Negative: Attorney/Client Emails

By “Coach Vance” Trefethen

***The United States Federal Government should significantly reform its policies regarding convicted prisoners under federal jurisdiction***

Case Summary: The AFF plan modifies the “TRULINCS” email system in federal prisons to allow for prisoners to be able to send emails to their attorney confidentially without being monitored. This is to uphold the 6th Amendment right to counsel, which includes the right to be able to confer with your attorney in complete privacy. AFF believes it is impossible to uphold the 6A without including emails. Prisoners today can place phone calls and write letters, as well as have their attorney visit the prison, and these can be done confidentially without monitoring (but only with an attorney, not anyone else).
I don’t normally recommend running “funding” solvency arguments. Congress can print money, so federal plans normally cannot run out of money unless they run into the trillions. But one exception to my rule is when the AFF specifically claims how much their plan costs and tells you that’s how much they budget for it… and then you find a piece of evidence that specifically says it will cost a lot more than that.

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Negative: Attorney/Client Emails

GOAL / PHILOSOPHY RESPONSES to “Equal Justice Under the Law”

Affirmative’s theory that prisoners must have “equal” constitutional rights as everyone else is flat wrong

Constitutional rights – including mail - can be restricted when it’s reasonably related to legitimate prison requirements

Judge Dineen King 1993 (US Court of Appeals, 5th Circuit) decision of the Court in the case of Brewer v. Wilkinson 22 Sept 1993 <https://www.casemine.com/judgement/us/59148609add7b049344cfcaf> (accessed 4 Feb 2022)



Prisoners cannot expect to get the same constitutional protections as law-abiding citizens, for obvious reasons

Sara Carter 2019 (Harvard Law School, JD candidate) 16 Oct 2019 “Strip Searches Deny Prisoners Their Constitutional Rights” <https://harvardcrcl.org/strip-searches-deny-prisoners-their-constitutional-rights/> (accessed 4 Feb 2022)

The Fourth Amendment protects from unreasonable searches and seizures of persons and their property. Importantly, the Fourth Amendment applies only when a party has a subjective expectation of privacy and that expectation is “one that society is prepared to recognize as [reasonable](https://supreme.justia.com/cases/federal/us/389/347/#tab-opinion-1946919).” Courts [deny](https://advance.lexis.com/search/?pdmfid=1000516&crid=147c50e4-123f-44d5-bbe4-00ac038e3540&pdsearchterms=.%E2%80%9D+Katz+v.+United+States%2C+389+U.S.+347%2C+361+(1967)&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdqttype=and&pdquerytemplateid=&ecomp=1gr9k&prid=86c5b520-08e5-41a2-924d-cfcd35fd6386) incarcerated people the full extent of their Fourth Amendment rights, finding curtailment necessary for institutional purposes. While pre-trial detainees have a lower expectation of privacy than the public, prisoners post-conviction face a [severely reduced](https://drive.google.com/file/d/1eDW5aQjjpASd50rstl_O08vo7EvLu43a/view?usp=sharing) expectation of privacy.

INHERENCY

1. Unmonitored alternatives

Phone calls, letters and personal visits with attorneys are not monitored

Carrie Johnson 2021. (journalist) 31 Mar 2021 “When It Comes To Email, Some Prisoners Say Attorney-Client Privilege Has Been Erased” <https://www.npr.org/2021/03/31/982339371/when-it-comes-to-email-some-prisoners-say-attorney-client-privilege-has-been-era#:~:text=Attorney%2DClient%20Privilege%20Rights%20In,Prisons%20Come%20Under%20Fire%20%3A%20NPR&text=Music%20Of%202021-,Attorney%2DClient%20Privilege%20Rights%20In%20Federal%20Bureau%20Of%20Prisons%20Come,use%20the%20bureau's%20email%20system>. (accessed 2 Feb 2022)

Scott Taylor, a spokesman for the Federal Bureau of Prisons, pointed out that inmates and their contacts who use the email system "voluntarily consent to having all system activity monitored and retained."He said that prisoners and their lawyers can communicate through phone, letters or visits, which he said are not monitored by staff.

HARMS / SIGNIFICANCE

1. No 6th Amendment violation #1: They don’t even have a “right” to use TRULINCS

TRULINCS is a privilege not a “right.” There can be no “right” to unmonitored access if there’s no right to ANY access

Federal Bureau of Prisons 2009. Program Statement 19 Feb 2009 Trust Fund Limited Inmate Computer System (TRULINCS) - Electronic Messaging <https://www.lb7.uscourts.gov/documents/13-852.pdf> (accessed 3 Feb 2022)

Use of the TRULINCS is a privilege; therefore, the Warden or an authorized representative may limit or deny the privilege of a particular inmate (see Section 3 for restrictions). Individual inmates may be excluded from program participation as part of classification procedures (see Section 3). Information supporting the exclusion is forwarded to the Warden for final determination.

2. No 6th Amendment violation #2: The Bill of Rights existed long before email

Link: TRULINCS was started in 2010

Federal Judge William T. Lawrence 2017 (US District Court Southern District of Indiana) decision in the case of Sebolt v. Lariva 23 May 2017 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF INDIANA TERRE HAUTE DIVISION <https://www.govinfo.gov/content/pkg/USCOURTS-insd-2_15-cv-00353/pdf/USCOURTS-insd-2_15-cv-00353-1.pdf> (accessed 3 Feb 2022)

Prior to Sebolt’s transfer to FCI-Terre Haute he was incarcerated at the Federal Correctional Institution in Hopewell, Virginia. The TRULINCS system was activated in October 2010.

Link: The 6th Amendment was ratified in 1791

Britannica encyclopedia online 2010. “Sixth Amendment” <https://www.britannica.com/topic/Sixth-Amendment> (accessed 3 Feb 2022)

**Sixth Amendment**, [amendment](https://www.britannica.com/topic/amendment) (1791) to the [Constitution of the United States](https://www.britannica.com/topic/Constitution-of-the-United-States-of-America), part of the [Bill of Rights](https://www.britannica.com/topic/Bill-of-Rights-United-States-Constitution), that effectively established the procedures governing criminal courts.

Fail: Email CANNOT be essential to upholding the 6th Amendment

Email CANNOT be essential to uphold the 6th Amendment because it didn’t exist for over 200 years after the 6th Amendment was written.

3. No 6th Amendment violation #3: Alternate means of communication satisfy the Constitutional right

Even if they’re more burdensome, alternate means of communication are enough to uphold the 6th Amendment

Judge Margo K. Brodie 2014 (federal judge, US District Court, Eastern District of N.Y.) 25 July 2014 Decision of the court in the case of U.S. v. Walia <https://casetext.com/case/united-states-v-walia-1> (accessed 4 Feb 2022)

 Even though they may be more burdensome than email, the aforementioned methods of communication between Defendant and counsel remain available and unfettered. *See Groenow v. Williams,*No. 13-CV-3961, 2014 WL 941276, at \*6 (S.D.N.Y. Mar. 11, 2014) (recognizing that "district courts have found that a prisoner's right to counsel is not unreasonably burdened where a plaintiff has alternate means of communication with counsel" (collecting cases)). The Court has no legal basis to prohibit the review of these emails. Defendant's motion to prevent the government from reviewing his non-privileged communication with counsel is denied.

Private emails would be nice to have. But not having them doesn’t violate the 6th Amendment

**[As a parallel, a prisoner and his attorney both might think it would be good for the prisoner to get a week’s furlough to leave prison and go visit the attorney’s office personally at the taxpayer’s expense. That would be nice. But it isn’t required by the 6th Amendment.]**

Judge Allyne Ross 2014. (Federal judge in the US District Court for the Eastern District of N.Y.) decision of the court in the caes of US v. Asaro 15 July 2014 <https://casetext.com/case/united-states-v-asaro> (accessed 5 Feb 2022) (brackets in original)

The government's policy does not "unreasonably interfere" with Mr. DiFiore's ability to consult his counsel, as other means of privileged communication remain open to him, including phone calls, mail, and in-person visits with his attorney. See Benjamin v. Fraser, [264 F.3d 175, 187](https://casetext.com/case/benjamin-v-fraser-4#p187) (2d Cir. 2001) (noting that prison regulations restricting defendants' access to counsel would be unconstitutional where they "unreasonably burden [] the inmate's opportunity to consult with counsel and to prepare his defense") (internal quotation marks omitted). Mr. DiFiore has not alleged 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. In fact, by implementing TRULINCS in recent years, BOP has not placed restrictions on inmates' ability to contact their counsel, but rather it has significantly increased inmates' ability to communicate with the outside world, including with their counsel, even if not currently in a privileged form. Certainly, it would be a welcome development for BOP to improve TRULINCS so that attorney-client communications could be easily separated from other emails and subject to protection. However, I find that any  inconvenience to Mr. DiFiore and his counsel caused by the current system does not rise to the level of a Sixth Amendment violation.

4. No 6th Amendment violation #4: Inmates are warned and consent to monitoring

Warning and consent block the claim of attorney/client privilege

Judge Charles Pannell 2012. (Federal judge, US District Court for Northern District of Ga.) FTC v. Nat'l Urological Grp. Inc. 20 Jan 2012 <https://casetext.com/case/fed-trade-commn-v-natl-urological-grp-inc> (accessed 4 Feb 2022)

First, defendant Jared Wheat waived his privilege by communicating with his attorney using a prison-monitored email system, the Trust Fund Limited Inmate Computer System (TRULINCS). Essentially, TRULINCS requires prisoners using  the system to consent to monitoring and warns that communications with attorneys are not privileged.

5. No 6th Amendment Violation #5: Safety concerns trump prisoners’ rights

Link: Justice O’Connor said prisoners’ constitutional “right” to correspondence can be limited if there’s a security reason

Prof. David L. Hudson 2009. (law professor) “THE FIRST AMENDMENT ENCYCLOPEDIA” <https://www.mtsu.edu/first-amendment/article/542/turner-v-safley> (accessed 5 Feb 2022) (brackets in original)

Writing for the majority, [Justice Sandra Day O’Connor](https://mtsu.edu/first-amendment/article/1349/sandra-day-o-connor) stated that “[p]rison walls do not form a barrier separating inmates from the protections of the Constitution,” but also that prison administrators deserve a wide degree of deference. She rejected the application of heightened scrutiny under Procunier and identified the proper standard: “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” She listed four factors crucial to applying this standard:
“(1) whether there is a “valid, rational connection” between the prison regulation and the legitimate governmental interest;

(2) whether there are alternative means for the inmates to exercise their constitutional rights;

(3) whether the granting of inmate request will negatively impact on guards and other inmates;

and (4) whether there are any ready alternative ways for the inmate to exercise his rights.”

Applying this deferential standard, the Court upheld the correspondence regulation, writing that it was reasonably related to legitimate security concerns.

Failure: Email meets Justice O’Connor’s tests. There are alternatives (proven above) and it can carry threats. Example: Federal prisoner Lamarcus Moore

Dept of Justice, US Attorney’s Office, Southern District of Alabama 2018. “Mobile Man Sentenced to Prison for Email Threats” 10 Jan 2018 <https://www.justice.gov/usao-sdal/pr/mobile-man-sentenced-prison-email-threats> (accessed 5 Feb 2022)

United States Attorney Richard W. Moore of the Southern District of Alabama announced that Lamarcus Moore, 32, of Mobile, was sentenced to 21 months in prison for emailing threats to kidnap and kill a woman in Mobile. United States District Judge Kristi K. DuBose imposed the sentence. Moore pled guilty to the charge in September. Court documents filed in connection with his plea indicate that Moore sent at least nine separate emails over a period of a month to the victim. The emails contained explicit threats to kill the woman. At the time, Moore was in federal prison in Yazoo City, Mississippi, serving a sentence on an unrelated charge. Following his release from prison, Judge DuBose ordered that Moore be supervised by the United States Probation Office for three years.

6. A/T “Convicted Pennsylvania Senator whose emails to the attorney were read by federal prosecutors”

Sen. Fumo was a member of the Pennsylvania State Senate. He was convicted of federal corruption charges in 2011. He was sentenced and then the government appealed his sentence because it was too light. While awaiting the re-sentencing, against the advice of his attorneys, he wrote angry emails to them saying all kinds of angry things. The judge then tacked on 6 more months onto his sentence. This is used by AFF as an example of how rights are violated in Status Quo. But not so fast…

Response #1: He was warned by his attorneys and he ignored them. Don’t blame the system for his stupidity

Associated Press 2011. “Ex-Pa. state senator re-sentenced to 61 months” 10 Nov 2011 <https://www.sandiegouniontribune.com/news/watchdog/sdut-ex-pa-state-senator-re-sentenced-to-61-months-2011nov10-story.html> (accessed 2 Feb 2022) (brackets added)

The voluminous emails may have cost Fumo the extra six months. Prison emails are monitored for security purposes. Despite warnings from his lawyers, Fumo rants at prosecutors, reporters, political enemies and anyone who crossed him at his five-month trial. He called the jury “dumb, corrupt and prejudiced.” [Federal Judge Ronald] Buckwalter took offense at that last attack.

Response #2: Fumo got off easy. He got far less prison time than he deserved according to sentencing guidelines

ABC13 News 2011 (Pennsylvania TV station) “Ex-Sen. Vince Fumo gets additional 6 months in prison” 10 Nov 2011 <https://abc13.com/archive/8427126/> (accessed 2 Feb 2022)

Vincent Fumo was convicted of defrauding the state Senate, a neighborhood nonprofit and museum of millions. The Philadelphia Democrat faced about 20 years under federal guidelines at his 2009 sentencing, but a judge initially sentenced Fumo to 4½ years. A federal appeals court threw out the sentence. The defense asked for a break based on the 68-year-old Fumo's age and health problems. Prosecutors sought a guideline sentence of at least 17 years.

Response #3: No constitutional violation in sentencing. Courts can consider subsequent behavior in sentencing

Government’s Reply Memorandum Regarding Resentencing in the case of U.S. v. Vincent J. Fumo 2011. IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA 28 Oct 2011 <https://philadelphia.cbslocal.com/wp-content/uploads/sites/15116066/2011/10/final-ecf-filed-supp-reply-sentencing-memo-by-usa-fumo.pdf> (accessed 2 Feb 2022)

The holding of Pepper v. United States, 131 S. Ct. 1229 (2011), that a court at resentencing may consider post-sentencing rehabilitation, cuts both ways. The decision rested on the proposition that Congress has directed that a sentencing court consider all available information regarding an offender. Id. at 1229. Accordingly, the Supreme Court stated, a resentencing court is equally entitled to consider post-sentencing developments which call for a higher sentence than the one originally imposed. Id. at 1249. In Fumo’s case, consideration of his post-sentencing views and conduct clearly does not provide any basis for a sentencing reduction below the guideline range.

Response #4: Fumo was plotting new crimes. Planning revenge and further crime is not a constitutional right

Government’s Reply Memorandum Regarding Resentencing in the case of U.S. v. Vincent J. Fumo 2011. IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA 28 Oct 2011 <https://philadelphia.cbslocal.com/wp-content/uploads/sites/15116066/2011/10/final-ecf-filed-supp-reply-sentencing-memo-by-usa-fumo.pdf> (accessed 2 Feb 2022)

These e-mails make abundantly clear that Fumo is unreformed and poses a continuing danger of engaging in illegal conduct if released, starting with efforts to retaliate against witnesses. He is a vengeful, spiteful, and completely remorseless individual who is incapable of recognizing the wrongfulness of his actions, and who ascribes blame to anyone who does not comport themselves to his own delusional views of his plight.

7. A/T “NYCLA evidence” - doesn’t apply to 6th Amendment violations

AFF’s NYCLA evidence (New York County Lawyers Assoc) about 6th Amendment violation is talking about pretrial detainees – which are extra-topical

**NYCLA advocates for the Affirmative plan. But they distinguish between 6th Amendment violation for pre-trial detainees and the “Model Rule of Professional Conduct” for attorneys representing convicted prisoners. They say the 6th Amendment violation only applies pre-trial. Post-conviction, the email system obstructs the “Model Rule,” not the US Constitution.**

New York County Lawyers Association 2016. AMERICAN BAR ASSOCIATION ADOPTED BY THE HOUSE OF DELEGATES – RESOLUTION 8 Feb 2016 <https://www.law.berkeley.edu/wp-content/uploads/2020/05/2016-Midyear-ABA-Resolution-10A-Report-Proposed-Resolution.pdf> (accessed 4 Feb 2022)

The BOP’s Legal Email policy imposes unnecessary and substantial administrative burdens on attorneys’ ability to communicate with their inmate-clients. These burdens frustrate attorneys’ ability to promptly inform and consult with their inmate-clients regarding important case matters, as required by Model Rule of Professional Conduct 1.4,9 and, in the case of counsel representing pretrial detainees, also frustrates their ability to provide meaningful Sixth Amendment representation.

SOLVENCY

1. Exceeds AFF budget of $100K

If AFF budgeted $100,000, then it won’t work. Plan would actually cost $52 million

Carrie Johnson 2021. (journalist) 31 Mar 2021 “When It Comes To Email, Some Prisoners Say Attorney-Client Privilege Has Been Erased” <https://www.npr.org/2021/03/31/982339371/when-it-comes-to-email-some-prisoners-say-attorney-client-privilege-has-been-era#:~:text=Attorney%2DClient%20Privilege%20Rights%20In,Prisons%20Come%20Under%20Fire%20%3A%20NPR&text=Music%20Of%202021-,Attorney%2DClient%20Privilege%20Rights%20In%20Federal%20Bureau%20Of%20Prisons%20Come,use%20the%20bureau's%20email%20system>. (accessed 2 Feb 2022)

In February, the House of Representatives overwhelmingly approved the [Effective Assistance of Counsel in the Digital Era Act](https://www.govtrack.us/congress/bills/116/hr5546/text) by a vote of 414 to 11. The legislation, which awaits action in the Senate, wouldrequire the attorney general to make sure that the BOP refrains from monitoring the contents of emails between incarcerated people and their lawyers and to get a warrant to access their contents.
**END QUOTE. THEY GO ON LATER IN THE ARTICLE TO WRITE QUOTE:**
The Congressional Budget Office predicted that if the legislation passed the Senate, the Federal Bureau of Prisons would have to build a new email system and create a registry of approved lawyers — measures it expects could cost $52 million through 2025.

DISADVANTAGES

1. Security threats and terrorism

Link: AFF reduces monitoring of emails

Link: Inspector General reports the risk is so high that BOP should INCREASE monitoring of emails, not reduce it

Dept of Justice, Office of the Inspector General 2020 “Audit of the Federal Bureau of Prisons’ Monitoring of Inmate Communications to Prevent Radicalization” March 2020 <https://oig.justice.gov/sites/default/files/reports/a20042.pdf> (accessed 5 Feb 2022)

We agree with BOP staff that reasonable limitations are needed in order to effectively monitor general population emails while also satisfying the monitoring requirements for high-risk inmate communications. The limited time staff have to review emails along with other forms of communication, and the inability to obtain official translations for general population emails without prior approval is concerning because some general population inmates may exhibit radical or other high-risk behavior after incarceration

Link: AFF’s “attorney” safeguards won’t work. Even in Status Quo with full monitoring, inmates circumvent email safeguards.

Dept of Justice, Office of the Inspector General 2020 “Audit of the Federal Bureau of Prisons’ Monitoring of Inmate Communications to Prevent Radicalization” March 2020 <https://oig.justice.gov/sites/default/files/reports/a20042.pdf> (accessed 5 Feb 2022) (black redacted words in original)



Impact: Terrorism

Dept of Justice, Office of the Inspector General 2020 “Audit of the Federal Bureau of Prisons’ Monitoring of Inmate Communications to Prevent Radicalization” March 2020 <https://oig.justice.gov/sites/default/files/reports/a20042.pdf> (accessed 5 Feb 2022) (black redacted words in original)

We found that the BOP also does not have sufficient control over inbound emails. Several BOP staff worried about mass emails being sent to multiple inmates’ email accounts. Because most inmates have an email account, individuals and companies can send mass emails to multiple inmates. BOP personnel have detected radical emails being sent to multiple inmates. BOP staff also expressed concern to us about the possibility of a mass email being sent to all inmates in a particular group such as Al Qaeda, Aryan Circle, Al-Shabaab, or ISIS inmates directing them to take coordinated action on a certain day.

Link & Impact: Even with SQ safeguards, BOP doesn’t adequately prevent terrorism by email. Reducing safeguards increases the risk

Dept of Justice, Office of the Inspector General 2020 “Audit of the Federal Bureau of Prisons’ Monitoring of Inmate Communications to Prevent Radicalization” March 2020 <https://oig.justice.gov/sites/default/files/reports/a20042.pdf> (accessed 5 Feb 2022) (black redacted words in original)

We have serious concerns about the lack of control over email use within the BOP system, especially when it comes to use by high-risk inmates, such as terrorist inmates. Because BOP staff do not always know who terrorist and other high-risk inmates may be communicating with, we believe a significant risk exists not just to the particular institution, but to the general public as well. Through the use of email, we are concerned that inmates and their associates outside of BOP institutions can plan criminal and terrorist activities with a low risk of being discovered. Additionally, BOP staff’s concern about mass emails being directly sent to high-risk, terrorist inmates also poses a significant risk as these emails may attempt to coordinate criminal or terrorist activities within and among BOP institutions.

2. Mindset critique #1: Wrong priorities. Affirmative values prisoners over taxpayers

One reason why Status Quo hasn’t done it yet is the cost to taxpayers. Given a choice, you should weigh the well-being of taxpayers over the well-being of prisoners

David Straughan 2021 (journalist) 6 Apr 2021 “ATTORNEY-CLIENT PRIVILEGE IS TESTED WHEN IT COMES TO EMAIL IN PRISON” <https://interrogatingjustice.org/right-to-counsel/attorney-client-privilege-email/> (accessed 4 Feb 2022)

While the bill sailed through the House, it may have a tougher time in the Senate due to its price tag. Officials at the Congressional Budget Office (CBO) suggested that the BOP would need to build a new email system to comply with the bill should it become law. It would also need to create a list of approved lawyers to create filters in the system. The CBO estimated that that project would cost upwards of $52 million over the next four years. That could cause the fight over attorney-client privilege via email to continue.

3. Mindset critique #2: The moral value of punishment outweighs / outbalances the AFF goal of equality

Link: Affirmative’s goal of “equal” rights for prisoners violates the moral value of punishment, which requires that prisoners NOT be “equal” to law-abiding citizens

Charles Logan & Gerald Gaes 1993. (Logan - University of Connecticut, Visiting Fellow at Fed. Bureau of Prisons Office of Research & Evaluation. Gaes – is with Federal Bureau of Prisons) META-ANALYSIS AND THE REHABILITATION OF PUNISHMENT (accessed 4 Feb 2022) https://www.bop.gov/resources/research\_projects/published\_reports/cond\_envir/oreprlogangaes.pdf

Punishment has at best only a limited capacity to achieve these ends, but in any case it should not be regarded as a form of social engineering, having worth only because it is useful. Rather, punishment is a significant aspect of culture, with meaning and merit in itself. It is a symbol and an expression of cultural and moral values. Punishment constructs and communicates some of the most important shared meanings, values, and beliefs that define the character of a culture. It "communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters" (Garland 1990: 252). Those who exercise authority and impose sanctions are important cultural agents. They include not only the legislators and judges who define the purpose, nature, and targets of punishment, but also the agents who administer it, from the executive level to the line staff. The meaning and significance of the work they do should be viewed as a moral enterprise, an exercise in the philosophy of punishment. One of the duties of prison officials is to help offenders understand the wrongfulness of their criminal conduct and accept responsibility and accountability for that conduct. This duty requires the imposition of punishment because the very concepts of wrongfulness, responsibility, and accountability must be socially defined and constructed through the use of sanctions. Thus punishment is a constructive, not a destructive, enterprise.

**END QUOTE. If the problem is “It’s a hassle to write letters to contact their attorney” then the solution is stop committing felonies and they won’t have that problem. Don’t do the crime if you can’t do the time.**