy).

44. *United States v. DeFonte*, 441 F.3d 92, 94 (2d Cir. 2006) (explaining that inmates' communications have the protection of the attorney-client privilege, despite their diminished expectation of privacy).

45. *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989).

46. See *supra* note 5.

47. See *supra* note 14 and accompanying text.

48. See *Procunier*, 416 U.S. at 404–05.

49. 416 U.S. 396 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989).

50. *Id.* at 405.

51. 191 F.2d 749 (1951).

52. *Id.* at 758–60.

53. See *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1052–53 (8th Cir. 1989) (explaining that only allowing inmates to consult with their attorneys in public areas risked the confidentiality of these communications and consequently violated the inmates' right to "effective aid of counsel" (quoting *Mastrian v. McManus*, 554 F.2d 813, 820–21 (8th Cir. 1977)) (internal quotation marks

assume that their jail visiting room communications are private.⁵⁴ In *Black v. United States*,⁵⁵ the Supreme Court vacated a conviction because the state had recorded conversations between the defendant and his attorney.⁵⁶ Courts have tied the attorney-client privilege to the Fourth Amendment's privacy analysis, finding that the privilege applies to communications recorded by the prison for which the participants have a reasonable expectation of privacy.⁵⁷ Consequently, private conversations between inmates and their attorneys, in which the inmates have a reasonable expectation of privacy, are protected by the attorney-client privilege.⁵⁸ Therefore, monitoring the private conversations violates the Fourth Amendment.⁵⁹

In addition to not monitoring these privileged conversations, prisons must provide a certain level of quality access to attorneys.⁶⁰ In *Mitchell v. Untreiner*,⁶¹ the U.S. District Court for the Northern District of Florida determined that the Escambia County Jail had such severe management problems that the court ordered specific remedies for the jail to implement.⁶² The court required the jail to provide attorneys access to inmates on a daily basis, and to provide "adequate facilities" which could "insure the confidentiality of attorney-client communications."⁶³ The court also established that there was a minimum level of quality access that the jail must provide to attorneys representing inmates.⁶⁴

omitted)); *see also* *Negron v. Wallace*, 436 F.2d 1139, 1145 (2d Cir. 1971) (holding that "a detained juvenile has a constitutional right to consult with an attorney in privacy").

54. *See* *Gennusa v. Shoar*, 879 F. Supp. 2d 1337, 1349 (M.D. Fla. 2012); *CARR & BELLIA*, *supra* note 4, § 3:6.

55. 385 U.S. 26 (1966).

56. *Id.* at 27–29.

57. *See, e.g., Gennusa*, 879 F. Supp. 2d at 1349 (finding the recording of plaintiffs' conversations to be a violation of the Fourth Amendment since the plaintiffs had reasonably believed their conversations to be private); *Lonegan v. Hasty*, 436 F. Supp. 2d 419, 435 (E.D.N.Y. 2006) (acknowledging that there is a reasonable "expectation of privacy in . . . attorney-client communications with [inmates]").

58. *See supra* note 57.

59. *See supra* note 57.

60. *See, e.g., Mitchell v. Untreiner*, 421 F. Supp. 886, 902 (N.D. Fla. 1976).

61. 421 F. Supp. 886 (N.D. Fla. 1976).

62. *Id.* at 897.

63. *Id.* at 902.

64. *See id.* (requiring the prison to provide "[a]ttorneys representing inmates in the Escambia County Jail [with] access to said inmates at any time within 12 hours of arrest," and during "normal visiting hours").

2. *Written Letters Between Attorneys and Inmates Are Privileged When the Parties Follow the Applicable Rules*

Attorneys and inmates also have a right to communicate through written letters.⁶⁵ In *Ex parte Hull*,⁶⁶ the Supreme Court established the concept of privileged mail in the context of confirming an inmate's right to have access to the courts.⁶⁷ Thirty-three years later, the Supreme Court applied the First Amendment's freedom of speech protection to inmate mail in *Procunier v. Martinez*.⁶⁸ In *Procunier*, the Court said that inmate mail could only be censored if a prison had a policy that both furthered a governmental interest and was narrowly tailored to achieve only what was necessary.⁶⁹

Following *Procunier*, lower courts initiated programs requiring that mail from an attorney be clearly marked as such.⁷⁰ For example, a prison may require that mail from an attorney contain specific markings indicating that it is privileged, as opposed to just including an attorney's name and address as the return address.⁷¹ In *Stover v. Carlson*,⁷² the U.S. District Court for Connecticut limited such practices to instances where it was clear to both inmates and attorneys that a special marking was needed.⁷³ Additionally, according to the U.S. District Court of Hawaii, in *Samonte v. Manlinti*,⁷⁴ requiring inmates to have their attorneys mark mail as confidential was an appropriate balance of the prison's interest in security and an inmate's right to communicate with his attorney.⁷⁵

65. See *Laaman v. Helgemoe*, 437 F. Supp. 269, 322 (D. N.H. 1977); see also Daniel M. Donovan, Jr., *Constitutionality of Regulations Restricting Prisoner Correspondence with the Media*, 56 *FORDHAM L. REV.* 1151, 1152 (1988) (observing that mail communications between attorneys and their clients are privileged and that the First Amendment protects the content of those communications from censorship).

66. 312 U.S. 546 (1941).

67. *Id.* at 548–49 (invalidating a regulation that authorized the warden to intercept inmates' mail and deciding that "the state and its officers may not abridge or impair [an inmate's] right to apply to a federal court for a writ of habeas corpus" and the courts alone will determine the adequacy of such petitions).

68. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989).

69. *Id.* (holding that prison officials "must show that a regulation authorizing mail censorship furthers one or more of the substantial government interests of security, order, and rehabilitation").

70. See, e.g., *United States v. Stotts*, 925 F.2d 83, 89–90 (4th Cir. 1991) (finding that it was legal in North Carolina for a prison to require an attorney to specifically mark the confidential mail); *Harrod v. Halford*, 773 F.2d 234, 234 (8th Cir. 1985) (affirming the lower court's decision to uphold a Nebraska mail policy that allowed the opening of mail away from the inmate if it had not been properly marked); *Stover v. Carlson*, 413 F. Supp. 718, 721 (D. Conn. 1976) (noting that the opening of mail from courts and members of Congress outside the inmates presence "chill[s]" the inmate's right of access to the courts).

71. See *Stover*, 413 F. Supp. at 721–22 (finding that additional markings were required, absent a Bureau of Prisons regulation requiring additional markings).

72. 413 F. Supp. 718 (D. Conn. 1976).

73. *Id.* at 721–22.

74. No. 05-00598 SOM-BMK, 2007 WL 1963697 (D. Haw. July 3, 2007).

75. *Id.* at *8.

In addition to requiring inmates and their attorneys to mark privileged mail, the Supreme Court has said that prison employees can still open incoming mail in the presence of an inmate to ensure that there is no contraband in it.⁷⁶ However, as addressed by the U.S. Court of Appeals for the Sixth Circuit, in *Bell-Bey v. Williams*,⁷⁷ the review of an inmates' legal mail requires limitations and guidelines to restrict the discretion of prison officials.⁷⁸ Without safeguards, "it could chill a prisoner's free expression, communication with counsel, or access to the courts for fear his jailer reads the contents."⁷⁹ For outgoing mail designated as "special," inmates may send it unopened.⁸⁰ However, the prison may require inmates to supply the names of their attorneys in advance so that an attorney's status, as legal counsel, can be verified.⁸¹

3. Phone Calls Between Attorneys and Inmates Are Privileged When There Is No Warning Message

Phone calls between an inmate and an attorney have a different set of rules than in-person conversations and letters. Phone calls between inmates and their attorneys are exempted from being recorded.⁸² In *Coplon*, the D.C. Circuit stated that an inmate and his attorney have a right to speak on the phone without being recorded by an unknown monitoring device.⁸³ Further, according to the

76. *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974) (holding that opening inmates' mail in their presences is an appropriate measure and does not constitute censorship because the inmates' presence would prevent the prison employee from reading it). *See also Jones v. Diamond*, 594 F.2d 997, 1014 (5th Cir. 1979) ("Outgoing mail to be licensed attorneys . . . must be sent unopened, and incoming mail from such sources may be opened only in the presence of the inmate recipient if considered necessary to determine authenticity or to inspect for contraband. Prisoners may be required to submit the names of attorneys reasonably in advance of proposed mailings so that whether the named attorney is licensed may be ascertained."); *see also* 3 MUSHLIN, *supra* note 18, § 12:26.

77. 87 F.3d 832 (6th Cir. 1996).

78. *Bell-Bey v. Williams*, 87 F.3d 832, 839 (6th Cir. 1996) (finding that a prison's review of inmate's mail did not violate an inmate's constitutional right to communication with counsel because the prison had "implemented procedural safeguards" that "sufficiently collar the prison official's review of the mail").

79. *Id.*

80. *Meadows v. Hopkins*, 713 F.2d 206, 209 (6th Cir. 1983); *Jones*, 594 F.2d at 1014. For federal prisons, 28 C.F.R. § 540.18 addresses both incoming and outgoing mail and refers to privileged mail as "special mail." 28 C.F.R. § 540.18 (2014). The regulation states that privileged mail will be opened "only in the presence of the inmate for inspection for physical contraband and the qualification of any enclosures as special mail," but not "read or copied if the sender is adequately identified on the envelope, and the front of the envelope is marked 'Special Mail—Open only in the presence of the inmate.'" *Id.* § 540.18(a). It goes on to say that "outgoing special mail may be sealed by the inmate and is not subject to inspection." *Id.* § 540.18(c)(1). Section 540.19 also discusses procedures for "special mail." 28 C.F.R. § 540.19.

81. *Jones*, 594 F.2d at 1014.

82. *Coplon v. United States*, 191 F.2d 749, 759 (D.C. Cir. 1951).

83. *Id.*

court, the availability of alternative means of communication does not justify telephone call surveillance.⁸⁴

Federal regulations also prohibit prison staff from monitoring calls to attorneys.⁸⁵ The U.S. Court of Appeals for the First Circuit addressed this issue in *United States v. Novak*,⁸⁶ when a Massachusetts county jail recorded the phone calls between an inmate and his attorney.⁸⁷ The jail posted signs warning that calls were monitored and also played a recording that stated the same warning at the beginning of calls.⁸⁸ However, the prison, in an effort to comply with federal and state law prohibiting prisons from recording phone calls between attorneys and inmates, kept a list of attorneys and inmates could submit requests for additional names to be added to the list.⁸⁹ The list allegedly included all local Massachusetts lawyers, but in this case it did not include the relevant attorney.⁹⁰

The *Novak* court found that two mistakes had been made in the course of the phone call monitoring.⁹¹ First, the relevant attorney's number should have been included on the list.⁹² Second, once it became clear the calls were legal in nature, the prison staff should have stopped monitoring the calls.⁹³

However, courts have allowed phone calls between inmates and attorneys to be recorded when the prison provides a warning that the calls would be recorded.⁹⁴ In *United States v. Lentz*,⁹⁵ the U.S. District Court for the Eastern District of Virginia said that the parties could not have "reasonably expect[ed]" their conversation to be private because they had previously heard the recorded message alerting the participants that the prison recorded the calls.⁹⁶ According to the court, as long as there are other means of communicating with an attorney, prisons can restrict attorney-client phone calls in this way.⁹⁷

84. *Id.*

85. 28 C.F.R. § 540.102.

86. 531 F.3d 99 (1st Cir. 2008).

87. *Id.* at 100–01. *Novak* involved an attorney who had participated in illegal acts, but the court addressed the protections afforded to attorney-client calls. *Id.*

88. *Id.* at 100.

89. *Id.* (citing 28 C.F.R. § 540.102; 103 MASS. CODE REGS. § 482.09 (1994)).

90. *Id.* at 100–01.

91. *Id.*

92. *Id.* at 101.

93. *Id.*

94. See *United States v. Mitchell*, No. 3:11-CR-248(S1)-J-34TEM, 2013 WL 3808152, at *10 (M.D. Fla. July 22, 2013) (finding that calls preceded by a warning that they will be monitored or recorded are not protected by the attorney-client privilege because one of the parties consented to the recording); *United States v. Eye*, No. 05-00344-01-CRW-ODS, 2008 WL 1701089, at *11 (W.D. Mo. Apr. 9, 2008).

95. 419 F. Supp. 2d 820 (E.D. Va. 2005).

96. *Id.* at 828–29.

97. See, e.g., *Stamper v. Campbell Cnty., Ky.*, No. 2007-49 (WOB), 2009 WL 2242410, at *2 (E.D. Ky. July 24, 2009).

C. Recent Changes to the Attorney-Client Privilege

1. Developments in the Aftermath of the September 11, 2001 Terrorist Attacks to Reduce the Attorney-Client Privilege

After the September 11, 2001 terrorist attacks, the Federal Bureau of Prisons changed its guidelines to allow the Department of Justice (DOJ) to view communications between federal inmates and their attorneys.⁹⁸ As part of these changes, the Attorney General must first show that there is a “reasonable suspicion” that the written or spoken conversation is facilitating an act of terrorism.⁹⁹ Once the Attorney General has “reasonable suspicion,” the Director of the Bureau of Prisons may view and listen to communications that the attorney-client privilege has historically protected.¹⁰⁰

These changes have altered the traditional contours of the attorney-client privilege,¹⁰¹ potentially chilling attorney-client communications, which is a result that courts have tried to prevent.¹⁰² Now, clients and attorneys may feel unable to share information and speak freely, hindering “an inmate’s Sixth Amendment right to effective assistance of counsel.”¹⁰³ In *Al-Owhali v. Ashcroft*,¹⁰⁴ the defendant unsuccessfully argued that even though this regulation had not been used against him yet, it was having a “chilling effect” on his communications.¹⁰⁵

However, the regulation does attempt to provide checks on the government’s new power. The Director of the Bureau of Prisons must give notice to both the inmate and his attorney before beginning to monitor any conversations.¹⁰⁶ In addition, the officials monitoring the calls must not be involved in the inmate’s prosecution.¹⁰⁷ Additionally, except in extraordinary circumstances, if the

98. See Boghosian, *supra* note 22, at 15.

99. *Id.* at 19–20; see also 28 C.F.R. § 501.3 (2014); Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,063 (Oct. 31, 2001) (to be codified at 28 C.F.R. pt. 500–01) (discussing the changes to 28 C.F.R. § 501.3).

100. 28 C.F.R. § 501.3(d) (2007). The guidelines do not explain what reasonable suspicion is, but the Supreme Court has said that it involves more than an unspecified suspicion, but less than the level of suspicion required for probable cause. See *United States v. Sokolow*, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting).

101. See Cole, *supra* note 1, at 548–52 (discussing the change in 2001 and the criticisms of the regulation as an unconstitutional interference with an inmate’s right of access to counsel); Sharon Jaffrey, *An Act of Patriotism? Infringing on the Individual’s Sixth Amendment Right to Effective Counsel*, 33 SW. U. L. REV. 165, 166–67 (2004).

102. Boghosian, *supra* note 22, at 20–21.

103. Jaffrey, *supra* note 101, at 166–67.

104. 279 F. Supp. 2d 13 (D.D.C. 2003).

105. *Id.* at 22, 29 (internal quotation marks omitted) (dismissing a facial challenge to monitoring regulation for lack of standing because the “chilling effect” was too “remote and uncertain”).

106. 28 C.F.R. § 501.3(d)(2) (2014). See Cole, *supra* note 1, at 549.

107. 28 C.F.R. § 501.3(d)(3). See Cole, *supra* note 1, at 549.

government seeks to use material that was obtained from the monitoring, a federal judge must approve its use.¹⁰⁸

2. *Changes in the Forms of Communication: The Rise of E-mail*

Technology and the ways in which people communicate with each other are constantly changing.¹⁰⁹ The clearest example of this phenomenon has been the rise of e-mail, which offers a level of speed and efficiency not previously available.¹¹⁰ E-mail's increasing use among legal counsel is in part due to the fact that it does not require another person's availability, it provides a written version of a conversation, and it can be saved and easily accessed later.¹¹¹

a. *Attorney-Client E-mails Outside of the Prison Context*

For the general attorney-client privilege, when not involving inmates, courts have found that parties can have a reasonable expectation of privacy when using e-mail, except in the context of workplace e-mail accounts.¹¹² However, in *Convertino v. U.S. Department of Justice*,¹¹³ the court found that the defendant had a reasonable expectation of privacy in personal e-mails from a work account and that, consequently, those e-mails were protected by the attorney-client privilege.¹¹⁴ Courts determining the applicability of the attorney-client privilege to e-mail often employ traditional tests used for other forms of communications, including looking at whether legal advice was being conveyed and whether there was an expectation of privacy.¹¹⁵

108. See *supra* note 107.

109. See Piekarski, *supra* note 8, at 771.

110. Crotty, *supra* note 8 (discussing the increasing use of e-mail in legal contexts).

111. *Id.*

112. See, e.g., *Dombrowski v. Governor Mifflin Sch. Dist.*, No. 11-1278, 2012 WL 2501017, at *7 (E.D. Pa. June 29, 2012) (explaining that because the plaintiff's e-mail was not personal in any manner, such as a personal e-mail account, and was instead on a work computer, her expectation of privacy was unreasonable); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 561 (S.D.N.Y. 2008) (explaining that the plaintiff-employer's monitoring of the defendant's e-mails sent from the employer's computers was distinguishable from workplace e-mail cases because the defendant had used a personal e-mail account and therefore had a reasonable expectation of privacy); see also *United States v. Warshak*, 631 F.3d 266, 285–86 (6th Cir. 2010) (finding that e-mails should be afforded the same protection as other forms of communication).

113. 674 F. Supp. 2d 97 (D.D.C. 2009), *rev'd on other ground*, 684 F.3d 93 (D.C. Cir. 2012).

114. *Id.* at 110 (finding that the defendant had a reasonable expectation of privacy in e-mails sent from a work account because he was "unaware that [the employer] would be regularly accessing and saving e-mails sent from his account").

115. See, e.g., *Owens v. Stifel, Nicolaus & Co.*, No. 7:12-CV-144(HL), 2013 WL 6389035, at *2 (M.D. Ga. Dec. 6, 2013) (holding that e-mails with a lawyer recipient were not automatically privileged because they did not discuss legal advice).

b. Attorney-Client E-mails Sent Using Monitored Work E-mail Accounts Are Not Protected

Courts have generally found that e-mails sent on monitored workplace computers do not carry a reasonable expectation of privacy.¹¹⁶ In determining if certain e-mails are protected, courts often focus on whether the employees could reasonably have thought their communications were private, taking into account whether there was an employment policy that provided that the employer could monitor e-mails.¹¹⁷ For example, in *Hanson v. First National Bank*,¹¹⁸ the U.S. District Court for the Southern District of West Virginia found that, because an employer had a policy stating that the employer could monitor e-mail sent on a work e-mail system, the employee did not have a reasonable expectation of privacy in e-mails sent from work.¹¹⁹

c. A New Conversation: A Trend Toward Not Protecting E-mails Between Inmates and Their Attorneys

The debate over the protection of e-mails between inmates and their attorneys is only recently starting to appear in court cases.¹²⁰ This Comment focuses on federal cases because federal inmates have access to e-mail via the Trust Fund Limited Inmate Computer System (TRULINCS).¹²¹ States have been slower to adopt this policy, with many still not giving inmates access to e-mail or the Internet.¹²²

Among federal courts that have heard the issue, there is a consensus that because TRULINCS informs inmates that e-mails are monitored, there is no

116. See *Dombrowski*, 2012 WL 2501017, at *7.

117. *Hanson v. First Nat'l Bank*, No. CIV.A. 5:10-0906, 2011 WL 5201430, at *5 (S.D.W. Va. Oct. 31, 2011) (explaining that by using a work computer, an employee may have “impliedly waived confidentiality of the communication afforded by the attorney-client privilege if the employer has a policy which eliminates any expectation of privacy . . . by prohibiting personal use of the employer’s computer system and establishing that the employer has ownership of e-mails and the right to monitor them”).

118. No. CIV.A. 5:10-0906, 2011 WL 5201430 (S.D.W. Va. Oct. 31, 2011).

119. *Id.*, at *6.

120. Clifford, *supra* note 7.

121. 3 MUSHLIN, *supra* note 18, § 14:15 (quoting *Guajardo v. Estelle*, 580 F.2d 748, 755 (5th Cir. 1978)).

122. See, e.g., N.Y. STATE DEP’T OF CORR. & CMTY. SUPERVISION, HANDBOOK FOR THE FAMILIES AND FRIENDS OF NEW YORK STATE DOCCS OFFENDERS 38 (2013), available at <http://www.doccs.ny.gov/FamilyGuide/FamilyHandbook.pdf> (explaining that New York offenders do not have access to e-mail); *Frequently Asked Questions*, OHIO DEP’T REHAB. & CORR., <http://www.drc.ohio.gov/web/faq.htm> (last updated Nov. 25, 2014) (stating that Ohio inmates do not have access to e-mail); *How to Contact an Inmate*, CAL. DEP’T CORR. & REHAB., http://cdcr.ca.gov/Reports_Research/howtocontact.html (last visited Mar. 15, 2015) (stating that one can only contact California state inmates by mail or phone calls); but see Kimberly Railey, *Some Prisons Let Inmates Connect With Tablets*, USA TODAY (Aug. 18, 2013, 3:40 PM), <http://www.usatoday.com/story/news/nation/2013/08/17/tabletsforinmates/2651727/>.

expectation of privacy and, therefore, the e-mails are not privileged.¹²³ In *F.T.C v. National Urological Group, Inc.*,¹²⁴ the U.S. District Court for the Northern District of Georgia found that the defendants had waived their attorney-client privilege by e-mailing with their attorneys because the inmates had consented to the monitoring of their e-mail communications.¹²⁵

However, more recently, there has been a trend toward defendants conceding that their e-mails are not privileged, and, instead, arguing that the monitoring of their e-mails violates their constitutional right to access counsel.¹²⁶ In *United States v. Walia*,¹²⁷ the defendant acknowledged that his e-mails with his attorney, sent on the prison e-mail system, were not privileged, but argued they should not be viewable by the government because government review would “frustrate[] his right to access counsel.”¹²⁸ Further, the defendant’s attorney asserted that e-mail was a more efficient means of contacting his client, allowing him to “explain matters to his client so that his client [could] make informed decisions.”¹²⁹

Despite the ease and speed of attorney-client e-mail communications, in *Walia*, the U.S. District Court for the Eastern District of New York held that the prison e-mail system was not privileged and that the inmate’s right of access to counsel was not violated because he had other ways of communicating with his lawyer.¹³⁰ In addressing the constitutional question, the court acknowledged that these additional forms of communications may be more “burdensome,” but that this was not a sufficient reason to find that the prison had violated the defendant’s constitutional right to have access to counsel.¹³¹

123. See *United States v. Walia*, No. 14-CR-213 (MKB), 2014 U.S. Dist. LEXIS 102246, at *47 (E.D.N.Y. July 25, 2014); *United States v. Asaro*, No. 14-Cr-26 (ARR), 2014 U.S. Dist. LEXIS 97396, at *2 (E.D.N.Y. July 17, 2014); *F.T.C. v. Nat’l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP, 2012 WL 171621, at *6 (N.D. Ga. Jan. 20, 2012); see also *supra* note 7 and accompanying text.

124. No. 1:04-CV-3294-CAP, 2012 WL 171621 (N.D. Ga. Jan. 20, 2012).

125. *Id.* at *6 (holding that the defendant had waived attorney-client privilege “because he had consented to monitoring and thus had no reasonable expectation of privacy”).

126. See, e.g., *Walia*, 2014 U.S. Dist. LEXIS 102246, at *47.

127. No. 14-CR-213 (MKB), 2014 U.S. Dist. LEXIS 102246 (E.D.N.Y. July 25, 2014).

128. *Id.* at *47 (quoting Docket Entry No. 34 at 1) (internal quotation marks omitted) (explaining that the defendant’s counsel argued that using e-mail “allows him to meet his ethical obligations under the American Bar Association’s Model Rule 1.4” and “allows busy public defenders to tend to all of their clients”) (quoting Docket Entry No. 34 at 2–3)).

129. *Id.*

130. *Id.* at *48–50 (“TRULINCS . . . is a privilege and the BOP has absolute discretion in determining whether to limit or deny the use of TRULINCS by an inmate”) (quoting *Dunlea v. Fed. Bureau of Prisons*, No. 3:10-cv-214 (CFD), 2010 U.S. Dist. LEXIS 41134, at *3 (D. Conn. Apr. 26, 2010)).

131. *Id.* at *49–50 (holding that although the defendant’s counsel recommended a technological solution, which involved each inmate having two e-mail addresses to allow for e-mails with attorneys to automatically be separated, as of now the TRULINCS e-mail system “does not provide for the communication of privileged information”).

Another recent case with similar arguments is *United States v. Asaro*.¹³² In *Asaro*, the defendant argued that although his e-mails were not privileged, the government reading his e-mails frustrates his Sixth Amendment right of access to counsel because avoiding this official surveillance through using traditionally protected communications, such as in-person conferences, would not be as efficient as communicating with his attorney via e-mail.¹³³ The U.S. District Court for the Eastern District of New York found that this did not violate the defendant's Sixth Amendment rights because he had other forms of privileged communication with his attorney.¹³⁴ The court went on to say that, "it would be a welcome development for . . . [the Bureau of Prisons] to improve TRULINCS so that attorney-client communications could be easily separated from other e-mails and subject to protection. However, . . . any inconvenience . . . does not rise to the level of a Sixth Amendment violation."¹³⁵

The U.S. Attorney's office for the Eastern District of New York, which prosecuted both *Walia* and *Asaro*,¹³⁶ proactively asserts a lack of privilege to inmate's e-mails.¹³⁷ On June 9, 2014, the U.S. Attorney's Office released a letter explaining that the office would be monitoring e-mails between inmates and their attorneys sent on TRULINCS because the e-mails are not privileged.¹³⁸ The letter included several ways in which inmates and attorneys are warned that

132. No. 14-Cr-26 (ARR), 2014 U.S. Dist. LEXIS 97396 (E.D.N.Y. July 17, 2014).

133. *Id.* at *2-3. The defense attorney in the ongoing case of *United States v. Syed Imran Ahmed* raised a similar argument in a letter to the judge, arguing that the defendant's e-mails should be protected in order to preserve the defendant's right of access to counsel. Letter from Morris J. Fodeman to Judge Dora L. Irizarry 1-2 (June 20, 2014), available at <http://www.kmbllaw.com/documents/CorlinksPrivilegeClaimLetter.pdf>. Morris J. Fodeman, the attorney, explained the difficulties involved in attempting to contact the defendant. *Id.* at 2-3. The prison does not accept mail sent "via expedited mail services," resulting in a wait time of two or more weeks for an inmate to receive a letter. *Id.* at 2. This process does not include the time it then takes for the inmate to respond and to get a letter back to his attorneys. *Id.* at 2-3. As for phone calls, defense attorneys often have to spend an extended amount of time attempting to get their calls pre-approved. *Id.* Visiting the defendant in prison can take a total of five hours, which costs the taxpayers \$600 for the visit alone, because the defense attorney is paid by the taxpayers. *Id.*

134. *Asaro*, 2014 U.S. Dist. LEXIS 97396, at *3-4 (holding that the prison's system did not "unreasonably interfere" with the defendant's access to counsel and that the defendant did not assert "any interference with his ability to consult counsel through these other media, other than his counsel's expending time and funds on traveling to visit him and the inconvenience of having to arrange phone calls in advance").

135. *Id.* at *4.

136. See *Walia*, 2014 U.S. Dist. LEXIS 102246, at *1; *Asaro*, 2014 U.S. Dist. LEXIS 97396, at *1.

137. See Letter from James G. McGovern, Assistant U.S. Attorney, Chief, Criminal Division, E. Dist. of N.Y., to Peter Kirchheimer, Attorney-in-Charge, Federal Defenders of N.Y. (June 9, 2014), available at <http://nylawyer.nylj.com/adgifs/decisions14/072214letter.pdf>.

138. *Id.* (noting initial user agreements, warnings when users logged in, and notifications to users of the TRULINCS system).

the prisons monitor e-mails.¹³⁹ First, inmates consent to monitoring in order to gain access to TRULINCS.¹⁴⁰ Second, non-inmate users are also warned that the prisons monitor all communications.¹⁴¹ Third, every time inmates log onto TRULINCS they are again warned that the prison monitors e-mails, and inmates must click “I accept,” acknowledging their consent to the monitoring.¹⁴²

Other federal courts have not been as accepting of the government surveillance of e-mails between inmates and attorneys. For example, in *United States v. Aguilar*,¹⁴³ the U.S. District Court for the Central District of California suggested that e-mails between an inmate and her attorney were protected.¹⁴⁴ *Aguilar* involved an Assistant United States Attorney (AUSA) who had accessed e-mails between an inmate and her attorneys and shared them with the prosecution.¹⁴⁵ The AUSA claimed she had the court’s permission to do so.¹⁴⁶ Ultimately, the court suppressed the e-mails, finding that the AUSA was not authorized to monitor or share the communications.¹⁴⁷ The *Aguilar* decision suggests that the Central District of California affords inmates’ e-mails more protection than the Eastern District of New York.

II. DIFFERENT MOTIVATIONS FOR MAKING E-MAILS BETWEEN INMATES AND ATTORNEYS PRIVILEGED

The cases concerning e-mails between inmates and their attorneys have featured different legal arguments to support e-mail’s protection from surveillance, including the attorney-client privilege, the constitutional right to access counsel, and efficiency. Although not used in recent e-mail cases, the constitutional right of freedom of speech,¹⁴⁸ the right to petition the

139. *Id.* (stating that user agreements inform TRULINCS users that they are “notified of, acknowledge and voluntarily consent to having [their] messages and transaction data . . . monitored, read, retained by Bureau staff and otherwise handled” (internal quotation marks omitted)).

140. *Id.*

141. *Id.*

142. *Id.*

143. 831 F. Supp. 2d 1180 (C.D. Ca. 2011).

144. *Id.* at 1193–94 (observing that “the [c]ourt granted Aguilar’s motion to suppress” the prosecution’s improper use of “communications between Aguilar and her attorneys”).

145. *Id.*

146. *Id.* at 1194.

147. *Id.* (concluding and admitting that “[t]he prosecutors never requested [the] court[’s] permission to obtain [the e-mails]”).

148. See *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989) (holding that censorship of inmate mail is acceptable when there is a “substantial governmental interest unrelated to the suppression of expression” and “the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved”); *Bell-Bey v. Williams*, 87 F.3d 832, 839 (6th Cir. 1996) (explaining that a policy directing prison officials to read attorney-client mail would “chill a prisoner’s free expression”).

government,¹⁴⁹ and the right to due process¹⁵⁰ have also been used in cases dealing with attorney-client privilege and its attendant privacy interest generally.

A. *The Attorney-Client Privilege*

The first defense for preventing the government from looking at inmate-attorney e-mails is the attorney-client privilege.¹⁵¹ However, this argument has not been successful. For example, in *F.T.C. v. National Urological Group, Inc.*,¹⁵² the court addressed the question of attorney-client privilege and found that the defendants had waived their attorney-client privilege.¹⁵³ The court held that the privilege was waived because the inmate used TRULINCS, which notified him that his e-mails would be monitored.¹⁵⁴ In more recent cases, parties have conceded this argument, and instead proceeded to the constitutional claim of access to counsel.¹⁵⁵

The courts' analysis for attorney-client privilege in e-mails is similar to the analysis for phone calls. In *United States v. Lentz*, the U.S. District Court for the Eastern District of Virginia found that phone calls were not privileged when parties were alerted that their calls were being recorded because they could not have had a reasonable expectation of privacy.¹⁵⁶ Therefore, the courts seem to agree that when an inmate is put on notice that a phone call or e-mail is being monitored, the attorney-client privilege does not apply.

B. *A Constitutional Right to Access Counsel*

Parties have now started to concede the attorney-client privilege argument, and instead focus on the constitutional argument of the right to counsel.¹⁵⁷ This

149. *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (citing *Johnson v. Avery*, 393 U.S. 483 (1969)) (“[P]risoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.”).

150. *Coplon v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951) (citing *Neufield v. United States*, 118 F.2d 375, 383 (D.C. Cir.)) (explaining that due process involves an inmate having “effective and substantial aid of counsel”). The court went on to say that a person accused of a crime could not have “effective aid of counsel” if he could not converse privately with the attorney. *Id.*

151. *F.T.C. v. Nat’l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP, 2012 WL 171621, at *5 (N.D. Ga. Jan. 20, 2012).

152. No. 1:04-CV-3294-CAP, 2012 WL 171621, at *5 (N.D. Ga. Jan. 20, 2012).

153. *Id.* at *5–6.

154. *Id.*

155. *United States v. Asaro*, No. 14-Cr-26 (ARR), 2014 U.S. Dist. LEXIS 97396, *1–2 (E.D.N.Y. July 17, 2014).

156. *United States v. Lentz*, 419 F. Supp. 2d 820, 828–29 (E.D. Va. 2005).

157. See U.S. CONST. amend. VI; *Asaro*, 2014 U.S. Dist. LEXIS 97396, at *1–2.

argument was used to no avail in *United States v. Asaro*, *F.T.C. v. National Urological Group, Inc.*, and *United States v. Walia*.¹⁵⁸

In *Asaro*, the argument did not work because the court found that a lack of access to privileged e-mails did not deprive the defendant of his Sixth Amendment right to counsel because there are a myriad of alternative means of communicating with his attorney.¹⁵⁹ The court noted that instead of restricting inmates' ability to communicate with their attorneys, the prison actually improved inmates' access to the outside world and counsel by allowing inmates to use TRULINCS.¹⁶⁰

In *F.T.C.*, the court rejected this same argument for two reasons.¹⁶¹ First, the court found that the prison had not violated the defendant's constitutional rights because he consented to the monitoring of his e-mails and, therefore, had no "reasonable expectation of privacy."¹⁶² Second, the court found that because it was a civil contempt proceeding, the Sixth Amendment did not apply.¹⁶³

In *Walia*, the court did not find the defendant's right to counsel argument persuasive for similar reasons as those in *Asaro*.¹⁶⁴ The court stated that the defendant was not deprived of his Sixth Amendment right to counsel because he had additional ways of communicating with his attorney.¹⁶⁵ Specifically, the court found that although it "may not agree with the position of the United States Attorney's Office to review non-privileged e[-]mail communications between inmates and their attorneys communicated over a monitored system, the [c]ourt has no legal basis to find that the fundamental right of access to effective assistance of counsel . . . is compromised."¹⁶⁶

Parties have made similar arguments in cases dealing with phone calls between inmates and their attorneys.¹⁶⁷ In *Coplion*, the court stressed the importance of allowing an inmate to "privately . . . consult with counsel."¹⁶⁸ The court reasoned that even if the inmate had other ways to communicate with his attorney, because the right of access to counsel is important, phone calls should still not be intercepted.¹⁶⁹

158. *United States v. Walia*, No. 14-CR-213 (MKB), 2014 U.S. Dist. LEXIS 102246, at *47-51 (E.D.N.Y. July 25, 2014); *Asaro*, 2014 U.S. Dist. LEXIS 97396, at *1-4; *F.T.C.*, 2012 WL 171621, at *6.

159. *Asaro*, 2014 U.S. Dist. LEXIS 97396, at *3-4.

160. *Id.* at *4.

161. *F.T.C.*, 2012 WL 171621, at *5-8.

162. *Id.* at *6.

163. *Id.*

164. *United States v. Walia*, No. 14-CR-213 (MKB), 2014 U.S. Dist. LEXIS 102246, at *49-51 (E.D.N.Y. July 25, 2014). See *Asaro*, 2014 U.S. Dist. LEXIS 97396, at *3-4.

165. *Walia*, 2014 U.S. Dist. LEXIS 102246, at *49-50.

166. *Id.* at *50.

167. See *Coplion v. United States*, 191 F.2d 749, 759 (D.C. Cir. 1951).

168. *Id.* at 758.

169. *Id.* at 759.

C. The Efficiency of E-mail

Beyond the legal arguments for protecting attorney-client e-mails, there are practical reasons to do so as well. Attorneys have argued that e-mails are a more efficient means of communication with their incarcerated clients.¹⁷⁰ As the court admitted in *Asaro*, it is not only “easier but also more efficient and cost-effective if their communications regarding defense preparation could be conducted through privilege-protected emails.”¹⁷¹ This is especially important when the public, and not a private client, is paying for legal services.¹⁷²

The Federal Bureau of Prisons’ website outlines the several steps involved in visiting an inmate.¹⁷³ The visits can take hours between driving to and from the prison, going through security, and actually conducting the visit.¹⁷⁴ While phone calls can be an easy form of communication for those on the outside, a phone call to an inmate can also be extremely time consuming because it requires getting approval for an un-monitored call.¹⁷⁵ And while letters themselves may not take much time to write, the time it takes for them to get to the inmate, and then to get back to the attorney, can sometimes run up to several weeks.¹⁷⁶

Attorneys in both *Asaro* and *Walia* relied on the efficiency argument to support their claim that the government should not be reading the defendants’ e-mails to their attorneys.¹⁷⁷ However, the U.S. District Court for the Eastern District of New York was not persuaded by this argument in either case.¹⁷⁸ The court in *Asaro* said that although it understood that it would be “more efficient and cost-effective if their communications regarding defense preparation could be conducted through privilege-protected e-mails, there is insufficient legal basis for the argument that [the Bureau of Prisons’] failure to provide a privileged

170. See *United States v. Asaro*, No. 14-Cr-26 (ARR), 2014 U.S. Dist. LEXIS 97396, at *3 (E.D.N.Y. July 17, 2014).

171. *Id.* As the defense attorney in *Syed Imran Ahmed* outlined in his letter to the judge, the other three ways for attorneys to communicate with inmates—in-person, letter, and phone call—are very time consuming for the attorneys. Letter from Morris J. Fodeman to Judge Dora L. Irizarry, *supra* note 133, at 2–3.

172. See *id.* at 3.

173. *General Visiting Information*, FED. BUREAU PRISONS, <http://www.bop.gov/inmates/visiting.jsp> (last visited May 11, 2015) (explaining that before visiting an inmate one must locate the inmate, get approval to be on the inmate’s visiting list, prepare for all of the rules and procedures for a prison visit, and plan a visit based on the hours and location of the prison). However, as the defense attorney mentioned in *Syed Imran Ahmed*, there are generally requirements for pre-approval that involve extensive planning in advance. Letter from Morris J. Fodeman to Judge Dora L. Irizarry, *supra* note 133, at 2–3.

174. *Id.* at 3.

175. *Id.* at 2–3.

176. See *id.* at 2.

177. *United States v. Walia*, No. 14-CR-213 (MKB), 2014 U.S. Dist. LEXIS 102246, at *48–49 (E.D.N.Y. July 25, 2014); *United States v. Asaro*, No. 14-Cr-26 (ARR), 2014 U.S. Dist. LEXIS 97396, at *3 (E.D.N.Y. July 17, 2014).

178. *Walia*, 2014 U.S. Dist. LEXIS 102246, at *49–50; *Asaro*, 2014 U.S. Dist. LEXIS 97396, at *3–4.

form of email communication infringes . . . [the] right to counsel.”¹⁷⁹ The court in *Walia* took a similar approach, stating that, “[a]lthough the [c]ourt understands and appreciates [the] [d]efendant’s desire to have quick and easy access to his counsel by e-mail,” there was “no legal basis” to conclude that an inability to e-mail with one’s attorney violates the Sixth Amendment’s right of access to counsel.¹⁸⁰

III. A MODERN SOLUTION FOR AN OLD CONSTITUTIONAL RIGHT

The attorney-client privilege has been recognized in the American legal system longer than any other privilege.¹⁸¹ It is a vital part of a defendant’s ability to receive effective legal counsel and fair access to the courts.¹⁸² The privilege was previously extended to three common forms of communication—in-person visits, letters, and phone calls.¹⁸³ And yet, as technology has changed and a new form of communication, e-mail, has become part of society, the law has not adapted accordingly.

E-mail has integrated itself into every other facet of American culture and life.¹⁸⁴ Prisons took a positive step forward by granting inmates access to e-mail.¹⁸⁵ However, they need to take the next step by treating attorney-client e-mails, sent on TRULINCS, in the same manner as other forms of privileged communication that inmates can access.

This issue is new to federal courts. Of the courts faced with this question, several have said that they are forced to find that these e-mails are not privileged, and, therefore, prosecutors and prison officials can access the e-mails.¹⁸⁶ Even though courts were sympathetic to the inmates’ arguments in these cases, it ruled against them, citing current privilege doctrine and alternate means of communication, which prevent a lack of confidential e-mail from rising to the level of a Sixth Amendment violation.¹⁸⁷

The current approach is based on the assumption that the e-mails are not privileged because inmates consent to e-mail monitoring when they log on to

179. *Asaro*, 2014 U.S. Dist. LEXIS 97396, at *3.

180. *Walia*, 2014 U.S. Dist. LEXIS 102246, at *49–50.

181. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 WIGMORE, *supra* note 1).

182. *Id.*

183. *See Procnunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989) (discussing communication by letter); *Negron v. Wallace*, 436 F.2d 1139, 1145 (2d Cir. 1971) (evaluating in-person communication); *Coplon v. United States*, 191 F.2d 749, 759 (D.C. Cir. 1951) (analyzing telephone communications).

184. *See Crotty*, *supra* note 8, § 62:41.

185. *See United States v. Asaro*, No. 14-Cr-26 (ARR), 2014 U.S. Dist. LEXIS 97396, at *4 (E.D.N.Y. July 17, 2014) (lauding the Bureau of Prisons for “significantly increase[ing] inmates’ ability to communicate with the outside world” by implementing TRULINCS).

186. *United States v. Walia*, No. 14-CR-213 (MKB), 2014 U.S. Dist. LEXIS 102246, at *49–50 (E.D.N.Y. July 25, 2014); *Asaro*, 2014 U.S. Dist. LEXIS 97396, at *4.

187. *See supra* note 186.

TRULINCS.¹⁸⁸ However, the same argument could be made for phone calls that are monitored.¹⁸⁹ Yet, with phone calls, courts have held that while officials may monitor them generally, phone calls between attorneys and inmates are privileged and protected by the Sixth Amendment and therefore may not be monitored if inmates follow certain rules.¹⁹⁰ This rule should apply to e-mails as well. Prisons should generally monitor e-mails, but with an exception for attorney-client e-mails, so that there is no warning for those conversations. This would provide a reasonable expectation of privacy, and thus, a privilege.

Although e-mail should be treated as privileged, there is also a strong argument that e-mail should not be discoverable by the government because it infringes on an inmate's right to access counsel.¹⁹¹ The same constitutional impetus—which requires prisons to allow inmates to communicate with their attorneys via in-person visits, phone calls, and letters—should apply to e-mail. However, courts argue that there are sufficient alternative forms of communication.¹⁹² This argument is flawed for two reasons. First, it is arbitrary to say that three forms of communication are enough and four would be too many. Second, the fourth form is more efficient and effective than the previous three.

E-mail is efficient.¹⁹³ It allows an attorney to communicate more easily with his client about a time sensitive matter and receive a timely response. In cases with complicated documents, this efficiency is necessary for the attorney to effectively represent the client.¹⁹⁴ It also allows an attorney, especially a public defender, to do all of this from home or work, as opposed to spending hours getting to and from the prison, hours attempting to get phone call approval, or weeks waiting for letters to make it to and from the prison.¹⁹⁵

The solution to this problem is to treat e-mail communications between inmates and their attorneys as privileged, in the same way that the other forms of communication are already treated as privileged. Arguably, there are many ways to do this, but the best is to treat inmate e-mails in the same manner as

188. *Walia*, 2014 U.S. Dist. LEXIS 102246, at *49–50.

189. *See* *United States v. Novak*, 531 F.3d 99, 100 (1st Cir. 2008) (describing two ways that inmates using the phone are put on notice that the call is monitored).

190. *Id.* at 100–04 (holding that the defendant had a Sixth Amendment right to private conversations with his attorney, but that the official's monitoring did not violate the Fourth Amendment because the inmate consented to the monitoring when he used the phone, despite a warning that the prison was listening to the call).

191. *See, e.g., Asaro*, 2014 U.S. Dist. LEXIS 97396, at *2 (stating the defendant's argument that a defendant's Sixth Amendment right of access to counsel is impeded when a prison monitors the inmate's e-mails with his attorney).

192. *Walia*, 2014 U.S. Dist. LEXIS 102246, at *49–51.

193. Crotty, *supra* note 8, § 62:41 (discussing the benefits of e-mail in the legal context).

194. Letter from Morris J. Fodeman to Judge Dora L. Irizarry, *supra* note 133, at 2 (explaining why, in a case involving thousands of pages of discovery, privileged e-mail communications between an inmate and his attorney are essential to the inmate's right of access to counsel).

195. *Id.* at 2–3.

phone calls. E-mails are most similar to phone calls because nothing physical can be passed back and forth, as can be done with a visit or a letter. Therefore, the prison cannot justify e-mail monitoring on the basis of uncovering contraband. However, while phone calls may be monitored,¹⁹⁶ the federal rules provide for the protection of properly placed phone calls between attorneys and clients.¹⁹⁷ The e-mail rules should follow the federal phone call rules that protect the attorney-client privilege.

In coming up with a solution that treats e-mails like phone calls, the first step is to eliminate the warning that is included in the TRULINCS system. Currently, inmates are warned that the prison monitors all conversations.¹⁹⁸ TRULINCS needs to be updated so that e-mails between inmates and their attorneys are not monitored. If prisons are not able to change the message on TRULINCS, there needs to be a prison wide policy that filters e-mails between inmates and attorneys out of the general pool to prevent the government from monitoring them.

Additionally, the prisons need to require inmates and their attorneys to ensure that the e-mail addresses of the attorneys are on the prison's list of e-mails not to monitor. This approach is similar to the phone call and letter systems already in place.¹⁹⁹ It would be impossible for a prison to have a list of every local attorney's email address. There are always new attorneys, and people tend to change their e-mail addresses more frequently than people historically did with phone numbers. Therefore, the burden should rightfully be placed on inmates and their attorneys to update the prison list with the e-mail addresses of the attorneys in order to ensure their communications are protected.

As with the other forms of communication, cases where an inmate does not follow the rules to ensure the inmate has privileged conversations can result in a waiver of the inmate's right to a privileged conversation.²⁰⁰ However, for this to be appropriate, prisons must ensure that all requirements and systems are adequately explained and advertised to both inmates and their attorneys.

IV. CONCLUSION

The attorney-client privilege is an integral part of an individual's right to due process, counsel, free speech, and to petition. As such an important privilege, it is crucial, especially in the setting of prisons, that the law adapts to changes in technology. One technology that has revolutionized the way legal representation is conducted is e-mail communication. However, the law and the prison system

196. *United States v. Lentz*, 419 F. Supp. 2d 820, 828–29 (E.D. Va. 2005).

197. 28 C.F.R. § 540.102 (2014).

198. *See F.T.C. v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP, 2012 WL 171621, at *5–6 (N.D. Ga. Jan. 20, 2012) (“TRULINCS requires prisoners using the system to consent to monitoring and warns that communications with attorneys are not privileged.”).

199. *See United States v. Novak*, 531 F.3d 99, 100–01 (1st Cir. 2008); *Stover v. Carlson*, 413 F. Supp. 718, 721 (D. Conn. 1976); *see also* 28 C.F.R. § 540.102.

200. *See supra* note 190 and accompanying text; *see also F.T.C.*, 2012 WL 171621, at *5.

have not adapted to allow inmates to have privileged communications via e-mail. The law needs to be changed so that e-mails are given the same privileged treatment as in-person visits, letters, and phone calls. This change should be achieved by changing the language on TRULINCS, the inmates' e-mail access system, so that the parties can enjoy a reasonable expectation of privacy, which, in turn, will allow the courts to prevent the government from monitoring the e-mails between inmates and pre-approved attorneys.