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## Should the Medium Affect the Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email

Brandon P. Ruben  
*Fordham University School of Law*

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## SHOULD THE MEDIUM AFFECT THE MESSAGE? LEGAL AND ETHICAL IMPLICATIONS OF PROSECUTORS READING INMATE-ATTORNEY EMAIL

*Brandon P. Ruben\**

*The attorney-client privilege protects confidential legal communications between a party and her attorney from being used against her, thus encouraging full and frank attorney-client communication. It is a venerable evidentiary principle of American jurisprudence. Unsurprisingly, prosecutors may not eavesdrop on inmate-attorney visits or phone calls or read inmate-attorney postal mail. Courts are currently divided, however, as to whether or not they can forbid prosecutors from reading inmate-attorney email.*

*This Note explores the cases that address whether federal prosecutors may read inmates' legal email. As courts have unanimously held, because inmates know that the Bureau of Prisons (BOP) monitors all their email, their legal email is unprivileged. In addition, all courts have rejected the argument that prosecutors reading inmates' legal email impermissibly restricts inmates' Sixth Amendment right of access to counsel. Accordingly, despite questioning the practice's propriety, four courts have ruled that there is no legal basis to prevent prosecutors from reading inmate-attorney email. Two courts, however, pursuant to no clear authority, prevented the prosecutors from doing so.*

*This Note argues that prosecutors should abstain from reading inmate-attorney email as a matter of self-regulation because this behavior unjustifiably chills inmate-attorney communication. In addition, this Note asserts that BOP's email monitoring policy unconstitutionally restricts inmates' Sixth Amendment right of access to counsel, a challenge prisoners' rights advocates have yet to bring. In cases where BOP's email monitoring policy is not at issue, or where a court seeks to avoid a constitutional decision, this Note concludes that courts should prevent prosecutors from reading inmates' legal email by exercising their delegated authority to enforce Rules of Professional Conduct. Specifically, courts*

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\* J.D. Candidate, 2016, Fordham University School of Law; M.A., 2010, Columbia University; B.A., 2007, McGill University. Special thanks are due to Professor Bruce A. Green for guiding me throughout this project. For reading earlier drafts, I thank Professors Michael B. Mushlin and Julian Arato as well as Yahshuah A. Ford, Esq. I also thank my family for their encouragement. Most of all, I thank my wife Lianna for her love and for always inspiring me.

*should invoke Rule 8.4(d), which prohibits attorneys from engaging in conduct prejudicial to the administration of justice.*

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INTRODUCTION

Imagine the following scenario: you are a busy defense attorney and one of your many clients is detained in federal prison awaiting trial. She is accused of a crime but presumably innocent and you are doing all you can to defend against the U.S. government’s impending attempt to deprive her of her liberty. To communicate with her, the Bureau of Prisons (BOP) allows you to make in-person visits.<sup>1</sup> If you account for travel time and security clearance, however, these can consume the better part of your workday.<sup>2</sup> BOP also provides for confidential postal mail,<sup>3</sup> though physical mail’s inefficiency makes it a patently unattractive option. In addition, BOP allows you to arrange for confidential legal phone calls.<sup>4</sup> Depending on the cooperativeness of the correctional officer you deal with, however, arranging one can take as long as a month.<sup>5</sup>

To provide for more efficient inmate communications, since 2006 BOP has enabled inmates to send and receive email via the Trust Fund Limited Inmate Computer System (TRULINCS).<sup>6</sup> Assuming your client is computer literate, this would be your best choice, by far, to communicate with her day-to-day. There is, however, just one catch: in order to use TRULINCS your client must sign a form acknowledging that BOP

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1. 28 C.F.R § 543.13(b) (2012) (“The Warden generally may not limit the frequency of attorney visits . . . [which are to] take place in a private conference room, if available . . .”).

2. *See infra* note 293.

3. 28 C.F.R. § 540.18(a) (“The Warden shall open . . . special mail only in the presence of the inmate for inspection of . . . contraband . . . . The correspondence may not be read.”).

4. *Id.* § 540.102 (“The Warden shall notify an inmate of the proper procedures to have an unmonitored telephone conversation with an attorney.”).

5. *See infra* note 293.

6. *See generally TRULINCS Topics*, FED. BUREAU OF PRISONS, <http://www.bop.gov/inmates/trulincs.jsp> (last visited Feb. 23, 2015).

monitors *all* her emails, including her legal emails.<sup>7</sup> In turn, any email she sends or receives is not protected by the attorney-client privilege and, as four courts have ruled, fair game for the prosecution to read and use as evidence against her.<sup>8</sup>

“That’s hogwash,” a judge in the Eastern District of New York exclaimed during a recent pretrial conference discussing this issue.<sup>9</sup> The rebuke followed an Assistant United States Attorney’s statement that the government had “no interest” in reading inmate-attorney emails and would “do their best not to” when reviewing the PDF file of all the defendant’s emails BOP provides the government upon request.<sup>10</sup> As the prosecutor explained, the government used to assign a team of staff members to segregate defendants’ legal emails from their personal emails, but this practice became too expensive.<sup>11</sup> The government’s decision to read inmate-attorney email, the prosecutor thus emphasized, was motivated by administrative necessity as opposed to the desire to gain a strategic advantage.<sup>12</sup>

To the judge, the prosecutor’s remarks appeared particularly disingenuous given that his office recently issued a letter to the Federal Defenders of New York for the Eastern District declaring, “emails between inmates and their attorneys . . . are not privileged and [the U.S. Attorney’s Office for the Eastern District of New York] intends to review [them].”<sup>13</sup> “In this case,” the judge proclaimed, “the government will be precluded from looking at any of the attorney-client emails, period.”<sup>14</sup>

When the transcript of this proceeding became public, the mainstream and legal media denounced the government’s decision to read inmate-attorney emails as a “draconian and Kafkaesque” violation of the attorney-

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7. FED. BUREAU OF PRISONS, INMATE AGREEMENT FOR PARTICIPATION IN TRULINCS ELECTRONIC MESSAGING PROGRAM § 2(D) [hereinafter BOP’S EMAIL MONITORING POLICY], available at [http://www.bop.gov/policy/forms/BP\\_A0934.pdf](http://www.bop.gov/policy/forms/BP_A0934.pdf) (last visited Feb. 23, 2015) (“Consent to Monitoring. I am notified of, acknowledge, and voluntarily consent to having my messages . . . read . . . by Bureau staff . . . . I am notified of, acknowledge, and voluntarily consent that this provision applies to messages both to and from my attorney . . . and that such messages will not be treated as privileged communications.”).

8. See *infra* Part I.A–B, D, F.

9. Transcript of Criminal Cause for Status Conference Before the Honorable Dora L. Irizarry at 17, *United States v. Ahmed*, No. 1:14-cr-00277 (E.D.N.Y. June 27, 2014) [hereinafter Tr. of Ahmed Conference], available at <http://kmbllaw.com/documents/CorrlinksPrivilegeHearing.pdf>.

10. *Id.* As the government has explained elsewhere, BOP provides them a single PDF document containing all emails an inmate has sent and received via TRULINCS, including those to and from her attorney. Response in Opposition re: 34 First Motion in Limine re: Defendant Emails to Counsel at 2, *United States v. Walia*, No. 1:14-cr-00213 (E.D.N.Y. July 16, 2014).

11. See *infra* note 48 and accompanying text.

12. See *infra* note 49 and accompanying text.

13. Letter from James G. McGovern, Chief, Criminal Div. of the U.S. Att’y for the E.D.N.Y. to Peter Kircheimer, Att’y-in-Charge, Fed. Defenders of N.Y. for the E.D. 1 (June 9, 2014) (on file with author) [hereinafter McGovern Letter], available at <http://nylawyer.nylj.com/adgifs/decisions14/072214letter.pdf>.

14. Tr. of Ahmed Conference, *supra* note 9, at 21.

client privilege.<sup>15</sup> Two subsequent rulings from the Eastern District of New York, however, deemed the practice perfectly legal, if not commendable, because federal inmates are on notice that all their emails—including legal emails—are monitored and therefore unprivileged.<sup>16</sup>

This Note assesses the recent rulings (which this Note will refer to as “the email cases”) that have divided on whether BOP’s email monitoring policy<sup>17</sup> gives the government carte blanche to read inmates’ legal email. After summarizing these cases, this Note explores in succession the four major issues they have evoked: (1) why inmates’ legal emails are not privileged,<sup>18</sup> (2) whether prosecutors should nevertheless abstain from reading them as a matter of self-regulation,<sup>19</sup> (3) whether prosecutors reading inmate-attorney email is unconstitutional,<sup>20</sup> and (4) whether courts possess independent authority to forbid them from doing so.<sup>21</sup>

Part I summarizes the six cases that have addressed the issue of a prosecutor reading an inmate-defendant’s legal email. Part II begins by describing the attorney-client privilege generally.<sup>22</sup> It then explains why these cases have unanimously held that it does not apply to inmates’ legal email.<sup>23</sup> Part III explores the concept of prosecutorial self-regulation and considers both sides of the argument surrounding whether prosecutors should abstain from reading inmates’ legal email even though it is unprivileged. It concludes that they should because doing so unjustifiably chills inmates’ ability to communicate confidentially with their counsel.

This Note then explores the arguments defendants have made in opposition to prosecutors who have chosen to read, or threatened to read, their legal email. Part IV examines the defendants’ argument that the prosecutors’ acts of reading their legal email impermissibly restrict their Sixth Amendment right of access to counsel.<sup>24</sup> This part notes that all courts in the email cases have rejected the defendants’ constitutional claims.<sup>25</sup> It asserts, however, that this is because the defendants have attacked the individual prosecutors’ acts as opposed to BOP’s email

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15. Marlis Silver Sweeney, *Prosecutors Read Jailhouse Emails to Attorneys*, L. TECH. NEWS (July 24, 2014), <https://advance.lexis.com> (within “Browse Sources” search for Law Technology News; then follow “Get Documents” link; then search for article’s title); *see also, e.g.*, Editorial, *Privacy for Prisoners: Inmates Have a Right to Attorney-Client Privilege, Even in Email*, WASH. POST, Aug. 31, 2014, at A20; Editorial, *Prosecutors Snooping on Legal Mail*, N.Y. TIMES, July 23, 2014, at A26.

16. Opinion and Order at 2–3, *United States v. Asaro*, No. 1:14-cr-0026 (E.D.N.Y. July 17, 2014) [hereinafter *Asaro Order*]; Memorandum and Order re 25 Motion in Limine As to Tushar Walia at 28–29, *United States v. Walia*, No. 1:14-cr-00213 (E.D.N.Y. July 25, 2014) [hereinafter *Walia Order*].

17. *See* EMAIL MONITORING POLICY, *supra* note 7.

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

22. *See infra* Part II.A.

23. *See infra* Part II.A–C.

24. *See infra* Part III.A.

25. *See infra* Part III.C.

monitoring policy.<sup>26</sup> Part IV concludes that constitutional challenges to prison regulations require courts to apply stricter standards of review under which BOP's email monitoring policy impermissibly restricts inmates' right of access to counsel.<sup>27</sup>

Despite this seemingly meritorious challenge, Part V explains that the inquiry does not end here. In future litigations, as in the email cases, courts may seek to avoid rendering a constitutional decision as they often do.<sup>28</sup> Part V discusses delegated and non-delegated powers federal courts employ to independently regulate prosecutorial conduct they deem improper.<sup>29</sup> In the email cases, courts have divided over whether they can apply these powers. This part asserts that courts can and should prevent prosecutors from reading inmates' email pursuant to their delegated authority to enforce Rules of Professional Conduct.<sup>30</sup> Specifically, Part V concludes, courts should invoke Rule 8.4(d), which prohibits attorneys from engaging in conduct prejudicial to the administration of justice.<sup>31</sup>

#### I. THE EMAIL CASES: WHEN PROSECUTORS READ, OR THREATEN TO READ, AN INMATE-DEFENDANT'S LEGAL EMAIL

This part briefly summarizes the six cases to address a prosecutor reading an inmate-defendant's legal email.

##### A. *United States v. Fumo*

In 2009, Vincent J. Fumo, a former Pennsylvania state senator, was sentenced to fifty-five months in federal prison for charges relating to fraud, tax evasion, and obstruction of justice.<sup>32</sup> The government subsequently appealed, requesting a lengthier sentence based partially on an "explosive trove" of crude emails Fumo sent via TRULINCS to people he knew, including his attorneys.<sup>33</sup> Ultimately, the court resentenced Fumo to an additional six months in prison, citing the emails as evidence that he was unwilling to accept responsibility for his crimes.<sup>34</sup>

##### B. *FTC v. National Urological Group, Inc.*

In 2008, Jared Wheat, an ill-reputed pharmaceutical distributor, was enjoined from making statements about his company's products unless they

26. *See infra* Part III.D.

27. *See infra* Part III.D.

28. *See infra* note 231 and accompanying text.

29. *See infra* Part IV.A.

30. *See infra* Part V.C.

31. *See infra* Part V.C.

32. *United States v. Fumo*, 655 F.3d 288, 294 (3d Cir. 2011).

33. *Id.* at 294; *see, e.g.*, Supplemental Reply Sentencing Memorandum and Certificate of Service As to Vincent J. Fumo at 7–8, *United States v. Luchko*, No. 2:06-cr-00319 (E.D. Pa. Oct. 28, 2011) (citing emails where the defendant stated, "I do feel Christlike in the injustice I have suffered," compared himself to Jews in concentration camps, and called the jury that convicted him "dumb, corrupt, and prejudiced").

34. Transcript Sentencing Hearing Held on 11/10/11 at 47–48, *Luchko*, No. 2:06-cr-00319 (E.D. Pa. Nov. 17, 2011), ECF No. 926.

were scientifically substantiated.<sup>35</sup> From 2009 through 2010, Wheat was incarcerated for a separate conviction.<sup>36</sup> In 2011, he was held in contempt for violating the 2008 injunction by continuing to advertise his products with unsubstantiated claims.<sup>37</sup> As a major part of their case, the government submitted TRULINCS emails between Wheat and his attorney, sent during his 2009–2010 prison term that proved that he was aware his new advertisements would violate the 2008 injunction.<sup>38</sup> The court allowed the emails in as evidence and explicitly referenced them in holding Wheat in contempt of the 2008 injunction.<sup>39</sup>

### C. United States v. Saade

On February 8, 2011, Maroun Saade was indicted in the Southern District of New York for charges relating to aiding and abetting the Taliban.<sup>40</sup> At an early pretrial conference defense counsel notified the court that she received enclosures from the government containing recordings of all of her client's emails and phone calls sent from the BOP facility where he was detained.<sup>41</sup> After a discussion among the court, prosecutor and defense attorney, in which the court expressed its disapproval of the government possessing the defendant's legal emails and calls, the prosecutor stated that he would discontinue reviewing the defendant's legal communications.<sup>42</sup>

### D. United States v. Asaro

On January 23, 2014, Thomas Di Fiore, along with other members of the notorious Bonanno crime family, was indicted in the Eastern District of New York for charges relating to extortionate collection of credit.<sup>43</sup> Awaiting trial, he was detained at a BOP facility.<sup>44</sup> On June 9, 2014, the government notified the Eastern District bar, including DiFiore's defense attorneys, that from then on it would be reading all emails inmates send via TRULINCS.<sup>45</sup> Defense counsel sent a letter of objection to the court<sup>46</sup> and in reply—unlike in *Fumo*, *National Urological Group* or *Saade*—the

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35. *FTC v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294, 2014 WL 3893796, at \*1 (N.D. Ga. May 14, 2014).

36. *Id.* at \*3.

37. *Id.* at \*4.

38. *Id.* at \*4–5.

39. *Id.* (citing emails between Wheat and his counsel that prove Wheat made claims “that [his] counsel believed were prohibited”).

40. Sealed Indictment, *United States v. Saade*, No. 1:11-cr-00111 (S.D.N.Y. Feb. 8, 2011).

41. Transcript of Proceedings As to Maroun Saade Held on 9/26/2011 at 7, *Saade*, No. 1:11-cr-00111 (S.D.N.Y. Oct. 31, 2011).

42. *Id.* at 9–10.

43. Sealed Indictment As to Vincent Asaro, *United States v. Asaro*, No. 1:14-cr-00026 (E.D.N.Y. Jan. 16, 2014).

44. Letter Request to Preclude Gov't from Reading Att'y/Client Email—Redacted As to Thomas DiFiore at 4, *Asaro*, No. 1:14-cr-00026 (E.D.N.Y. July 11, 2014) [hereinafter DiFiore Letter].

45. McGovern Letter, *supra* note 13, at 1.

46. DiFiore Letter, *supra* note 44, at 4.



government justified its decision.<sup>47</sup> It stated that it used to voluntarily assign a “taint team”—or group of staff members not assigned to a given case—to redact legal emails from the single PDF of all an inmate’s emails BOP provides, but it decided to discontinue this practice because it had become an administrative burden.<sup>48</sup> The government emphasized that its decision to read inmates’ legal email was thus motivated by “practical” as opposed to “strategic” concerns.<sup>49</sup> Ultimately, the court issued a written order permitting the government to read the defendant’s legal emails going forward.<sup>50</sup>

#### E. United States v. Ahmed

On May 12, 2014, Dr. Syed Imran Ahmed was indicted in the Eastern District of New York for charges relating to Medicare fraud.<sup>51</sup> Like the defendants in *Asaro* and *Saade*, he was detained at a BOP facility prior to trial.<sup>52</sup> On June 9, 2014, Ahmed’s defense attorney received the same letter that defense counsel in *Asaro* received, regarding the government’s intent to review inmates’ legal email, and filed a letter of objection with the court.<sup>53</sup> As in *Asaro*, the government justified its decision as an administrative necessity as opposed to an attempt to gain a strategic advantage.<sup>54</sup> At a hearing addressing this issue, the court, pursuant to no clear authority, explicitly forbade the government from reading the defendant’s legal emails.<sup>55</sup>

#### F. United States v. Walia

On September 19, 2014, in the Eastern District of New York, Tushar Walia was convicted of charges relating to distribution of a controlled substance.<sup>56</sup> Throughout the course of his trial he was detained, like the defendants in *Asaro*, *Saade*, and *Ahmed* in a BOP facility.<sup>57</sup> As in these prior cases, on June 9, 2014, Walia’s defense counsel received notification

47. Letter Responding in Opposition to the Defendant’s Application at 1–5, *Asaro*, No. 1:14-cr-00026 (E.D.N.Y. July 14, 2014).

48. *Id.* at 5.

49. *Id.*

50. *Asaro* Order, *supra* note 16, at 3.

51. Indictment As to Syed Imran Ahmed, *United States v. Ahmed*, No. 1:14-cr-00277 (E.D.N.Y. May 12, 2014).

52. Order of Detention As to Syed Imran Ahmed, *Ahmed*, No. 1:14-cr-00277 (E.D.N.Y. Apr. 4, 2014).

53. Letter to the Honorable Dora L. Irizarry Respectfully Responding to the Gov’t’s June 16 Letter Regarding Emails Sent Between Counsel and Dr. Ahmed Through Bureau of Prison’s Email System (TRULINCS) As to Syed Imran Ahmed, *Ahmed*, No. 1:14-cr-00277 (E.D.N.Y. June 20, 2014) [hereinafter Irizarry Letter].

54. Letter re: Emails Through Bureau of Prisons’ TRULINCS System As to Syed Imran Ahmed at 5, *Ahmed*, No. 1:14-cr-00277 (E.D.N.Y. June 16, 2014).

55. Tr. of Ahmed Conference, *supra* note 9, at 21.

56. Jury Verdict As to Tushar Walia at 8–9, *United States v. Walia*, No. 1:14-cr-00213 (E.D.N.Y. Sept. 19, 2014).

57. Reply to Response to Motion re: 34 First Motion in Limine re: Defendant Emails to Counsel at 2, *Walia*, No. 1:14-cr-00213 (E.D.N.Y. July 22, 2014).

of the government's intent to read his legal email. He petitioned the court to prevent this,<sup>58</sup> and the government explained that its decision was motivated by the need to conserve resources.<sup>59</sup> Like in *Asaro*, the court ultimately issued a written order allowing the government to read the defendant's legal emails.<sup>60</sup>

In sum, the *Fumo* and *National Urological Group* courts allowed the defendant's legal emails in as evidence<sup>61</sup> and the *Asaro* and *Walia* courts gave the prosecutor permission to read them.<sup>62</sup> By contrast, the *Saade* court persuaded the prosecutor to abstain from reading the defendant's legal email,<sup>63</sup> and the *Ahmed* court, which ruled in the same month and in the same district as the *Asaro* and *Walia* courts,<sup>64</sup> explicitly forbade it.<sup>65</sup>

The remainder of this Note explores: why none of these courts found the defendants' legal emails privileged;<sup>66</sup> whether prosecutors should nevertheless abstain from reading them as a matter of self-regulation;<sup>67</sup> whether it is unconstitutional for prosecutors to read inmate-attorney email;<sup>68</sup> and whether, apart from the privilege and constitutional issues, courts possess independent authority to forbid prosecutors from reading defendants' legal email if they deem this conduct improper.<sup>69</sup>

## II. WHY INMATES' LEGAL EMAIL IS NOT PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE

This part explains why, as courts have unanimously held, inmates' legal email sent via TRULINCS is not protected by the attorney-client privilege. Part II.A describes the attorney-client privilege generally and explains that it does not attach to communications made in a third party's presence. Part II.B explains that courts have found inmates' monitored phone calls unprivileged under the theory that the phone recording device is the equivalent of a third party. Part II.C discusses how the email cases have relied on this precedent in unanimously holding that inmates' monitored emails are likewise unprivileged.

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58. First Motion in Limine re: Defendant Emails to Counsel at 2, *Walia*, No. 1:14-cr-00213 (E.D.N.Y. June 27, 2014) [hereinafter First *Walia* Motion].

59. Response in Opposition re: 34 First Motion in Limine re: Defendant Email to Counsel at 3, *Walia*, No. 1:14-cr-00213 (E.D.N.Y. July 16, 2014) (“[A]s periodic hiring freezes . . . drastically reduced the government’s resources, it became too burdensome to appoint [additional staff] to every case in which the government requested an inmate’s TRULINCS emails.”).

60. *Walia* Order, *supra* note 16, at 30.

61. *See supra* Part I.A–C.

62. *See supra* Part I.D, F.

63. *See supra* Part I.C.

64. *Compare* Tr. of Ahmed Conference, *supra* note 9, with *Asaro* Order, *supra* note 16, and *Walia* order, *supra* note 16.

65. *See supra* Part I.E.

66. *See supra* Part II.

67. *See supra* Part III.

68. *See supra* Part IV.

69. *See supra* Part V.

A. *The Attorney-Client Privilege and Third-Party Presence*

The attorney-client privilege is a venerable common law rule of evidence.<sup>70</sup> According to Dean Wigmore, it first appeared in the mid-sixteenth century as a “natural,” “unquestioned” exception to testimonial compulsion.<sup>71</sup> Today, the attorney-client privilege maintains its “exalted place in our jurisprudence;”<sup>72</sup> it is recognized in every U.S. jurisdiction.<sup>73</sup> As the U.S. Supreme Court famously articulated, its purpose is to encourage “full and frank” attorney-client communication, thereby promoting “broader public interests in the observance of law and administration of justice.”<sup>74</sup>

In defining the attorney-client privilege, federal courts frequently utilize the definition Dean Wigmore proposed.<sup>75</sup> Alternatively, the Second Circuit employs the following pithy formulation: “the attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice.”<sup>76</sup>

As commentators note, the justice system does not view the attorney-client privilege as absolute because, like all evidentiary privileges, in protecting information it impedes the truth-seeking process.<sup>77</sup> Accordingly, the privilege is generally held not to apply if (1) the communication is deemed to have been between a client and someone other than an attorney,<sup>78</sup> (2) the communication was not confidential,<sup>79</sup> or (3) the client sought something other than legal assistance.<sup>80</sup>

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70. FED. R. EVID. 501 (“The common law . . . governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court.”); 1 RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:1 (2014) (“We readily acknowledge the importance of the attorney-client privilege, which is one of the oldest recognized privileges for confidential communications.” (citing *Mohawk Indus. Inc. v. Carpenter*, 558 U.S. 100, 108 (2009))).

71. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542–43 (McNaughton rev ed. 1961). *But see* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978) (arguing that the “recognition of the privilege was slow and halting until after 1800”).

72. *In re Lott*, 424 F.3d 446, 459 (6th Cir. 2005).

73. LEONARD ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE § 6.2.4 (2013).

74. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

75. Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 855 (1998) (citing WIGMORE, *supra* note 71, § 2290, at 554 (“(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.”)).

76. *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011).

77. *See, e.g.*, Albert W. Alschuler, *The Preservation of a Client’s Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 349 (1981); Laurence A. Steckman & Richard Granofsky, *The Assertion of Attorney-Client Privilege by Counsel in Legal Malpractice Cases: Policy, Privilege, and the Search for Truth in Cases Involving Implied Waivers*, 45 TORT TRIAL & INS. PRAC. L.J. 839, 879–80 (2010).

78. *See, e.g.*, *Velasquez v. Borg*, No. 93-15566, 1994 WL 327328, \*1 (9th Cir. July 8, 1994) (concluding that the privilege was not applicable because the inmate did not contend that he believed the “jailhouse lawyer” was actually authorized to practice law).

The relevant question in the email cases is whether or not legal emails inmates know are monitored can be considered confidential.<sup>81</sup> Even if a party asserts that she intended for a given legal communication to remain confidential, courts generally hold her intent to be irrelevant if her conduct belies it.<sup>82</sup> Thus when a party knowingly discloses information in front of a third party, or fails to take reasonable precautions to guard against a third party overhearing, courts generally find that confidentiality could not have been intended and that the privilege therefore does not attach.<sup>83</sup>

*B. Because Courts Consider the Phone Recording Device a Third Party, Inmates' Monitored Phone Calls Are Not Privileged*

At all BOP facilities inmates' telephone calls may be monitored.<sup>84</sup> The prison warden is statutorily required to put inmates on notice of this policy.<sup>85</sup> In addition, all BOP facilities are required to enable inmates to place unmonitored legal phone calls.<sup>86</sup> These circumstances have called into question whether or not a call an inmate places to an attorney on a line the inmate knows to be monitored is privileged; federal courts have held that it is not.<sup>87</sup>

In the email cases, the courts have relied on *United States v. Hatcher*<sup>88</sup> and *United States v. Mejia*<sup>89</sup> in holding that, like monitored phone calls, emails inmates send via TRULINCS are unprivileged.<sup>90</sup> In *Hatcher*, the appellant argued that the district court erred in refusing to order the government to turn over conversations between cooperating coconspirators

79. *Bower v. Weisman*, 669 F. Supp. 602, 606 (S.D.N.Y. 1987) (holding that the privilege did not apply to defendant's letter to his attorney because it was left spread out on a table in an office's waiting room and thus not confidential).

80. *United States v. Horvath*, 731 F.2d 557, 561 (8th Cir. 1984) (holding that because the privilege "extends only to . . . communications made for the purpose of facilitating . . . legal services . . . transferring funds and facilitating transactions . . . were not privileged").

81. See *infra* Part II.B.

82. RICE ET AL., *supra* note 70, § 9:24.

83. *Id.* §§ 6:7, 9:25; see, e.g., *United States v. Gann*, 732 F.2d 714, 723 (9th Cir. 1984) (holding that statements made by a client to his attorney over the telephone while detectives were searching his house were not privileged); *Prebilt Corp. v. Preway, Inc.*, No. CIV.A. 87-7132, 1988 WL 99713, at \*3 (E.D. Pa. Sept. 23, 1988) (holding that confidential documents inadvertently given to opposing counsel during discovery were not privileged because the error was due to carelessness).

84. 28 C.F.R. § 540.102 (2012) ("The Warden shall establish procedures that enable monitoring of telephone conversations on any telephone located within the institution . . .").

85. *Id.* ("The Warden must provide notice to the inmate of the potential for monitoring.").

86. *Id.* ("The Warden shall notify an inmate of the proper procedures to have an unmonitored telephone conversation with an attorney.").

87. See, e.g., *United States v. Mejia*, 655 F.3d 126, 132–35 (2d Cir. 2011); *United States v. Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003); *United States v. Mitchell*, No. 3:11-CR-248(S1)-J-34, 2013 WL 3808152, at \*12 (M.D. Fla. July 22, 2013); *United States v. Landers*, No. 1:12-CR-88-TWT, 2012 WL 6214627, at \*4–6 (N.D. Ga. Nov. 7, 2012); *United States v. Lentz*, 419 F. Supp. 2d 820, 827–28 (E.D. Va. 2005).

88. 323 F.3d 666 (8th Cir. 2003).

89. 655 F.3d 126 (2d Cir. 2011).

90. See *infra* Part II.C.

and the government, which took place over a prison line all parties knew was monitored.<sup>91</sup> The government argued that the conversations were protected by the attorney-client privilege and the district court agreed.<sup>92</sup> The Eighth Circuit, however, disagreed—concluding that because the “presence of the recording device was the functional equivalent of a third party,” the parties could not have expected their conversations to remain confidential and therefore the privilege did not attach.<sup>93</sup>

In *Mejia*, the appellant argued that the district court erred in admitting part of a prison call he knew was recorded in which he told his sister to tell his brother to tell his attorney that he wanted to accept a plea before he was indicted.<sup>94</sup> The government, citing *Hatcher* but taking the opposite position, asserted that the conversation was not privileged because it was made to a third party (i.e., his sister) in the presence of another third party (i.e., the recording device).<sup>95</sup> The Second Circuit agreed and affirmed the district court’s decision to admit the call.<sup>96</sup>

*C. Because Courts Consider the Email Monitoring Device a Third Party, No Court Has Held That Inmates’ Emails Are Privileged*

In *Fumo*, the issue of whether the emails defendant sent via TRULINCS were privileged was not litigated because defense counsel stipulated to the government’s argument that in using TRULINCS, which defendant knew was monitored, he had no expectation of privacy and thus “waived the privilege.”<sup>97</sup> In *Saade*, the privilege issue was likewise never subject to formal legal analysis because the court persuaded the prosecutor to stop reading the defendant’s legal emails shortly after the issue was first raised at a pretrial hearing.<sup>98</sup> In the remaining email cases, the courts, adopting the government’s argument, ruled that the emails were unprivileged because: (1) the defendants’ were on notice that their emails were monitored, (2) the computer monitoring system—like the phone recording device in *Hatcher* and *Mejia*—is the equivalent of a third party, (3) communications knowingly made in front of third parties cannot be confidential, and

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91. *Hatcher*, 323 F.3d at 674.

92. *Id.*

93. *Id.*

94. *Mejia*, 655 F.3d at 129. The government sought to introduce this conversation as evidence of the appellant’s guilty conscience. *Id.*

95. *Id.* at 130.

96. *Id.* at 133.

97. Transcript Sentencing Hearing Held on 11/10/11 at 93, *United States v. Luchko*, No. 2:06-cr-00319 (E.D. Pa. Nov. 17, 2011), ECF. No. 925. In making this argument, the government cited no legal authority in any proceeding or in their brief. *Id.*; Sentencing Memorandum and Certificate of Service by USA As to Vincent J. Fumo, *Luchko*, No. 2:06-cr-00319 (E.D. Pa. Oct. 28, 2011).

98. *See supra* note 42 and accompanying text. While the *Saade* court never claimed the emails were privileged, it is the only court to even balk at the suggestion that they are unprivileged. Transcript of Proceedings As to Maroun Saade Held on 9/26/2011 at 11, *United States v. Saade*, No. 1:11-cr-00111 (S.D.N.Y. Sept. 26, 2011) (“[Prosecutor]: [A]bove every phone is a warning saying that these are monitored phones, and so that could operate as a waiver . . . The Court: I don’t think you really argue that position. I don’t think your office takes that . . . position.”).

(4) confidentiality is required for a communication to be protected by the attorney-client privilege.<sup>99</sup>

III. EVEN THOUGH INMATES' LEGAL EMAIL IS UNPRIVILEGED,  
SHOULD PROSECUTORS ABSTAIN FROM READING IT  
AS A MATTER OF SELF-REGULATION?

As Part II explained to qualify for the attorney-client privilege, a communication must be confidential.<sup>100</sup> As the email cases unanimously hold, because communications knowingly made in front of third parties are not confidential, and because under *Hatcher* and *Mejia* prison monitoring devices are considered third parties, federal inmates' email is not confidential, as the inmates know it is monitored, and it is therefore unprivileged.<sup>101</sup> Attorneys may review non-confidential information. From a legally formalistic perspective—as the *Fumo*,<sup>102</sup> *National Urological Group*,<sup>103</sup> *Asaro*<sup>104</sup> and *Walia*<sup>105</sup> courts have ruled—there is thus no reason why prosecutors may not read inmates' unprivileged legal email.<sup>106</sup>

But as the adage goes, just because one may do something does not mean one should. With respect to the email cases, the *Ahmed* court seems to have felt this way because it forbade the prosecutor, pursuant to no clear authority, from reading the defendant's legal email,<sup>107</sup> despite acknowledging that the email was unprivileged.<sup>108</sup> More significantly, at least one prosecutor's office has voluntarily employed "taint teams" to segregate inmates' unprivileged legal email.<sup>109</sup> Further because there have been just six cases, from only three jurisdictions to address a prosecutor reading an inmate's legal email,<sup>110</sup> which BOP monitors at all of its facilities nationwide,<sup>111</sup> it is likely that other prosecutors' offices also

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99. *FTC v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294, 2012 WL 171621, at \*1 (N.D. Ga. Jan. 20, 2012) ("Essentially, TRULINCS requires prisoners using the system to consent to monitoring and warns that communications with attorneys are not privileged."); *Asaro Order*, *supra* note 16, at 1 (stating "TRULINCS communications . . . do not qualify for the protection of attorney-client privilege" (citing *Mejia*, 655 F.3d at 133–35)); *Tr. of Ahmed Conference*, *supra* note 9, at 5 ("There are certainly admonitions or warnings that communications over [TRULINCS] are not privileged."); *Walia Order*, *supra* note 16, at 29 ("[T]he TRULINCS system does not provide for the communication of privileged information" (citing *Mejia*, 655 F.3d at 133)).

100. *See supra* notes 79–83 and accompanying text.

101. *See supra* Part II.C.

102. *See supra* Part I.A.

103. *See supra* Part I.B.

104. *See supra* Part I.D.

105. *See supra* Part I.F.

106. *See supra* note 10.

107. *See supra* note 55 and accompanying text.

108. *See Tr. of Ahmed Conference*, *supra* note 9. Part V discusses whether federal courts possess the authority to regulate prosecutors in this fashion.

109. *See supra* note 48 and accompanying text.

110. *See supra* Part I.

111. *See TRUNLINCS Locations*, FED. BUREAU OF PRISONS, <http://www.bop.gov/inmates/trulincs.jsp> (last visited Feb. 23, 2015).

choose not to read inmates' legal email.<sup>112</sup> Accordingly, the question arises as to whether all prosecutors, as a matter of self-regulation, should abstain from reading inmates' legal email, even if they may read it because it is unprivileged.

This part addresses that question. Part III.A provides background on prosecutorial self-regulation. Part III.B explains why some prosecutors choose not to read inmates' legal email. Part III.C explains the arguments prosecutors have offered in defense of their decision to read it. Part III.D argues that all prosecutors should abstain from reading inmate-attorney email, even though it is unprivileged, because this behavior unjustifiably chills confidential inmate-attorney communication.

#### A. Prosecutorial Self-Regulation

As the American Bar Association (ABA) writes, prosecutors are not simply advocates but "ministers of justice."<sup>113</sup> Accordingly, it is their duty to "seek justice, not merely convict."<sup>114</sup> This duty encompasses obvious directives, such as refraining from prosecuting charges one knows are unsupported.<sup>115</sup> Perhaps surprisingly, however, another important part of this duty is to encourage efforts to remediate "inadequacies and injustices" prosecutors detect in "substantive and procedural law."<sup>116</sup>

As Professor Bruce A. Green explains, the idea that a prosecutor is an advocate *and* a quasi-judicial actor partly responsible for the justness of criminal proceedings is generally explained by one of two theories: (1) because prosecutors have great power to bring criminal charges, they must also bear great ethical responsibility, or (2) because prosecutors represent and serve the sovereign, they must seek to meet all of the state's objectives, which in the United States emphatically includes fair process.<sup>117</sup>

Regardless of what explanatory theory one accepts, prosecutors' duty to seek justice is a concept that appeals to many in the legal profession.<sup>118</sup> Most importantly, as Green and Professor Fred C. Zacharias point out, many prosecutors themselves take this notion seriously.<sup>119</sup> With respect to federal prosecutors, a testament to this is the degree to which they self-regulate.<sup>120</sup> For example, on its own accord, the U.S. Department of Justice

112. The number of prosecutor's offices that voluntarily abstain from reading inmate-attorney email would be valuable data. Capturing it, however, is beyond this Note's scope.

113. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2014).

114. ABA Prosecution Function Standards Standard 3-1.2(c) (2014).

115. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2014).

116. ABA Prosecution Function Standards Standard 3-1.2(d) (2014).

117. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 625-38 (1999).

118. See, e.g., R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 983 (2014); Bennet L. Gershman, *The Zealous Prosecutor As Minister of Justice*, 48 SAN DIEGO L. REV. 151, 152 (2011); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 49 (1991).

119. Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 449-50 (2002).

120. *Id.* at 427.

(DOJ) promulgated and maintains the U.S. Attorneys' Manual (USAM).<sup>121</sup> The USAM is an internal set of policies that state what federal prosecutors should and should not do.<sup>122</sup> A recent example of DOJ issuing a policy that barred a lawful prosecutorial practice for the sake of "enhancing due process" is its decision to prohibit prosecutors from including ineffective assistance of counsel waivers in plea agreements.<sup>123</sup> In DOJ's own words, even though federal courts have uniformly allowed this practice, DOJ barred it in furtherance of ensuring that the adversarial system functions "fairly, efficiently, and responsibly."<sup>124</sup>

In sum, there are federal prosecutors who take seriously their duty to seek justice. Accordingly, they may voluntarily abstain from a given practice if doing so increases fairness, even if it also decreases their ability to secure convictions.

### *B. Why Some Prosecutors Choose to Abstain from Reading Inmates' Legal Email*

At least one prosecutor's office, and likely more, has voluntarily employed taint teams to segregate inmates' unprivileged legal email.<sup>125</sup> This raises the question of why a prosecutor's office would choose to self-regulate with respect to this issue. Though no prosecutor's office has answered this question, answers can be inferred from the arguments that defendants and courts have made against prosecutors who choose to read inmates' legal email.

The first reason a prosecutor's office would choose not to read inmates' unprivileged legal email is to avoid restricting confidential attorney-client communication. As the defendant in *Walia* argued, because email is now the legal profession's dominant communicative medium, denying inmates the ability to communicate confidentially with counsel via email seriously impedes their overall ability to communicate confidentially with counsel.<sup>126</sup> Prosecutors are well aware of the value our legal system places on

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121. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9 (2015), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.justice.gov/usao/eousa/foia_reading_room/usam/) [hereinafter U.S. ATTORNEYS' MANUAL].

122. See, e.g., *id.* § 9-13.420(E) ("Conducting [a] Search . . . [T]o protect the attorney-client privilege . . . a 'privilege team' should be designated, consistent of agents and lawyers not involved in the underlying investigation.").

123. U.S. Dep't of Justice, *Attorney General Holder Announces New Policy to Enhance Justice Department's Commitment to Support Defendant's Right to Counsel*, JUST. NEWS (Oct. 14, 2014), <http://justice.gov/opa/pr/attorney-general-holder-announces-new-policy-enhance-justice-departments-commitment-support>.

124. Memorandum from the U.S. Dep't of Justice to All Federal Prosecutors, U.S. DEP'T OF JUSTICE (Oct 14, 2014), available at <http://justice.gov/sites/default/files/press-releases/attachments/2014/10/15/dept-policy-on-waivers-of-claims-of-ineffective-assistance-of-counsel.pdf>.

125. See *supra* notes 109–12 and accompanying text.

126. Reply to Response to Motion re: 34 First Motion in Limine re: Defendant Emails to Counsel at 3, *United States v. Walia*, No. 1:14-cr-00213 (E.D.N.Y. July 22, 2014); see also ABA LEGAL TECH. RES. CTR., 2 ABA LEGAL TECHNOLOGY SURVEY REPORT: LAW OFFICE TECHNOLOGY 48 (2014) (reporting that 98.3 percent of lawyers surveyed said they use email for law-related tasks).



confidential attorney-client communication: there are at least three Model Rules of Professional Conduct devoted to its furtherance,<sup>127</sup> and the Supreme Court proffered “full and frank” attorney-client communication as the very behavior the attorney-client privilege is meant to promote.<sup>128</sup> A prosecutor’s office that chooses not to read inmates’ unprivileged legal email is thus likely making this decision, at least in part, in recognition of how critically important it is for a client to be able to communicate confidentially with her attorney.

A second, related reason that a prosecutor’s office would abstain from reading inmates’ legal email is because the office appreciates the unique difficulties inmates face in communicating with their attorneys. As the defendant in *Walia* argued and the *Ahmed* court opined, denying inmates confidential legal email is particularly detrimental to their overall ability to communicate confidentially with counsel because (1) the alternative means of privileged communication BOP offers are inefficient, and (2) most inmates are represented by public defenders with high caseloads and limited resources.<sup>129</sup> It is therefore likely that a prosecutor’s office that chooses to abstain from reading inmates’ unprivileged legal email does so, at least in part, in recognition of the unique difficulty inmates’ face with respect to communicating in confidence with their attorney.

### C. *Why Some Prosecutors Choose to Read Inmates’ Legal Email*

Prosecutors in at least three jurisdictions have chosen to read inmates’ legal email.<sup>130</sup> Only the U.S. Attorney’s Office for the Eastern District of New York, however, has provided justifications for its decision.<sup>131</sup> As this office explained in *Ahmed*, it decided to read inmate-attorney email because it reads inmates’ personal email, and it is too expensive to segregate inmates’ legal email from the single PDF of all an inmate’s email that BOP provides.<sup>132</sup> In other words, for the Eastern District of New York, the decision to read inmate-attorney email was motivated by administrative necessity. As the *Ahmed* court opined, however, it is hard to imagine that prosecutors are not also motivated to read inmates’ legal email in order to gain greater access to the truth.<sup>133</sup>

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127. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2014) (enumerating attorneys’ duties of confidentiality); *id.* R. 1.4 (enumerating attorneys’ duties to communicate with their client); *id.* R.4.4(b) (requiring an attorney who receives inadvertently sent information pertaining to an adverse party to notify the sender).

128. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

129. Reply to Response to Motion re: 34 First Motion in Limine re: Defendant Emails to Counsel at 3, *Walia*, No. 1:14-cr-00213 (E.D.N.Y. July 22, 2014); Tr. of Ahmed Conference, *supra* note 9, at 18–21.

130. See *supra* Part I.

131. See *supra* Part I.D–F.

132. See Tr. of Ahmed Conference, *supra* note 9, at 10.

133. See *id.* at 17.

*D. Prosecutors Should Abstain from Reading Inmate-Attorney Email  
Because This Behavior Unjustifiably Chills  
Inmate-Attorney Communication*

From a legally formalistic perspective, prosecutors may read inmates' legal email because it is unprivileged.<sup>134</sup> As ministers of justice, however, they should abstain from reading it because this behavior is normatively disfavored within the profession, further disadvantages criminal defendants, and lacks a compelling justification.

In recognition of the critical role communicating in confidence with one's attorney plays in the adversary system,<sup>135</sup> all the actors involved in litigating whether prosecutors can read inmates' legal email have expressed discomfort with them doing so: obviously, inmates and defense attorneys are against it; more significantly, three of the four courts that ruled to allow the practice expressed substantial misgivings about it;<sup>136</sup> more significantly still, until recently the government voluntarily used taint teams to manually segregate inmates' legal email,<sup>137</sup> which provides the inference that the government itself believes eavesdropping on opposing parties' legal communications is undesirable behavior.<sup>138</sup> Thus, while the prosecutors can read inmates' legal email to better their chances of a favorable outcome, the normative consensus among actors who have evaluated the issue, including the government itself, is that they should refrain from doing so because it chills defendants' ability to communicate confidentially with counsel.

Moreover, as recent commentators note, high rates of pretrial detention combined with the threat of draconian mandatory minimum sentences gives federal prosecutors nearly plenary power to extract guilty pleas from defendants.<sup>139</sup> This has pushed federal prosecutors dangerously close to becoming defendants' "inquisitors" as opposed to their adversaries.<sup>140</sup> To deny federal inmates and their attorneys the ability to use the dominant communicative medium of our time to prepare their case only exacerbates this troubling power discrepancy.

Finally, prosecutors should not read inmates' legal email because their decision to do so is not justified by an important legal principle or law

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134. See *supra* notes 100–06 and accompanying text.

135. See *supra* Part I.A.1.

136. See *supra* note 281 and accompanying text.

137. See *supra* note 48 and accompanying text.

138. Indeed, this is exactly what the government argued in *Hatcher*, where despite the government claims of attorney-client privilege the court ruled to admit conversations between the government and cooperating witnesses that took place on monitored prison lines. See *supra* notes 92–93 and accompanying text. As the First Circuit aptly has noted, "it is disturbing to see the Justice Department change the color of its stripes . . . portraying . . . events variously . . . depending on the strategic necessities of the separate litigations." *United States v. Kattar*, 840 F.2d 118, 127 (1st Cir. 1998).

139. See David Patton, *Federal Public Defense in an Age of Inquisition*, 122 *YALE L.J.* 2578, 2581 (2013) (noting that because of this combination of circumstances only 2.7 percent of federal cases went to trial in 2010 as opposed to 15 percent in 1963); see also *The Kings of The Courtroom*, *ECONOMIST*, Oct. 4, 2014, at 33.

140. See Patton, *supra* note 139, at 104.

enforcement policy. Rather, it is an opportunistic choice that exploits a gap between technological innovation and established norms in order to save money.<sup>141</sup> As the *Saade* court implied,<sup>142</sup> and as common sense dictates, because over time BOP has successively provided for confidential legal visits, legal mail, and legal phone calls,<sup>143</sup> it will almost certainly eventually provide for confidential legal email. But while BOP had significant financial incentive to provide inmates with email access,<sup>144</sup> its only incentive to provide confidential legal email is that it is normatively the right thing to do. Because prisoners are an extremely weak political group, it is unsurprising that BOP has yet to accommodate this interest. As the ABA suggests, when prosecutors recognize this type of imbalance in the criminal justice system they should seek to remediate it.<sup>145</sup> At the very least, they should not seek to exploit it.

In sum, while prosecutors can legally read inmates' legal emails because they are unprivileged, as ministers of justice they should refrain from doing so as this behavior is disfavored within the profession because it chills inmate-attorney communication, further disadvantages inmates, and can be explained as a choice to save money by exploiting the fact that BOP has yet to apply its established norms to new technology.

#### IV. ARE INMATES' CONSTITUTIONAL RIGHTS IMPERMISSIBLY RESTRICTED WHEN PROSECUTORS READ THEIR LEGAL EMAIL?

Part II argues that inmates' legal emails are unprivileged but that prosecutors should nevertheless refrain from reading them. Parts IV and V discuss the arguments defendants have made against prosecutors who choose to read their legal email.

This part discusses whether or not prosecutors reading inmates' legal email is unconstitutional. Part IV.A provides background regarding inmates' Sixth Amendment right of access to counsel which defendants have argued prosecutors impermissibly restrict by reading their legal email. Part IV.B explains the different standards of review courts employ when assessing whether a *given action* or a *prison policy* impermissibly restricts this right. Part IV.C notes that all courts have rejected the defendants' constitutional arguments. Part IV.D asserts, however, that defendants' constitutional claims have been unsuccessful because they have argued that the individual prosecutors' acts of reading their legal email, as opposed to BOP's email monitoring policy, impermissibly restricts their constitutional rights. In contrast with claiming that an act restricts an inmate's

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141. See *supra* note 48 and accompanying text.

142. See *supra* note 288 and accompanying text.

143. See *supra* notes 158–59 and accompanying text.

144. See FED. BUREAU OF PRISONS, TRUST FUND LIMITED INMATE COMPUTER SYSTEM (TRULINCS) ELECTRONIC MESSAGING 1 (2009), available at [http://www.bop.gov/policy/progstat/5265\\_013.pdf](http://www.bop.gov/policy/progstat/5265_013.pdf) (describing program objectives as “[t]o provide the Bureau with a more efficient, cost-effective, and secure method of managing and monitoring inmate communications services” and “[t]o reduce opportunities for . . . contraband to be introduced into Bureau facilities through inmate mail”).

145. ABA Prosecution Function Standards Standard 3–1.2(d) (2014).

constitutional rights, Part IV.D concludes constitutional challenges to prison regulations require courts to apply specific, stricter standards of review, under which BOP's email monitoring policy impermissibly restricts inmates' right of access to counsel.

*A. Inmates' Sixth Amendment Right of Access to Counsel*

As the Supreme Court has proclaimed, "[p]rison walls do not form a barrier" between inmates and constitutional protections.<sup>146</sup> Two constitutional protections inmates retain are the Sixth Amendment right of access to counsel and the right of access to the courts.<sup>147</sup> In the email cases, defendants have argued, thus far unsuccessfully, that even if their legal email is unprivileged, prosecutors cannot read it because doing so impermissibly restricts these rights.<sup>148</sup>

By its plain text, the Sixth Amendment guarantees an individual accused of a federal crime the right "to have the assistance of counsel for his defense."<sup>149</sup> In *Douglas v. California*,<sup>150</sup> this right was extended to appeals as of right,<sup>151</sup> in *Massiah v. United States*<sup>152</sup> the Court recognized the special importance of legal assistance during pretrial proceedings,<sup>153</sup> and in *Strickland v. Washington*<sup>154</sup> the Court explained that assistance of counsel means "reasonably effective" assistance.<sup>155</sup> For pretrial detainees, convicts appealing as of right, and the small percentage of convicts able to retain private counsel,<sup>156</sup> reasonably effective assistance has been interpreted to guarantee at least the right to meet with their attorney in a confidential setting.<sup>157</sup> At BOP facilities, inmates are entitled to confidential legal visits,<sup>158</sup> physical mail,<sup>159</sup> and phone calls.<sup>160</sup>

146. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

147. See generally 3 MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS*, §§ 12:1, 12:24 (4th ed. 2014) (subscription required).

148. See *infra* Part I.C.

149. U.S. CONST. amend. VI. This right was reaffirmed in *Johnson v. Zerbst*, 304 U.S. 458, 459 (1938). The Sixth Amendment's guarantee of assistance of counsel was extended to defendants in state courts in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

150. 372 U.S. 353 (1963).

151. An appeal as of right, as opposed to by permission, is an appeal a party is statutorily entitled to and an appellate court must hear. Compare FED. R. APP. P. 3 ("Appeal As of Right"), with FED. R. APP. P. 5 ("Appeal by Permission").

152. 377 U.S. 201 (1964).

153. *Id.* at 205 (calling arraignment through trial "perhaps the most critical period of the proceedings" (citing *Powell v. Alabama*, 287 U.S. 45, 53 (1932))).

154. 466 U.S. 668 (1984).

155. *Id.* at 687.

156. See U.S. DEP'T OF JUSTICE, *FEDERAL JUSTICE STATISTICS 8* (2009), available at <http://www.bjs.gov/content/pub/pdf/fjs09.pdf> (noting that only 21 percent of federal defendants retained private counsel). BOP inmates are entitled to retain private counsel at any time. See 28 C.F.R. § 543.12 (2012).

157. 3 MUSHLIN, *supra* note 147, § 12:27.

158. 28 C.F.R. § 543.13(b) ("The Warden generally may not limit the frequency of attorney visits . . . [which are to] take place in a private conference room, if available . . .").

159. *Id.* § 540.18(a) (2012) ("The Warden shall open . . . special mail only in the presence of the inmate for inspection of . . . contraband . . . . The correspondence may not be read.").

160. See *id.* § 540.1021; *supra* note 86 and accompanying text.

Convicted inmates unable to retain private counsel, who have neither the right of access to counsel nor the right to appeal, are thus not cutoff from the justice system; they retain the related “fundamental” constitutional right of access to the courts, which requires prisons to provide for, and ensure they do not impermissibly impede, inmates’ ability to bring non-frivolous legal claims.<sup>161</sup>

*B. Judicial Review of Prison Regulations  
That Restrict Inmates’ Constitutional Rights*

Because prisoners retain constitutional protections, when a given action or prison policy threatens an inmate’s constitutional guarantee, federal courts will “discharge their duty” to protect it.<sup>162</sup> As of publication, defendants have not challenged the constitutionality of BOP’s email monitoring policy; instead, they have, thus far unsuccessfully, argued on a case-by-case basis that the prosecutor’s act of reading their legal email impermissibly restricts their right of access to counsel.<sup>163</sup>

Federal courts assess whether an action impermissibly restricts an inmate’s constitutional right by ascertaining the degree to which the action restricted the inmate’s overall ability to exercise the right.<sup>164</sup> Barring a particularly egregious incident, inmates’ constitutional claims are generally dismissed.<sup>165</sup>

In contrast with actions that restrict inmates’ constitutional rights, prison policies that do so are subject to specific, stricter standards of review.<sup>166</sup>

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161. *Bounds v. Smith*, 430 U.S. 817, 827 (1977); *see, e.g., Al-Amin v. Smith*, 511 F.3d 1317, 1325 (11th Cir. 2008) (“[A] prisoner’s constitutional right of access to the courts requires that incoming legal mail from his attorneys . . . may be opened only in the inmate’s presence and only to inspect for contraband.”); *Lewis v. Casey*, 518 U.S. 343, 346 (1996) (affirming prisoners’ right of access to the courts as mandating an adequate library or adequate assistance from persons trained in law); *Procnier v. Martinez*, 416 U.S. 396, 419 (1974) (holding that a prison policy barring law students and legal paraprofessionals from visiting prisoners unjustifiably restricted inmates’ right of access to the courts). *See generally* 3 MUSHLIN, *supra* note 147, § 12.

162. *Procnier*, 416 U.S. at 406.

163. *See infra* Part III.C.

164. These cases are relatively uncommon and are not decided pursuant to a consistent standard of review. *See, e.g., Zavala v. Rios*, No. 1:09-CV-00679-BAM PC, 2012 WL 1592544, at \*3 (E.D. Cal. May 4, 2012) (finding no constitutional violation of an inmate’s right to communicate with his attorney when a prison guard failed to return several of the attorney’s phone calls); *Schick v. Apker*, No. 07CIV.57775SHS, 2009 WL 2016926, at \*2–3 (S.D.N.Y. July 10, 2009) (finding no constitutional violation of an inmate’s right of access to counsel where he was denied unmonitored phone calls on three occasions); *Hall v. McLesky*, 83 S.W.3d 752, 759 (Tenn. Ct. App. 2001) (finding no violation of inmate’s right of access to counsel where the inmate was temporarily unable to call his attorney because the prison administration was slow in placing the attorney’s name on the approved call list). *But see In re Roark*, 56 Cal Rptr. 2d 582, 589 (1996) (holding that prison officials impermissibly restricted the defendant’s right of access to counsel where they required the removal and search of his attorney’s prosthetic leg prior to visitation, which the attorney refused to comply with); *but see also Tucker v. Randall* 948 F.2d 388, 390–91 (7th Cir. 1991) (holding that denying a pretrial detainee telephone access for four days may be unconstitutional).

165. *See supra* note 164.

166. *See generally* 3 MUSHLIN, *supra* note 147, § 2:3.

Today, *Turner v. Safely*<sup>167</sup> generally governs cases in which a prison policy's constitutionality is at issue.<sup>168</sup> In *Turner*, the Court ruled that a prison regulation limiting inmates' ability to correspond with one another did not impermissibly restrict their First Amendment right to free speech, but that a regulation requiring inmates to obtain the prison superintendent's permission prior to marrying did impermissibly restrict their right to marry.<sup>169</sup>

The *Turner* Court announced that when a prison policy restricts inmates' constitutional rights, it is valid if it is "reasonably related to legitimate penological interests."<sup>170</sup> In performing this rational basis review, the Court furthered, it is necessary to consider: (1) whether there is a "rational connection" between the regulation and governmental interest, (2) whether there are "alternative means" for the inmates to exercise the restricted right, (3) the effect accommodating the right will have on prison interests and resources, and (4) whether inmates can point to a low-cost alternative to the regulation.<sup>171</sup> The Supreme Court has not provided guidance as to the relative weight of each factor, and lower courts have afforded factors more or less importance depending on a given case's facts.<sup>172</sup>

*Turner* does not, however, govern all cases in which a defendant claims that a prison policy impermissibly restricts her constitutional rights.<sup>173</sup> The court did not apply *Turner*, for example, in *Benjamin v. Fraser*,<sup>174</sup> a case

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167. 482 U.S. 78 (1987).

168. See *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) ("[I]n *Turner* we adopted a unitary . . . standard for reviewing prisoners' constitutional claims."); 3 MUSHLIN, *supra* note 149, § 2.4 ("The four-part *Turner v. Safely* test . . . has become the default test to use in great many prison cases."). But see Michael Keegan, *The Supreme Court's "Prisoner Dilemma": How Johnson, RLUIPA, and Cutter Re-defined Inmate Constitutional Claims*, 86 NEB. L. REV. 279 (2007) (analyzing recent departures from *Turner*); Trevor N. McFadden, *When To Turn To Turner? The Supreme Court's Schizophrenic Prison Jurisprudence*, 22 J.L. & POL. 135 (2006) (also analyzing recent departures from *Turner*).

169. *Turner*, 482 U.S. at 81. The right to marry is protected under *Zablocki v. Redhail*, 434 U.S. 374 (1978).

170. *Turner*, 482 U.S. at 89. Courts have recognized legitimate penological interests as those related to maintaining security, providing for rehabilitation, and conserving resources. See 3 MUSHLIN, *supra* note 147, § 12.

171. *Turner*, 482 U.S. at 90. The Court reasoned that regulating correspondence was reasonably related to institutional security, and monitoring all communications would be unreasonably burdensome. *Id.* at 98. By contrast, the Court reasoned that requiring permission to marry was unrelated to security and prison marriages can be overseen at nearly no cost. *Id.*; see also, e.g., *Clement v. Cal. Dep't. of Corr.* 364 F.3d 1148, 1153 (9th Cir. 2004) (holding policy banning inmates' receipt of internet-generated material unconstitutional under *Turner*). But see *Beard v. Banks*, 548 U.S. 521, 533 (2006) (upholding prison regulation under *Turner* that restricted access to newspapers, magazines, and photographs for inmates housed in prison's most restricted level).

172. See 3 MUSHLIN, *supra* note 147, § 2:9.

173. See, e.g., *Demery v. Arpaoui*, 378 F.3d 1020, 1028–29 (9th Cir. 2004) (refusing to apply *Turner* in case concerning pretrial detainees as opposed to convicts). See generally Keegan, *supra* note 168; McFadden *supra*, note 168. Most recently the court explained that *Turner* applies only to rights that need "necessarily be compromised" for proper prison administration, such as restrictions on access to the counsel. *Johnson v. California*, 543 U.S. 499, 510 (2005). By contrast, *Turner* would not apply to the right not to be discriminated against based on one's race. *Id.* at 510–11.

174. 264 F.3d 175 (2d. Cir 2001).

courts in the email cases have relied on in holding that prosecutors reading inmates' legal email does not impermissibly restrict their right of access to counsel.<sup>175</sup> In *Benjamin*, the defendants, who were pretrial detainees, challenged several prison policies that caused extensive delays for their attorneys trying to visit them.<sup>176</sup> Defendants brought suit against the prison, claiming that its delay-causing policies infringed their right of access to counsel and access to the courts.<sup>177</sup>

Though the *Benjamin* court stated that it believed the prison policies would fail under *Turner*,<sup>178</sup> it chose to apply the more inmate-friendly "unjustifiably obstructs" standard articulated in *Procunier v. Martinez*.<sup>179</sup> In addition, the court applied a standard specifically for pretrial detainees set out in *Bell v. Wolfish*,<sup>180</sup> which states that regulations restricting pretrial detainees' constitutional rights must be evaluated *only* in light of prison administrations' central objective, namely, "safeguarding institutional security."<sup>181</sup> The court reasoned that *Turner* was inapposite and *Procunier* and *Wolfish* controlled because the case involved (1) pretrial detainees (at issue in *Wolfish*) and (2) a regulation restricting inmates' access to counsel (at issue in *Procunier*), neither of which *Turner* addressed.<sup>182</sup> Pursuant to this analysis, the court affirmed the trial court's judgment that the prison's delay-causing policies unjustifiably obstructed the defendants' right of access to counsel.<sup>183</sup>

The *Benjamin* court noted that the prison's policies implicated defendants' right of access to counsel and access to the courts, but it made a point to differentiate the two.<sup>184</sup> The difference is meaningful because in *Lewis v. Casey*<sup>185</sup> the Supreme Court held that prisoners bringing an access

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175. *See infra* notes 196–98 and accompanying text. As Part III.B argues, however, these holdings are predicated on a misreading of *Benjamin* that the government proffered and the courts adopted uncritically. *See infra* notes 207–14 and accompanying text.

176. *Benjamin*, 264 F.3d at 179. These policies included maintaining a small number of counsel rooms and refusing to bring pretrial detainees to counsel rooms during inmate counts or without special escort officers. *Id.*

177. *Id.* at 180.

178. *Id.* at 187 n.10.

179. 416 U.S. 396, 419 (1974) ("[Prison] [r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.").

180. 441 U.S. 520, 547 (1979).

181. *Id.* This stands in contrast to *Turner*, which allows a court to evaluate a prison policy in relation to any legitimate penological interest. *See supra* note 170 and accompanying text.

182. *Benjamin*, 264 F.3d at 187 n.10. The Court argued that *Turner* is inapposite in cases involving pretrial detainees because it involved convicted prisoners and promulgated a standard predicated on penological interests, which a state does not have with respect to persons merely accused of a crime. *Id.*

183. *Id.* at 190.

184. *Id.* at 186 ("[T]he right to counsel and the right of access to the courts are interrelated, since the provision of counsel can be a means of accessing the courts. However, the two rights are not the same.").

185. 518 U.S. 343 (1996).

to the courts claim must show “actual injury” to have standing.<sup>186</sup> Though it is arguable as to whether *Lewis*’s actual injury requirement applies to access to counsel claims,<sup>187</sup> the *Benjamin* court held that it does not because access to counsel, unlike access to the courts, is a right that the Constitution directly guarantees.<sup>188</sup>

*C. Courts Have Not Found That Prosecutors Reading Legal Email Is Unconstitutional*

In *National Urological Group*, *Asaro*, *Ahmed*, and *Walia*, the defendants argued that, regardless of whether their legal emails are privileged, the government’s decision to read them impermissibly restricts their Sixth Amendment right of access to counsel.<sup>189</sup> In *National Urological Group*, citing *Al-Amin v. Smith*,<sup>190</sup> the defendant argued additionally that this behavior violated his right of access to the courts.<sup>191</sup> The *National Urological Group* court ignored the access to the courts claim and dismissed the access to counsel claim because, it held the Sixth Amendment does not apply in a civil contempt proceeding.<sup>192</sup> In *Ahmed*, despite barring the government from reading the defendant’s legal emails,<sup>193</sup> the court never addressed his access to counsel claim.<sup>194</sup> This issue, however, was given significant attention by the *Asaro* and *Walia* courts.<sup>195</sup> Both courts acknowledged the burden that the inability to send privileged email places on inmates’ ability to consult their counsel.<sup>196</sup> The courts held, however, that under *Benjamin*,<sup>197</sup> because BOP facilities provide for alternative

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186. *Id.* at 351 (“Insofar as [access to the courts] is concerned . . . the inmate must demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.”).

187. See 3 MUSHLIN, *supra* note 147, § 12:23.

188. *Benjamin*, 264 F.3d at 186; see also *Lewis*, 518 U.S. at 367 (Thomas, J., concurring) (noting the Courts historic inability to “agree upon the constitutional source” of the right of access to the courts). As Part III.B argues, the burden of having to prove actual injury makes it unlikely that a challenge to BOP’s email monitoring policy under an access to the courts theory would succeed.

189. *FTC v. Nat’l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP, 2012 WL 171621, at \*1 (N.D. Ga. Jan. 20, 2012); *Asaro Order*, *supra* note 16, at 2; *Irizarry Letter*, *supra* note 53, at 2; *Walia Order* *supra* note 16, at 29–30. No constitutional claims were raised in *Fumo* or *Saade*.

190. 511 F.3d 1317 (11th Cir. 2008).

191. Cross Motion to Dismiss the Charges or Motion to Disqualify the F.T.C. Trial Team at 4, *Nat’l Urological Grp.*, No. 1:04-CV-03294 (N.D. Ga. Dec. 28, 2011).

192. *Nat’l Urological Grp.*, 2012 WL 171621, at \*1. This dismissal was arguably improper. See *infra* note 200.

193. Tr. of *Ahmed* Conference, *supra* note 9, at 21.

194. See generally *id.*

195. *Asaro Order*, *supra* note 16, at 2; *Walia Order*, *supra* note 16, at 29–30.

196. *Asaro Order*, *supra* note 16, at 2 (“[T]he court sympathizes with [defendant and defense counsel’s] concern that it would . . . be more efficient . . . if their . . . defense preparation could be conducted through privilege-protected emails.”); *Walia Order*, *supra* note 16, at 29 (“[T]he Court understands and appreciates Defendant’s desire to have quick and easy access to his counsel by email.”).

197. See *supra* notes 174–83 and accompanying text.



modes of confidential communication, the defendants' right of access to counsel were not "unreasonably burdened."<sup>198</sup>

*D. BOP's Email Monitoring Policy Impermissibly Restricts  
Inmates' Right of Access to Counsel*

In the email cases, the defendants' constitutional arguments claimed only that the *prosecutors' behavior*, as opposed to *BOP's email monitoring policy*, restricted their right of access to counsel.<sup>199</sup> The *National Urological Group* court dismissed this claim under the theory that the Sixth Amendment "does not apply" in civil contempt cases.<sup>200</sup> The *Ahmed* court did not respond to the defendant's access to counsel claim,<sup>201</sup> and the *Asaro* and *Walia* courts, while devoting significant discussion to the defendants' access to counsel claims, ultimately rejected them.<sup>202</sup>

In the email cases, the defendants' constitutional arguments have failed because they challenged an action that BOP's email monitoring policy made possible—i.e., the prosecutor reading the defendants' legal email—as opposed to challenging the policy itself. As *Asaro* and *Walia* illustrate, courts assess whether an action unconstitutionally restricts an inmate's constitutional rights by, rather amorphously, comparing the degree to which the event inhibited her ability to exercise them.<sup>203</sup> By contrast, constitutional challenges to prison regulations require courts to apply specific, stricter standards of review,<sup>204</sup> under which BOP's email monitoring policy unconstitutionally restricts inmates' right of access to counsel.

The *Asaro* court, citing *Benjamin*, ruled that because BOP offers other means of privileged legal communication, its failure to provide privileged email did not unreasonably burden the defendant's right of access to counsel.<sup>205</sup> This ruling is confusing because the defendant never challenged BOP's email monitoring policy.<sup>206</sup> In addition, this ruling is predicated on a plain misreading of *Benjamin* that the government

198. *Asaro* Order, *supra* note 16, at 2; *Walia* Order, *supra* note 16, at 30. In so holding, both courts, arguably, adopted a misreading of *Benjamin* that the government proffered. *See infra* notes 207–14 and accompanying text.

199. *See supra* Part IV.C. In *National Urological Group*, the defendant also argued that the government's behavior impinged his right of access to the courts, which the court ignored. *See supra* note 190 and accompanying text.

200. *See supra* note 192 and accompanying text. This dismissal was arguably improper. While the Sixth Amendment does not guarantee counsel in civil contempt proceedings, inmates have the derivative right of access to counsel if they retain an attorney. *See supra* notes 156–59 and accompanying text. Because assistance of counsel in civil contempt proceedings is not directly guaranteed by the constitution, it is likely that the defendant would have the added burden of proving actual injury. *See supra* notes 185–88. This does not mean, however, that the right does not apply.

201. *See supra* note 194 and accompanying text.

202. *See supra* notes 195–98 and accompanying text.

203. *See supra* note 164 and accompanying text.

204. *See supra* notes 167–88 and accompanying text.

205. *Asaro* Order, *supra* note 16, at 2.

206. DiFiore Letter, *supra* note 44, at 3 (only arguing that the "government's decision to read our communications with [the defendant] . . . will frustrate [his] access of counsel").

proffered.<sup>207</sup> The *Benjamin* court stated that it was applying *Procunier* and *Bell*.<sup>208</sup> It merely referred to “unreasonably burdens” as a “similar standard” it had adopted in the past and it never mentioned an alternative means test.<sup>209</sup> The *Asaro* court thus misguidedly ruled on BOP’s email monitoring policy’s constitutionality pursuant to a standard of review, which the government derived from a misreading of *Benjamin*, that was intended to respond to the defendant’s argument that the prosecutor’s behavior—not BOP’s email monitoring policy—restricted his right of access to counsel.<sup>210</sup>

In *Walia*, the government submitted the *Asaro* ruling,<sup>211</sup> and the court rejected the defendant’s access to counsel claim pursuant to its logic.<sup>212</sup> The court framed its ruling, however, with respect to the prosecutor reviewing the defendant’s legal email; it made no reference to BOP’s email monitoring policy.<sup>213</sup> Thus, though the *Walia* court employed the same misreading of *Benjamin* that the *Asaro* court did, its result was more reasonable because the alternative means test it employed accords with analyses other courts have used to assess whether an individual act, or set of acts, impermissibly restricts an inmate’s constitutional rights.<sup>214</sup>

In order to avoid the confusing, unfavorable results *Walia* and *Asaro* represent, future defendants should explicitly argue that BOP’s email monitoring policy unconstitutionally restricts their right of access to counsel. This clearly should prompt courts to apply either the four-part *Turner* test,<sup>215</sup> or an appropriate alternative, such as *Procunier*<sup>216</sup> and its progeny, which include *Benjamin*. Whether a court would apply one or the other in a given Sixth Amendment challenge to BOP’s email monitoring policy is arguable.<sup>217</sup> For this Note’s purposes, however, the question is moot because BOP’s email monitoring policy impermissibly restricts inmates’ right of access to counsel under either standard.

207. Letter Responding in Opposition to the Defendant’s Application at 4, United States v. Asaro, No. 1:14-cr-00026 (E.D.N.Y. July 17, 2014) (“[D]efendant’s Sixth Amendment argument fails because, to the extent the government’s review of TRULINCS emails at all deters [him] from using that mode of communication . . . that inconvenience does not unreasonably interfere with [his] ability to consult his attorney . . . in light of the other methods of attorney-client communication available” (citing *Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001))).

208. *Benjamin*, 264 F.3d at 187; see *supra* notes 179–83 and accompanying text.

209. *Benjamin*, 264 F.3d at 187.

210. For a discussion of courts improperly upholding prison regulations pursuant only to an alternative means test, see Peter R. Shults, Note, *Calling the Supreme Court: Prisoners’ Constitutional Right to Telephone Use*, 92 B.U. L. REV. 369, 385 (2012).

211. Letter re: Supplemental Authority As to Tushar Walia, United States v. Walia, No. 1:14-cr-00213 (E.D.N.Y. July 17, 2014).

212. Compare *id.*, with *Walia* Order, *supra* note 16, at 29–30.

213. *Walia* Order, *supra* note 16, at 29–30.

214. See *supra* notes 164–65 and accompanying text.

215. See *supra* notes 168–72.

216. See *supra* note 179 and accompanying text.

217. The Court has referred to *Turner* as a unitary standard. See *supra* note 168 and accompanying text. As the *Benjamin* court held, however, *Turner* is arguably inapposite in cases where the rights of pretrial detainees are at issue because it concerned convicted prisoners. See *supra* note 182.

In contrast to the *Asaro* court's holding, a proper analysis of a prison regulation under *Benjamin* asks if a prison policy "unjustifiably obstructs" the availability of pretrial detainees' representation. This inquiry analyzes this question *only* in relation to prison administrations' central objective, "safeguarding institutional security."<sup>218</sup> BOP's email monitoring policy fails this test. As the defense attorneys in *Walia* rightly observe, in today's American legal profession, email is how business is done.<sup>219</sup> In addition, for anyone working with an attorney, the ability to communicate confidentially is paramount.<sup>220</sup> Denying pretrial detainees confidential legal email thus plainly obstructs their representation's availability.<sup>221</sup> Further, security concerns cannot justify this obstruction. BOP cannot say it views confidential inmate-attorney communication as a security threat because BOP allows inmates to communicate confidentially with counsel via every other communicative media that it offers.<sup>222</sup> There is nothing unique about email to warrant making it the first exception to this rule. In fact, per BOP's own reasoning, confidential email is safer than confidential legal visits or confidential physical mail because one cannot smuggle contraband via email.<sup>223</sup> Thus, under *Benjamin*'s application of *Procunier* and *Bell*, because BOP's email monitoring policy obstructs the availability of pretrial detainees' attorneys, and because this obstruction is not justifiable as a security measure, it impermissibly restricts pretrial detainees' right of access to counsel.

If a court chose to apply the four-part *Turner* test<sup>224</sup> in considering whether BOP's email monitoring policy impermissibly restricts inmates' right of access to counsel, it would reach the same result. Though BOP has never had occasion to state in a legal proceeding what their interest is in monitoring inmates' email communication, it is presumably the same interest it has in monitoring phone calls and physical mail—i.e., maintaining institutional security.<sup>225</sup> Maintaining institutional security is a legitimate penological interest under *Turner*.<sup>226</sup> With respect to the first factor, a court would almost certainly find monitoring inmates' emails rationally related to maintaining institutional security. In addition, the

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218. *See supra* notes 180–81 and accompanying text.

219. Reply to Response to Motion re: 34 First Motion in Limine re: Defendant Emails to Counsel at 3, *United States v. Walia*, No. 1:14-cr-00213 (E.D.N.Y. July 22, 2014); *see also* ABA LEGAL TECH. RES. CTR, *supra* note 126.

220. *See supra* Part I.A.1.

221. This obstruction is exacerbated by the fact that, as the *Ahmed* court stated, it can be exceedingly difficult to arrange for in-person legal visits or unmonitored phone calls and communicating via physical mail is not a viable option in preparing a case. *See supra* note 293.

222. *See supra* notes 158–59.

223. *See supra* note 144.

224. *See supra* notes 170–71.

225. *See* FED. BUREAU OF PRISONS, BOP PROGRAM STATEMENT, U.S. DEP'T OF JUSTICE 1 (2008), available at [http://www.bop.gov/policy/progstat/5264\\_008.pdf](http://www.bop.gov/policy/progstat/5264_008.pdf) (noting the institutional interest in security as the reason for inmate phone call monitoring); FED. BUREAU OF PRISONS, BOP PROGRAM STATEMENT, U.S. DEP'T OF JUSTICE 8 (2011), available at [http://www.bop.gov/policy/progstat/5265\\_014.pdf](http://www.bop.gov/policy/progstat/5265_014.pdf) (same with respect to physical mail).

226. *See supra* note 170.

second factor also favors BOP because inmates have alternative means of exercising their right to communicate confidentially with counsel.<sup>227</sup>

Nevertheless, with respect to the third factor, far from having a negative effect on institutional security or prison resources, providing inmates confidential legal email would benefit each. As BOP states, it provided inmates email to limit the risk of incoming contraband and to ease the administrative burden that arranging for phone calls and in-person visits creates.<sup>228</sup> Enabling inmates to communicate confidentially with counsel via email would further both these goals. Finally, with respect to the fourth factor, as the *Ahmed* court opined, any casual user of Google Mail would find it difficult to imagine that BOP could not, at a low cost, simply add a feature to TRULINCS that filtered emails to and from inmates' attorneys of record.<sup>229</sup>

It is true that monitoring inmate communication is rationally related to BOP's legitimate penological interest in maintaining institutional security, and inmates have other means by which to communicate confidentially with counsel. However because providing for confidential legal email would have a positive effect on institutional security and prison resources (and likely it would be easy to provide), BOP's email monitoring policy impermissibly restricts inmates' right of access to counsel under *Turner*.

#### V. CAN FEDERAL COURTS PREVENT PROSECUTORS FROM READING INMATES' LEGAL EMAIL ON NON-CONSTITUTIONAL GROUNDS?

Part IV.D argues that BOP's email monitoring policy impermissibly restricts inmates' Sixth Amendment right of access to counsel. In the email cases, however, BOP's email monitoring policy was not at issue.<sup>230</sup> In future litigations, this is likely to remain the case because busy defense attorneys probably will continue to make case-by-case arguments regarding individual prosecutor's behavior rather than invest the resources in bringing a challenge against BOP. Moreover, in general, federal courts seek to avoid deciding issues on constitutional grounds where possible.<sup>231</sup> According to this principle of judicial restraint courts often choose not to address constitutional issues that have not been explicitly raised by the appropriate

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227. *See supra* notes 158–59.

228. *See supra* note 144.

229. Tr. of Ahmed Conference, *supra* note 9, at 11–12.

230. *See supra* note 199.

231. *See, e.g.,* *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) (noting the “longstanding principle of judicial restraint [which] requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them” (quoting *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988))). *See generally* 12B JOHN J. DVORSKE, TEXAS JURISPRUDENCE, CONSTITUTIONAL LAW § 12 (3d. ed. 2014) (subscription required) (“A court will not determine a constitutional question unnecessarily or in a case that does not present the question with sufficient clarity.”); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004–05 (1994) (noting that this principal is motivated by concerns “regarding federal courts’ credibility, the final . . . nature of judicial review . . . the paramount importance of constitutional adjudication . . . [and] maintaining appropriate separation of powers”).

parties.<sup>232</sup> Thus even if a defense attorney challenged BOP's email monitoring policy, a court would likely hesitate to rule on the issue if BOP was not a party, or it felt it had an alternative ground upon which to decide the case.

The question thus arises: Where the constitutionality of BOP's email monitoring policy is not properly at issue, or a court does not want to decide it, is there a legitimate alternative ground upon which a court can prevent a prosecutor from reading a defendant's legal email?

Part V explains that federal courts can negate the effects of a constitutionally questionable prosecutorial practice, without rendering a constitutional decision, by exercising their power to regulate prosecutors' behavior. Part V.A provides background on delegated and non-delegated versions of these powers. Part V.B notes that three defendants in the email cases appealed to the courts to use non-delegated variants of this power to prevent prosecutors from reading their legal email. The courts, however, rejected these petitions, concluding instead that they lacked the legal basis to prevent the prosecutor from doing so. Two courts, however, *sua sponte*, implicitly employed a non-delegated variant of this power to rule in the defendants favor.<sup>233</sup> Thus, Part V.B observes, either the four former courts were incorrect or the two latter courts exceeded their authority.

Part V.C asserts that the two courts that implicitly employed their non-delegated power to regulate prosecutors in order to prevent them from reading the defendant's legal email acted within their authority. Part V.C argues, however, that future courts should prevent prosecutors from reading inmates' legal email pursuant to their delegated authority to enforce Rules of Professional Conduct. This is because explicit rulings pursuant to delegated authority raise less separation of powers concerns and have more precedential value as compared to implicit rulings pursuant to non-delegated authority. Specifically, Part V concludes courts should prevent prosecutors from reading inmates' legal email by enforcing Rule 8.4(d), which prohibits attorneys from engaging in conduct prejudicial to the administration of justice.<sup>234</sup>

#### A. *Delegated and Non-Delegated Powers Federal Courts Use to Regulate Prosecutors*

Unlike state courts, which adopt professional conduct codes,<sup>235</sup> federal courts have no uniform approach to regulating prosecutors' behavior.<sup>236</sup>

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232. Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1326 n.91 (2003); *see also, e.g.*, Walia Order, *supra* note 16, at 30 n.1 (noting that the defendant's proposed solution to create an inmate-attorney email filter on TRULINCS was reasonable but refusing to further discuss it because BOP was not a party to the litigation).

233. *See infra* Part II.C.

234. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2014).

235. *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT (2014).

236. Fred C. Zacharias & Bruce A. Green, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 400 (2002); *see also* Judith A. McMorrow, *The (F)Utility of Rules:*

They nevertheless routinely do so by enforcing established rules of procedure<sup>237</sup> or utilizing rulemaking authority Congress explicitly granted them.<sup>238</sup> In addition, federal courts can enforce the McDade Amendment,<sup>239</sup> a federal statute authorizing them to apply state ethics rules to regulate prosecutorial conduct, even if it is otherwise lawful.<sup>240</sup> As Professors Zacharias and Green note, when courts exercise their delegated powers to regulate prosecutors, it is relatively uncontroversial, because their authority to do so is apparent.<sup>241</sup> As Zacharias and Green further note, however, federal courts also regulate prosecutors pursuant to forms of non-delegated authority, including setting standards of conduct “indirectly” (i.e. informally during proceedings)<sup>242</sup> and using their “inherent authority” to control their own proceedings<sup>243</sup> and “supervisory authority” over the administration of the criminal justice system.<sup>244</sup> When federal courts exercise these powers, it is more controversial because it is unclear whether they truly possess them and, if they do, what their scope is.<sup>245</sup>

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*Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 6 (2005) (“No single set of rules govern attorney conduct (i.e. ethics) in federal court practice.”).

237. See, e.g., FED. R. CIV. P. 11 (authorizing federal courts to sanction federal prosecutors for improper pleadings).

238. See, e.g., 28 U.S.C. § 2071 (2012) (allowing district courts to prescribe “rules of practice and procedure”); FED. R. CRIM. P. 57 (authorizing federal courts to promulgate local court rules for criminal proceedings); *United States v. Keane*, 375 F. Supp. 1201, 1204 (N.D. Ill. 1974) (recognizing discretionary assignment and transfer of cases as proper exercise of district courts’ authority under FED. R. CRIM. P. 57).

239. 28 U.S.C. § 530B.

240. See, e.g., *E. & W. Districts of Ky. v. Ky. Bar Ass’n*, 439 S.W.3d 136, 144 (Ky. 2014). This case applied a state ethics opinion pursuant to the McDade Amendment to bar prosecutors from including ineffective assistance of counsel waivers in plea agreements despite federal courts’ “nearly unanimous” opinion that it is legal to do so. *Id.* The ethics rule the court adopted was a “formal opinion,” issued by the Kentucky Bar Association, which held that this practice violated Kentucky’s professional conduct rule prohibiting conflicts of interest. K.Y. RULE OF PROF’L CONDUCT R. 1.7 (2014). The formal opinion reasoned that a defense attorney advising a client to accept a plea that includes a waiver of his right to appeal for ineffective assistance of counsel is inherently conflicted. *Ky. Bar Ass’n*, 439 S.W.3d at 144.

241. See Zacharias & Green, *supra* note 232, at 1310.

242. Zacharias & Green, *supra* note 236, at 401–02.

243. *Id.* at 407 (citing *Chambers v. Nasco*, 501 U.S. 32, 34–35 (1991) (affirming federal courts “inherent power” to, *inter alia*, sanction attorneys’ bad faith conduct, control admission to the bar, punish for contempt, and vacate judgments upon discovery of fraud)).

244. Zacharias & Green, *supra* note 232, at 1314. See generally John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Powers of Federal Judges*, 5 J.L. & POL’Y 423 (1997); Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984). Green and Zacharias also note as non-delegated sources of judicial authority “the authority of the federal courts to control the admission of lawyers to practice before them” and “the inherent authority of federal courts to protect their own jurisdiction.” Zacharias & Green, *supra* note 232, at 1310–14. These two sources of federal courts’ authority to regulate prosecutors are beyond this Note’s scope.

245. Zacharias & Green, *supra* note 232, at 1308–14.

### 1. The Delegated Authority of Federal Courts to Regulate Prosecutors Through the Rules of Professional Conduct

Congress has delegated general rulemaking authority to federal courts.<sup>246</sup> Pursuant to this authority, federal courts promulgate “local rules” to regulate attorney conduct.<sup>247</sup> The vast majority of district courts adopt the Rules of Professional Conduct that the state in which they sit employs, which typically reflect the ABA Model Rules of Professional Conduct.<sup>248</sup> In addition, in 2000, in the wake of scandals surrounding federal prosecutors’ attempts to exempt themselves from state Rules of Professional Conduct, Congress enacted the McDade Amendment.<sup>249</sup> It is titled “Ethical Standards for Attorneys for the Government” and states that federal prosecutors will be “subject to State laws and rules and local Federal court rules,” wherever they practice.<sup>250</sup> After the McDade Amendment, even if a district court has not adopted a state rule of professional conduct as one of its local rules, it can still enforce any rule of professional conduct adopted by the state in which it sits.<sup>251</sup>

One question that Zacharias and Green raise, and that is relevant to this Note, is how a federal court should proceed when it believes a prosecutor’s behavior is plainly wrong but no local rule, state rule of professional conduct, or any other authority specifically proscribes it.<sup>252</sup> This is the case in the email cases.<sup>253</sup> One option for courts in this situation is to broadly interpret a vague rule of professional conduct such as 8.4(d), which prohibits lawyers from engaging in “conduct that is prejudicial to the administration of justice.”<sup>254</sup> Lower courts’ interpretations of vague Rules

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246. See *supra* notes 237–38.

247. 30 COQUILLETTE ET AL., MOORE’S FEDERAL PRACTICE § 802.01 (3d ed. 2014).

248. *Id.* See generally MODEL RULES OF PROF’L CONDUCT (2014).

249. 28 U.S.C. § 530B (2012). Congressman Joseph McDade, who was indicted in 1992 on five counts of bribery-related charges and eventually acquitted of them all, introduced the legislation. Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 211 (2000). During his criminal proceedings, McDade filed numerous motions alleging prosecutorial violations of ethics standards. *Id.* at 212. Roughly contemporaneously to McDade’s criminal proceedings, then-Attorney General Richard Thornburgh circulated an internal Department of Justice memorandum that ostensibly held Department of Justice attorneys exempt from certain ethics rules adopted by several states. Richard L. Thornburgh, Memorandum from Attorney General to all Justice Department Litigators 1 (June 8, 1989), reprinted in *In re Doe*, 801 F. Supp. 478, 489 (D.N.M. 1992).

250. 28 U.S.C. § 530B; see, e.g., *United States v. Bunday*, 908 F. Supp. 2d 485, 496 (S.D.N.Y. 2012) (analyzing prosecutors behavior under New York Rule of Professional Conduct 4.2(a) pursuant to the McDade Amendment).

251. See Zacharias & Green, *supra* note 236, at 418.

252. Zacharias & Green, *supra* note 232, at 1306.

253. The rule of professional conduct that comes closest to specifically covering the scenario the email cases present is Rule 4.4(b), which provides that a lawyer who inadvertently receives a document from the opposing party shall notify the sender. MODEL RULES OF PROF’L CONDUCT R. 4.4(b). This rule does not apply, however, because BOP advertently sends inmates’ legal emails to the government. See *supra* note 10 and accompanying text.

254. Zacharias & Green, *supra* note 236, at 394. MODEL RULES OF PROF’L CONDUCT R. 8.4(d); see, e.g., *United States v. Whittaker*, 201 F.R.D. 368, 370 (E.D. Pa.), *rev’d*, 268 F.3d 185 (3d Cir. 2001) (pursuant to the McDade Amendment, district court disqualified

of Professional Conduct, however, can be perceived as inappropriately exploiting the rules' open-textured language to give effect to idiosyncratic judicial preferences.<sup>255</sup> To this end, in analyzing lower court applications of Rules of Professional Conduct, a threshold question that has arisen is whether or not the court is enforcing a true "ethics rules," as opposed to effectuating a policy choice.<sup>256</sup> The Tenth Circuit argues that ethics rules (1) address conduct the legal profession consensually deems inappropriate and (2) are directed specifically at attorneys.<sup>257</sup> Zacharias and Green suggest that ethics rules (1) apply to all lawyers (because rules that apply only to a subclass of lawyers are too likely to implicate policy choices) and (2) primarily impact lawyers as opposed to institutions.<sup>258</sup>

## 2. Non-Delegated Authority Federal Courts Use to Regulate Prosecutors

For a federal court seeking to control a prosecutor's behavior where no local rule, state rule of professional conduct, or any other authority specifically proscribes it, an alternative to interpreting a vague rule of professional conduct is to act pursuant to one of the non-delegated powers federal courts have historically employed to regulate prosecutors' behavior.<sup>259</sup> These include their ability to set standards indirectly,<sup>260</sup> their inherent authority over their own proceedings,<sup>261</sup> and their supervisory power over the administration of the criminal justice system.<sup>262</sup>

### *a. Indirect Standard Setting*

As Zacharias and Green note, the most common way federal courts regulate prosecutorial behavior is by "setting standards indirectly," or making ad hoc decisions throughout the litigation process that communicate the court's view of appropriate conduct.<sup>263</sup> These decisions may be memorialized in a written opinion, appear on the record as oral

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prosecutor for violating Pennsylvania ethics rule 8.4(d) where the prosecutor sent extremely confusing letters to the defendant regarding whether he was or was not a crime suspect); *Grievance Adm'r v. Fried*, 570 N.W.2d 262, 267 & n.11, 267-68 (Mich. 1997) (finding Rule 8.4(d) applicable where lawyer hired judge's relative to work on a case to force the judge's recusal).

255. *See, e.g.*, *United States v. Whittaker*, 268 F.3d 185, 195 (3d Cir. 2001) (reversing district court's interpretation of Rule 8.4(d) because it was "unjustified").

256. Zacharias & Green, *supra* note 232, at 1332.

257. *United States v. Colo. Supreme Court*, 189 F.3d 1281, 1285 (10th Cir. 1999).

258. Zacharias & Green, *supra* note 232, at 1333.

259. *Id.* at 1310-15.

260. Zacharias & Green, *supra* note 236, at 401-03.

261. *Id.* at 407-08.

262. Zacharias & Green, *supra* note 232, at 411-12.

263. Zacharias & Green, *supra* note 236, at 401-03; *see, e.g.*, *United States v. Sabri*, 973 F. Supp. 134, 146 (W.D.N.Y. 1996) (suppressing evidence of a conversation based on a violation of an ethics rule); *United States v. Bazan*, 807 F.2d 1200, 1204 (5th Cir. 1986) (approving district court's sustaining of objections to prosecutors' cross examination); *United States v. Hernandez*, 779 F.2d 456, 458, 461 (8th Cir. 1985) (affirming district court's striking of the prosecutor's improper remarks).



admonitions, or remain unrecorded.<sup>264</sup> Though regulating prosecutors in this fashion can be effective, as Zacharias and Green point out, it is unclear what authority courts act pursuant to when doing so; in turn, because federal prosecutors exercise executive discretion, the prospect of courts constraining their behavior pursuant to no clear authority raises acute separation of powers concerns.<sup>265</sup> In the email cases, both courts that prevented prosecutors from reading inmates' legal email did so by issuing oral admonitions, pursuant to no clear authority, at pretrial hearings.<sup>266</sup>

*b. Inherent Judicial Authority over Their Own Proceedings*

Several defense attorneys in the email cases have unsuccessfully petitioned the courts to prevent prosecutors from reading their clients' legal emails by exercising their inherent authority to control their own proceedings.<sup>267</sup> As Zacharias and Green point out, while this source of non-delegated authority is widely recognized, it is generally narrowly employed to punish lawyer activity that threatens a court's efficient operations,<sup>268</sup> such as bad faith conduct<sup>269</sup> or tardiness.<sup>270</sup>

*c. Supervisory Authority over the Administration of the Criminal Justice System*

The Supreme Court has long recognized federal courts' power to regulate prosecutors' behavior pursuant to their "supervisory authority over the administration of criminal justice."<sup>271</sup> As Zacharias and Green note, however, this power's scope has been subject to much judicial and

264. Zacharias & Green, *supra* note 236, at 402.

265. Zacharias & Green, *supra* note 232, at 1313–14. Professors Zacharias and Green suggest that when federal courts are silent as to the authority pursuant to which they are controlling lawyers' behavior, they may believe they are exercising what some courts have called a "general ethics authority." Zacharias & Green, *supra* note 232, at 1313–14 (citing *Weibrech v. S. Ill. Transfer, Inc.*, 241 F.3d 875, 878 (7th Cir. 2001) (affirming the district courts' "inherent power and responsibility to supervise the conduct of attorneys admitted to practice before it."); *Whitehouse v. U.S. Dist. Court for the Dist. of R.I.*, 53 F.3d 1349, 1356 (1st Cir. 1995) (discussing district court's inherent power to "erec[t] reasonable prophylactic rules to regulate perceived abuses by attorneys appearing before the court").

266. *See infra* notes 287–92 and accompanying text.

267. *See infra* notes 282–83 and accompanying text. In the two cases where the court prevented prosecutors from reading the defendant's legal email, defense counsel made no reference to courts' non-delegated authority to regulate prosecutors. *See infra* notes 287–92 and accompanying text.

268. Zacharias & Green, *supra* note 232, at 1342.

269. *See, e.g.*, *Chambers v. Nasco*, 501 U.S. 32, 50 (1991) (affirming district court's use of its "inherent power" to shift attorneys' fees because a litigant filed frivolous pleadings and thereby delayed the proceeding).

270. *United States v. Seltzer*, 127 F. Supp. 2d 172, 172 (E.D.N.Y. 2000) (sanctioning an attorney for tardiness pursuant to the court's "inherent power to manage and control" its own proceedings).

271. *McNabb v. United States*, 318 U.S. 332, 349 (1943); *see also* *United States v. Williams*, 504 U.S. 36 (1992); *Bank of N.S. v. United States*, 487 U.S. 250 (1988); *United States v. Hasting*, 461 U.S. 499 (1983).

scholarly scrutiny.<sup>272</sup> In *McNabb v. United States*,<sup>273</sup> the Court stated that the power should be used to “maintain[] civilized standards of procedure and evidence,” and exercised it to exclude confessions obtained coercively though not illegally.<sup>274</sup> As commentators argue, however, *McNabb* represents an era where courts applied this power too liberally,<sup>275</sup> as broad judicial discretion to regulate law enforcement practices smacks of interbranch encroachment.<sup>276</sup> Most recently, the Court has cabined its use.<sup>277</sup> Judge John Gleeson suggests that it should be used only to remedy “violations of federal law in the evidence gathering process that actually prejudice the defendants.”<sup>278</sup> Perhaps unsurprisingly, then, in the email cases only one defendant referred to this power, and implicitly at that.

*B. The Courts Divide on Whether They Have Regulatory Authority to Prevent Prosecutors from Reading the Defendants’ Legal Emails*

In *Fumo*, defense counsel never explicitly contested the government’s use of their client’s legal emails as evidence and the court thus admitted them with little question.<sup>279</sup> In *National Urological Group, Asaro*, and *Walia*, upon concluding that the defendants’ legal emails were not privileged, and that the prosecutors reading them did not impermissibly restrict the defendants’ constitutional rights, the courts permitted the

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272. Zacharias & Green, *supra* note 232, at 1311; *see, e.g.*, Beale, *supra* note 244; Gleeson, *supra* note 244.

273. 318 U.S. 332 (1943).

274. *Id.* at 338–40 (citing *Lisenba v. California*, 314 U.S. 219, 239 (1941)).

275. Bennet L. Gershman, *Supervisory Power of the New York Courts*, 14 PACE L. REV. 41, 47 (1994) (“[T]he rise and fall of supervisory power resembles a parabolic arc, beginning with *McNabb*, reaching its crest . . . and then descending precipitously); Zacharias & Green, *supra* note 236, at 412 (“*McNabb* . . . provided an open-ended definition of the power . . . . Recent cases, however, have suggested that [it] may have gone too far . . .”).

276. *See* Gleeson, *supra* note 244, at 428 (stating that “[judicial] attempts to supervise investigations . . . interfer[es] with the appropriate divisions of powers among the branches of government.”); *see also* Beale, *supra* note 244, at 1522 (“[S]eparation of powers dictates that federal prosecutors . . . should perform their duties subject only to the requirements imposed by the federal Constitution and statutes, not subject to the federal judiciary’s preference for particular policies . . .”).

277. *United States v. Williams*, 504 U.S. 36 (1992) (reversing a district court order, pursuant to its supervisory powers, that the government must present substantial exculpatory evidence to the grand jury). The Court noted the grand jury’s institutional independence and federal courts’ corresponding lack of competence to prescribe rules governing it. *Id.* at 49–50.

278. *See* Gleeson, *supra* note 244, at 466–67.

279. *See supra* notes 32–34 and accompanying text. Defense counsel did, however, characterize the government’s behavior as an “Orwellian spectacle” that was “beneath the dignity” of the court. Letter Brief in Response to Gov’t’s Reply Memorandum Regarding Resentencing at 2, *United States v. Luchko*, No. 2:06-cr-00319 (E.D. Pa. Nov. 4, 2011). This language closely recalls that used by the court in *McNabb*. *See supra* note 273–274 and accompanying text. Defense counsel was thus, arguably, implicitly asking the court to prevent the government from using the defendant’s email pursuant to its supervisory authority over the administration of the criminal justice system. *See generally supra* Part IV.A.2.c.

prosecutors to read the defendants' legal email.<sup>280</sup> In allowing this, however, all courts but the *National Urological Group* court expressed significant discomfort with the practice, as well as sympathy for the defendants' inability to email their counsel confidentially.<sup>281</sup>

Presumably in hope of appealing to this sympathy, the defendants in *Asaro* and *Walia* advanced several policy arguments regarding the benefits confidential legal email provides.<sup>282</sup> Based on these arguments, they impelled the courts to exercise their inherent power to control their own proceedings to prevent the prosecutor from reading their clients' legal email, notwithstanding the prosecutors' ability to do so lawfully.<sup>283</sup> In *Walia*, the defense attorneys argued additionally that the inability to send confidential legal email made it impossible for them to comply with their obligations under Rule of Professional Conduct 1.4,<sup>284</sup> inviting the court to exercise its delegated authority to enforce Rules of Professional Conduct.<sup>285</sup> Despite their avowed sympathy for the defendants' position, however, the *Walia* and *Asaro* courts chose not to respond to any of these arguments, concluding instead that there was no "legal basis" to prohibit the government from reviewing the defendants' legal emails.<sup>286</sup>

In *Saade*, however, despite never adjudging the practice illegal, the court prevented the prosecutor from reviewing the defendant's legal email.<sup>287</sup> Upon discussing the issue at a pretrial hearing the court offered the prosecutor, what it called, an "off the cuff reaction": the court stated that prosecutors should not be able to read inmate-attorney email because they

280. *FTC v. Nat'l Urological Grp., Inc.*, No. 1:04-CV-3294-CAP, 2012 WL 171621, at \*1 (N.D. Ga. Jan. 20, 2012); *Asaro Order*, *supra* note 16, at 2; *Walia Order*, *supra* note 16, at 30.

281. Transcript Sentencing Hearing Held on 11/10/11 at 47–48, *Luchko*, No. 2:06-cr-00319 (E.D. Pa. Nov. 17, 2011), ECF No. 926 (expressing the court's intuitive dislike of the government "snooping around" on Fumo's "private conversations"); *Asaro Order*, *supra* note 16, at 2 ("[I]t would be a welcome development for BOP to improve TRULINCS so that attorney-client communications could be easily separated . . . and subject to protection."); *Walia Order*, *supra* note 16 at 29–30 (noting that the Court does not necessarily "agree with the position of the [government]" to review inmates' legal email and expressing sympathy for the burden that the inability to email counsel confidentially places on the defendant).

282. First *Walia* Motion, *supra* note 58, at 3 (noting that there is "no meaningful substitute" for email in today's workplace, that using physical mail and arranging for legal phone calls and visit are all very inefficient, and that public defenders have a particularly demanding caseload); *DiFiore Letter*, *supra* note 44, at 4 (same).

283. *DiFiore Letter*, *supra* note 44, at 3; First *Walia* Motion, *supra* note 58, at 2.

284. First *Walia* Motion, *supra* note 58, at 2–3. Rule 1.4 enumerates a lawyer's duties to, *inter alia*, "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and "keep the client reasonably informed about the status of the matter." MODEL RULES OF PROF'L CONDUCT R. 1.4; *see also* N.Y. RULES OF PROF'L CONDUCT R. 1.4.

285. *See supra* Part I.C.2.

286. *Asaro Order*, *supra* note 16, at 2; *Walia Order*, *supra* note 16, at 30.

287. Transcript of Proceedings As to Maroun Sade Held on 9/26/2011 at 7, *United States v. Saade*, No. 1:11-cr-00111 (S.D.N.Y. Sept. 26, 2011). This type of indirect standard setting is what Professors Zacharias and Green have argued is the most common form of power federal courts employ to regulate federal prosecutors' behavior. *See supra* Part V.A.2.a.

cannot eavesdrop on inmate-attorney meetings or phone calls, or read inmates' legal mail, and it should not "make a difference whether the mode of communication is more modern or more traditional."<sup>288</sup> Shortly thereafter the prosecutor volunteered to refrain from reading the defendant's legal emails.<sup>289</sup>

In *Ahmed*, the court conceded that the defendant's legal emails were unprivileged.<sup>290</sup> In addition, it never addressed either the defendant's argument that in reading them the prosecutor impermissibly restricted his right of access to counsel, or the defendant's request for the court to exercise its inherent powers to control its own proceedings to prevent this behavior.<sup>291</sup> The court nevertheless issued an oral ruling, pursuant to no clear authority, expressly prohibiting the government from reading the defendant's legal emails.<sup>292</sup>

Unlike other courts treating this issue, the *Ahmed* court expressed a high level of knowledge concerning the difficulty defendants and defense attorneys face in arranging for in-person legal visits and unmonitored phone calls at BOP facilities.<sup>293</sup> In addition, the court took special exception with the government's contention that it was only choosing to review inmate-attorney email because it could no longer afford to implement taint teams, not because it sought to gain a strategic advantage.<sup>294</sup> Finally, the court noted in its opinion that the government could easily update TRULINCS to

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288. Transcript of Proceedings As to Maroun Sade Held on 9/26/2011 at 7, *Saade*, No. 1:11-cr-00111. Though the court did not explain its reasoning further, as Professor Orin Kerr highlights, this type of "technology neutral" argument has been made by courts and commentators in the related context of evolving technology as it applies to the Fourth Amendment. *See generally* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009). *See, e.g.*, *United States v. Warshak*, 631 F.3d 266, 285–86 (6th Cir. 2010) (holding that "it would defy common sense to afford emails lesser Fourth Amendment protection" than traditional mail).

289. Transcript of Proceedings As to Maroun Saade Held on 9/26/2011 at 10, *Saade*, No. 1:11-cr-00111.

290. Tr. of Ahmed Conference, *supra* note 9, at 5 ("There are certainly admonitions . . . that the [emails] are not privileged . . . . But that's not really what's at the heart of the issue here.").

291. *Compare* Irizarry Letter, *supra* note 53, with Tr. of Ahmed Conference, *supra* note 9.

292. Tr. of Ahmed Conference, *supra* note 9, at 21 ("I'm going to tell you what we're going to do in this case. In this case, the government will be precluded from looking at any of the attorney-client e-mails, period.").

293. *Id.* at 19 (stating "I've had sit-downs with the warden at the [BOP facility where defendant was detained] to cut down on the amount of wait time that the attorneys have when they get there" and "[i]t can take up to . . . a month to arrange an unmonitored phone call").

294. *Id.* at 17–18 ("You're going to tell me you don't want to know what your adversary's strategy is? What kind of litigator are you then? Give me a break . . . . The executive budget is far bigger than the judiciary's budget, okay, and the defense budget. So forgive me if I'm not overly sympathetic to the issue of the government having to put up a taint team in order to avoid having to look at attorney-client e-mails.").

provide for a filtering function to segregate email between inmates and their attorneys of record.<sup>295</sup>

In sum, courts have unanimously held that inmates' legal emails sent via TRULINCS are unprivileged,<sup>296</sup> and no court has held that prosecutors reading these emails impermissibly restricts inmates' right of access to counsel or right of access to the courts.<sup>297</sup> As a result, despite expressing various levels of sympathy for the defense position, the *Fumo*, *National Urological Group*, *Asaro*, and *Walia* courts held that there was no legal basis to prohibit the government from reading the defendants' legal email. The *Saade* and *Ahmed* courts, however, did just that, though pursuant to no clear authority. Thus, either the *Fumo*, *National Urological Group*, *Asaro*, and *Walia* courts were incorrect, or the *Saade* and *Ahmed* courts acted beyond their authority's scope.

*C. Federal Courts Should Prevent Prosecutors from Reading Inmates' Legal Email By Enforcing Rule of Professional Conduct 8.4(d)*

The email cases evoked four forms of federal courts' authority to regulate federal prosecutors: their ability to enforce Rules of Professional Conduct,<sup>298</sup> their ability to set standards indirectly,<sup>299</sup> their inherent power to manage their own proceedings,<sup>300</sup> and their supervisory authority over the administration of the criminal justice system.<sup>301</sup> The ability to enforce Rules of Professional Conduct is the most appropriate form of this power for a federal court to exercise in preventing a prosecutor from reading a defendant's legal email.

Though effective in practice, as in *Saade* and *Ahmed*, judicial acts that set standards indirectly lack precedential value and raise separation of powers concerns, especially when they constrain executive discretion.<sup>302</sup> Preventing prosecutors from reading defendants' legal email pursuant to this power is therefore not optimal.

With regard to courts' inherent power to manage their proceedings, it is unsurprising that, despite defendants' enjoinders, no court exercised this authority to prevent prosecutors from reading defendants' legal email.<sup>303</sup> It is unsurprising because this power's function is to ensure the efficiency of day-to-day courtroom operations, not to second guess lawful executive evidence-gathering practices.<sup>304</sup>

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295. *Id.* at 11 ("And I find it very hard to believe that the Department of Justice, with all the resources that it has . . . cannot come up with a simple program that segregates identified [attorney] e-mail addresses.").

296. *See supra* Part II.C.

297. *See supra* Part IV.C.

298. *See supra* note 285 and accompanying text.

299. *See supra* notes 287, 292 and accompanying text.

300. *See supra* note 283 and accompanying text.

301. *See supra* note 279.

302. *See supra* note 265 and accompanying text.

303. *See supra* notes 283, 286 and accompanying text.

304. *See supra* notes 268–70 and accompanying text.

Because barring judicially disfavored executive evidence-gathering practices was once exactly what federal courts used their supervisory authority over the criminal justice system to do,<sup>305</sup> preventing prosecutors from reading defendants' legal email pursuant to this authority may appear appropriate. As Judge Gleeson and others have argued persuasively, however, liberal use of this authority smacks of inter-branch encroachment.<sup>306</sup> Pursuant to Judge Gleeson's analysis of what constitutes an appropriate exercise of this power,<sup>307</sup> it is improper for federal courts to prevent prosecutors from reading defendants' legal email pursuant to it because this behavior is not a clear violation of federal law.<sup>308</sup>

Unlike the three aforementioned non-delegated powers federal courts exercise to regulate prosecutors' behavior, Congress explicitly has authorized federal courts to regulate federal prosecutors by enforcing Rules of Professional Conduct.<sup>309</sup> Judicial rulings pursuant to this authority, assuming they are proper, therefore raise fewer separation of powers concerns because they are grounded in congressionally delegated authority. To be proper, such rulings must function as ethics rules—as opposed to judicial policy preferences<sup>310</sup>—that either specifically cover the facts at issue or can be reasonably interpreted to do so.<sup>311</sup>

Under the tests of the Tenth Circuit and Zacharias and Green,<sup>312</sup> a rule of professional conduct preventing prosecutors from reading inmates' legal email is an ethics rule. A rule preventing this behavior could apply to all lawyers, including, as in *Hatcher*,<sup>313</sup> defense attorneys seeking to eavesdrop on cooperating witnesses' legal communication. In addition, it would address conduct that the legal profession consensually disfavors.<sup>314</sup> Finally, it would only affect attorney conduct, as neither BOP nor any other institution would have to alter its practices.

Having determined that a rule preventing federal prosecutors from reading inmates' legal email would qualify as an ethics rule, the next question is whether there is a rule of professional conduct that specifically prohibits this behavior or can be reasonably interpreted to. It is possible that state bar associations will publish formal ethics opinions that speak directly to the issue of prosecutors reading inmates' legal email. If this occurs, a federal court could simply choose to adopt it, as was the case in *E. & W. Districts of Kentucky v. Kentucky Bar Ass'n*.<sup>315</sup> This is not likely to occur anytime soon, however, because, as of this writing, only three states

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305. See *supra* notes 273–75 and accompanying text.

306. See *supra* notes 275–76 and accompanying text.

307. See *supra* note 278 and accompanying text.

308. See *supra* note 278.

309. See *supra* note 250 and accompanying text.

310. See *supra* notes 256–57 and accompanying text.

311. See *supra* notes 252–54.

312. See *supra* notes 256–57 and accompanying text.

313. See *supra* note 91 and accompanying text.

314. See *supra* notes 135–38 and accompanying text.

315. 439 S.W.3d 136 (Ky. 2014).

offer inmates the ability to send and receive email,<sup>316</sup> presumably making this an issue of little interest to state bar associations.

Because it is unlikely that a state bar association will issue an opinion specifically addressing whether prosecutors can read inmates' legal email, a federal court seeking to prevent this practice on non-constitutional grounds will have to apply a rule of professional conduct that can reasonably be interpreted as proscribing it. As Zacharias and Green note, federal courts often apply Rule of Professional Conduct 8.4(d), which prohibits conduct "prejudicial to the administration of justice," to sanction or bar conduct that is "plainly wrong" but not otherwise specifically proscribed.<sup>317</sup> Rule 8.4(d) is the most appropriate rule by which to prevent prosecutors from reading inmates' legal email.

Although Rule 8.4(d)'s open-textured wording has been understandably criticized for being overinclusive, and thus raising due process concerns because attorneys cannot predict how it will apply to them,<sup>318</sup> preventing federal prosecutors from reading inmates' legal email is within its scope. As one set of commentators writes, the debate leading to the adoption of Rule 8.4(d) by the ABA House of Delegates explained that it should only apply to violations of clear norms and conventions of practice.<sup>319</sup> In other words, it should prohibit conduct that is "plainly wrong" in the profession's eyes, not just in the eyes of individual judges. Because prosecutors reading defendants' legal emails chills defendants' ability to communicate confidentially with counsel—an ability long recognized as critical to the adversary system—all the parties litigating this issue, including the government itself, have recognized its inappropriateness.<sup>320</sup> Prosecutors reading defendants' legal email is thus precisely the type of conduct, viewed as normatively improper within the profession but difficult to foresee, that Rule 8.4(d)'s open-textured, flexible language was meant to proscribe.

#### CONCLUSION

The American legal profession recognizes the ability to communicate confidentially with an attorney as a—if not the—critical component of the adversary system. As such, it is unsurprising that prosecutors reading

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316. As of February 13, 2015, the only state department of corrections websites that discuss a bidirectional email system for inmates are Iowa, New Hampshire, and South Carolina. See *O'Mail*, IOWA DEP'T OF CORR., <http://www.doc.state.ia.us/UploadedDocument/380> (last visited Feb. 23, 2015); *Inmate Email Service*, N.H. DEPT' OF CORR., <http://www.nh.gov/nhd/doc/policies/documents/5-24.pdf> (last visited Feb. 23, 2015); *Sending Electronic Messages to an Inmate*, S.C. DEP'T OF CORR., <http://www.doc.sc.gov/pubweb/family/sendingmessages.jsp> (last visited Feb. 23, 2015).

317. See *supra* notes 252–54 and accompanying text.

318. See, e.g., *In re Discipline of Attorney*, 815 N.E.2d 1072, 1079 (Mass. 2004); *Matter of Hinds*, 449 A.2d 483, 497 (N.J. 1982).

319. 2 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 65.6, at 16 (3d ed. 2009); see also *In re Matter of Holtzman*, 577 N.E.2d 30, 33 (N.Y. 1991) (holding that with respect to broad standards "the guiding principle must be whether a reasonable attorney . . . would have notice of what conduct is proscribed").

320. See *supra* notes 135–38 and accompanying text.

inmates' unprivileged legal email, despite this practice's legality, is behavior that no one, not even prosecutors themselves, truly approves of. At least one advocacy group has begun to pressure BOP to alter TRULINCS in order to provide for unmonitored inmate-attorney email.<sup>321</sup> Fortunately, because BOP provides for confidential legal visits, mail, and phone calls it seems likely that it is only a matter of time before BOP provides inmates the ability to email their attorneys confidentially.

Until BOP provides inmates' confidential legal email, this Note argues that prosecutors should abstain from reading inmates' legal email as a matter of self-regulation. It asserts that, in cases where they do not, there are legal bases to prevent them. Prisoners' rights advocates should challenge BOP's email monitoring policy under the theory that it unconstitutionally restricts inmates' right of access to counsel, and courts should uphold this challenge. Where BOP's email monitoring policy is not at issue, or where a court seeks to avoid a constitutional decision, courts should prevent prosecutors from reading inmates' legal email by invoking Rule of Professional Conduct 8.4(d).

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321. *See, e.g.*, N.Y. COUNTY LAWYERS' ASS'N SECTION ON CIVIL RIGHTS & LIBERTIES, REPORT TO THE HOUSE OF DELEGATES ON PROSECUTORS READING INMATE-ATTORNEY EMAIL 13-16 (forthcoming September 2015) (on file with author).