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IS "SECRET LAW" REALLY EITHER?

CONGRESSIONAL INTENT, LEGISLATIVE PROCESS, AND SECTION 215 OF THE USA PATRIOT ACT

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After the U.S. Government disclosed the bulk collection of telephony metadata pursuant to Section 215 of the USA PATRIOT Act, debate arose as to whether Congress intended the provision to be interpreted to allow such collection. In addition, debaters wondered whether such interpretation constituted "secret law" inasmuch as it was not widely known among legislators or the public. These issues are best understood within the evolving legal structure surrounding intelligence activities, as well as in light of congressional rules governing legislation and oversight related to such activities. Congressional controversy over the intended scope and meaning of previously enacted legislation is nothing new, but as a matter of law and parliamentary procedure, Section 215 should be considered as properly reenacted and authorized as a basis for the activities at issue.

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INTRODUCTION

In June of 2013, the Director of National Intelligence ("DNI") issued an extraordinary public statement disclosing and confirming the nature and existence of a top-secret order of the Foreign Intelligence Surveillance Court ("FISC").[1] The order,[2] which had been disclosed without authorization earlier that month, was one of several orders enabling one of the United States' most sensitive intelligence programs under authority provided by Section 215 of the USA PATRIOT Act ("Section 215").[3] This program provided for the collection of telephony metadata in bulk for use in an intelligence program intended to assist in the detection and prevention of potential terrorist attacks against the United States.[4] At least certain

[1] James R. Clapper, *DNI Statement on Recent Unauthorized Disclosures of Classified Information*, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE (June 6, 2013), http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/868-dni-statement-on-recent-unauthorized-disclosures-of-classified-information.

[2] *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. BR 13-80 (FISA Ct. Apr. 25, 2013), *available at* http://www.dni.gov/files/documents/PrimaryOrder_Collection_215.pdf.

[3] 50 U.S.C. § 1861 (2012).

[4] In light of the substantial attention devoted to the telephony metadata program following its disclosure, this article will not attempt to describe or analyze core issues relating to it. For two general primers, see Steven G. Bradbury, *Understanding the NSA Programs: Bulk Acquisition of Telephone Metadata Under Section 215 and Foreign-Targeted Collection Under Section 702*, 1 LAWFARE RES. PAPER SERIES 1

portions of all three branches of government were fully witting and ratified this surveillance activity in a manner consistent with their authorities. However, in the wake of the disclosure, advocates and scholars have asked whether a law such as Section 215 can truly be *law* if neither *all* lawmakers nor the public at large are reasonably aware of the potential scope and effect of its provisions.

The issue is profound on many levels. It ranges from the black letter mechanics of how the legislative process works for secret intelligence matters to the practical question of whether legislators must specifically assent to interpretive meanings behind plain legislative text to bestow legitimacy on those interpretations. Ultimately, these issues lead to core jurisprudential questions concerning whether democratic or lawmaking institutions can include features that "deliberately take public debate and decision making out of the loop."[5]

Part I of this Article explores the question of whether Section 215 is "secret law"[6] as applied to telephony metadata collection. Part

(Sept. 1, 2013); David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. NAT'L SEC. L. & POL'Y 209 (2014). For an advocacy paper taking a critical view, see Gregory T. Nojeim, *NSA Spying Under Section 215 of the Patriot Act: Illegal, Overbroad and Unnecessary*, CTR. FOR DEMOCRACY & TECH. (June 19, 2013), *available at* https://www.cdt.org/files/pdfs/Analysis-Section-215-Patriot-Act.pdf. For the current view of the executive branch, see *Administration White Paper, Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act*, HUFFINGTON POST (Aug. 9, 2013), *available at* https://big.assets.huffingtonpost.com/Section215.pdf.

[5] Steven Vladeck, *Espionage Porn and Democratic Platitudes: A Response to Rahul Sagar*, JUST SEC. (Feb. 21, 2014, 2:48 PM), http://justsecurity.org/2014/02/21/espionage-porn-democratic-platitudes-response-rahul-sagar/.

[6] Although the term has been used informally in many ways, Kevin Bankston appears to have first used the term "secret law" in connection with electronic surveillance in an academic context. Kevin Bankston, *Only the DOJ Knows: The Secret Law of Electronic Surveillance*, 41 U.S.F. L. REV. 589 (2007). The phrase became popularized in 2011, when Senator Ron Wyden offered an amendment that stated in part, "United States Government officials should not secretly reinterpret public laws and statutes in a manner that is inconsistent with the public's understanding of these laws . . . ." Press Release, Sen. Ron Wyden, Amendment Requires Government to End Practice of Secretly Interpreting Law (May 25, 2011), http://www.wyden.senate.gov/news/press-releases/amendment-requires-government-to-end-practice-of-secretly-interpreting-law. *See*, *e.g.*, Spencer

II examines how the evolution of the statute's interpretation and use relates to the processes by which Congress considers, adopts, and provides for secret and sensitive intelligence activities. This part emphasizes the nature and effect of parliamentary rules of procedure adopted pursuant to express constitutional authority. Part III considers whether and how congressional rules can be construed to include an express delegation of authority to more limited groups of Members of Congress with respect to sensitive intelligence matters, as well as the parliamentary and legal implications of such rulemaking.

The Article also explores whether and to what extent the understandings of individual Members of Congress affect the force or interpretation of the law. These issues are considered in light of evolutionary trends in post-9/11 national security authorities as well as scholarship arguing that legislation must be construed in light of the rulemaking processes that created it. Ultimately, this Article argues that the legislative authorization for the Section 215 telephony metadata program was legitimate and valid as a matter of congressional process and black letter law.

I. WAS THE TELEPHONY METADATA PROGRAM AUTHORIZED BY "SECRET LAW"?

The USA PATRIOT Act ("PATRIOT Act") was first enacted on October 26, 2001, in the wake of the September 11, 2001, terrorist attacks.[7] Although elements of the law have fed public debate almost continuously since its passage, the urgency of the national security threat at the time led to its adoption by overwhelming bipartisan majorities in both the House and Senate.[8] Notwithstanding the

Ackerman, *There's a Secret Patriot Act*, WIRED (May 25, 2011, 4:56 PM), http://www.wired.com/2011/05/secret-patriot-act/. For a more recent advocacy piece with respect to the idea of "secret law" in the context of the Foreign Intelligence Surveillance Act, see Alan Butler, *Standing Up to Clapper: How to Increase Transparency and Oversight of FISA Surveillance*, 48 NEW ENG. L. REV. 55, 63 (2013) ("Over the last decade, the FISC began developing a secret body of law governing FISA surveillance . . . .").

[7] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[8] The bill passed the House of Representatives on a vote to suspend the rules (with a two-thirds majority required) of 357-66 on October 24, 2001, 147 CONG. REC. 20,465

speed of its passage and the ultimate consensus in support of it, the bill received thorough and contested consideration during the legislative process.[9]

It is easy to refute the argument that the telephony metadata program was enabled by "secret law." Consideration of the PATRIOT Act did not involve the use of any congressional procedure available for handling sensitive national security information. The bill's reports had no separate classified annex, and no secret session of either House of Congress was convened incident to the bill.[10] Further, Section 215 was in the PATRIOT Act from the very beginning in 2001. Its initial form was even more permissive than the current text, which was amended incident to the 2005 renewal of the PATRIOT Act.[11] Thus, the authority that provides the basis for the program has been public law (in both the literal and descriptive senses) for well over a decade.[12]

(2001), and passed the Senate by a recorded vote of 98-1 on October 25, 2001. 147 CONG. REC. 20,669 (2001).

[9] *See* Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145 (2004). Howell, a Senate staff member at the time, argues that the Administration "did not get everything it asked for" and contributed only a third of the text that became the final bill, which was significantly modified. *Id*. at 1178-79. After a more scholarly-oriented consideration of whether emergency circumstances distorted the legislative process post-9/11, Professor Adrian Vermeule similarly observed in an aside that "the substantive scope of the statutory delegations in these cases did not go beyond what a rational legislature motivated to maximize social welfare would grant." Adrian Vermeule, *Emergency Lawmaking After 9/11 and 7/7*, 75 U. CHI. L. REV. 1155, 1190 (2008).

[10] *See* Mildred Amer, CONG. RESEARCH SERV., RS20145, SECRET SESSIONS OF CONGRESS: A BRIEF HISTORICAL OVERVIEW 2-5 (2008), a*vailable at* https://www.fas.org/sgp/crs/secrecy/RS20145.pdf.

[11] The original text of Section 215 was amended in 2006 to add a requirement that an application for an order include "a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation . . . ." USA PATRIOT Reauthorization and Improvement Act of 2005, Pub. L. No. 109-177, 120 Stat. 192.

[12] The law, and Section 215 in particular, has also been the subject of extensive and continuing debate for much of that period. *See, e.g.*, Letter from F. James Sensenbrenner, Member of Cong., to Eric Holder, United States Att'y Gen. (June 6, 2013), *available at* http://sensenbrenner.house.gov/uploadedfiles/holder_fisa_letter.pdf. While the implications of this debate will be addressed in further detail in Part II, for the moment it is worth simply noting that Members of

Of equal importance, the executive branch collected telephony metadata in bulk for many years after 2001 without relying on Section 215 as the operative legal authority to support its activities, and expressed the legal opinion that no statutory authority under the Foreign Intelligence Surveillance Act ("FISA") was necessary as a matter of law.[13] This course of action shows *no one* in 2001 manifested either an understanding or a specific intent that provisions of the PATRIOT Act would serve as the basis for bulk metadata collection, even though the plain text of Section 215 arguably is sufficiently broad on its face to support the program. While this has been understood in a general and speculative sense for many years, the executive branch revealed the key facts only recently.

On December 21, 2013, the DNI declassified the fact that in early October 2001 President Bush authorized the National Security Agency to collect "telephony and Internet non-content information (referred to as 'metadata') in bulk, subject to various conditions."[14] Further, the DNI specifically disclosed and explained, "The bulk collection of telephony metadata transitioned to the authority of the FISA in May 2006 and is collected pursuant to Section 501 of FISA."[15] Thus, between 2001 and May 2006, activities currently conducted under Section 215 were conducted under presidential authorization, as part of what has more popularly been known as the

Congress, advocates, and the public at large have understood for many years that these authorities were being used to enable key national security programs and that there has been no shortage of controversy with respect to the provision.

[13] *See* U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006) [hereinafter LEGAL AUTHORITIES], a*vailable at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/surv39.pdf.

[14] OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, *DNI Announces the Declassification of the Existence of Collection Activities Authorized by President George W. Bush Shortly After the Attacks of September 11, 2001*, IC ON THE RECORD (Dec. 21, 2013) [hereinafter IC ON THE RECORD], http://icontherecord.tumblr.com/post/70683717031/dni-announces-the-declassification-of-the.

[15] *Id.*; *see also In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. BR 06-05 (FISA Ct. May 24, 2006), *available at* http://www.dni.gov/files/documents/section/pub_May%2024%202006%20Order%20from%20FISC.pdf.

Terrorist Surveillance Program ("TSP").[16] While the reader may have been generally aware of both the TSP and the FISC-ordered collection from press accounts, partial declassifications, and speculation, the DNI's December 2013 disclosure marked the first official acknowledgment and description of how these two activities were linked and have evolved over time.

The executive branch in 2001 did not view Section 215 of the PATRIOT Act as necessary to support the bulk collection of telephony metadata. Instead, consistent with its long-held views with respect to electronic surveillance for foreign intelligence purposes, the executive branch relied on the President's inherent Article II constitutional authorities and the then-recently enacted Authorization for Use of Military Force ("AUMF").[17] Thus, Section 215 not only was not secret, it was not even the legal basis for developing and conducting the telephony metadata program in the first place.[18] Instead, the legal theories and authorities supporting the program evolved over time. In that sense, the issue is much more of a question of interpretation and congressional oversight than a question of "secret law."

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[16] *See* Unclassified Declaration of Francis J. Fleisch, National Security Agency at 18-19, Jewel v. Nat'l Sec. Agency, 2010 WL 235075 (2010) (No. 08-cv-4373-JSW), *available at* http://www.dni.gov/files/documents/1220/NSA%20Fleisch%202013%20Jewel%20Shubert%20Declaration%20Unclassified.pdf ("In light of the declassification decisions described above concerning the NSA's collection of telephony and Internet metadata and targeted collection content under FISC orders, the President has determined to publicly disclose the fact of the existence of these activities prior to the FISC orders, pursuant to presidential authorization."); *see also id.* at 16 ("The declaration also expressly acknowledges that these activities were a portion of the TSP.").

[17] *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Beyond establishing that the executive branch in no way relied on Section 215 prior to 2006, the legal underpinnings of the presidentially-authorized bulk collection activities are beyond the scope of this Article. *See* LEGAL AUTHORITIES, *supra* note 13, for a general and contemporaneous description of the executive branch view of the matter.

[18] If there *was* a secret law related to bulk collection it would thus be the AUMF, which has been interpreted extraordinarily broadly to support many activities that were not debated or specifically contemplated by Congress. The Article will further explore the implications of such broad and unforeseen interpretation in Part II.

This historical background is important to place popular assumptions about the bulk metadata collection and Section 215 into a more precise legal and legislative context. At the same time, however, the fact that Section 215 was not originally enacted to enable the telephony metadata program does not answer broader questions about perceived gaps in the understanding of individual legislators with respect to the program as its legal and legislative underpinnings evolved over time. Understanding those issues first requires consideration of the processes for congressional oversight and renewal of sensitive intelligence activities in general, and then the particular issues related to the bulk collection program can be analyzed.

II. CONGRESSIONAL INTENT AND PROCESS RELATING TO SENSITIVE INTELLIGENCE PROGRAMS

Congressional process relating to sensitive intelligence programs flows first and foremost from the Constitution. Article I, Section 5, frequently referred to as the "Rulemaking Clause,"[19] provides, "Each House may determine the Rules of its proceedings . . . ."[20] The Rulemaking Clause directly vests a significant and broad power to each house of Congress to develop and specify processes and procedures relating to legislation and oversight. This authority is so strong that in 1892 the Supreme Court described it as "absolute and beyond the challenge of any other body or tribunal."[21] The Supreme Court has construed the Rulemaking

[19] *See, e.g.,* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1789 (2003).

[20] U.S. CONST. art. I, § 5, cl. 2.

[21] United States v. Ballin, 144 U.S. 1, 5 (1892). In *Ballin*, the Court noted only these limitations on congressional rulemaking: "It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." *Id*. Courts may, however, examine issues related to whether Congress or its Committees have actually followed whatever rules they make. *See, e.g*., Yellin v. United States, 374 U.S. 109 (1963); Christoffel v. United States, 338 U.S. 84 (1949). More recently, the Rulemaking Clause has been the subject of debate in the contexts of "entrenchment" of legislation (where a current majority imposes a requirement for a supermajority to

Clause to uphold congressional rules, interpretations, and actions flowing from them relating to such matters as quorum requirements [22] and whether the Senate could reconsider the confirmation of an appointed official. [23] As Professor Adrian Vermeule has observed, however, "Legal scholarship, on the other hand, has neglected legislative rules altogether . . . ."[24]

A. The Nature of Congressional Rulemaking

The Constitutional roots of the Rulemaking Clause appear to vest congressional rules with an even stronger legal foundation than judicial rulemaking.[25] This distinction is significant, because federal judicial rules are accorded deference and can have great effect against individuals, notwithstanding that they are not directly provided for in the Constitution.[26] For example, judicially created rules impose substantial grand jury secrecy requirements, often on matters of great

undo a controversial law) and filibuster reform. *See, e.g.*, Roberts & Chemerinsky, *supra* note 19; John C. Roberts, *Gridlock and Senate Rules*, 88 NOTRE DAME L. REV. 2189 (2013). In light of debate over entrenchment issues, it is worth noting with respect to the Rules discussed in this article that the House of Representatives customarily adopts its rules at the beginning of each Congress and thus does not purport to bind future Congresses. WM. HOLMES BROWN ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 837 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf. The Senate is a continuing body. *See* McGrain v. Daugherty, 237 U.S. 125, 181-82 (1927). See Aaron-Andrew P. Bruhl, *Burying the "Continuing Body" Theory of the Senate*, 95 IOWA L. REV. 1401 (2010), for a critical discussion with respect to the force and effect of Senate rules in this context.

[22] *Ballin*, 141 U.S. at 5.

[23] United States v. Smith, 286 U.S. 6 (1932).

[24] Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 363 (2004).

[25] Since 1934, judicial rules have been given legal effect by statute—the Rules Enabling Act. 28 U.S.C. § 2072 (2012). It has been argued that Congress impinges the independence of the Judicial Branch by regulating its rulemaking with respect to judicial matters. *See, e.g.*, Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733 (1995). Regardless, neither statutory nor inherent rulemaking authority of the judiciary is expressly provided for in the Constitution, in contrast to the congressional authority granted by the Rulemaking Clause. *See* U.S. CONST. art. I, § 5, cl. 2, art. III, § 2.

[26] *See* Mullenix, *supra* note 25, at 754.

public interest.[27] Court rules may require individuals to appear and to provide materials at a deposition.[28] Court rules also provide authority for *any party* to litigation to secure, by a mere request to the clerk of court, a subpoena requiring production of "any books, papers, documents, data, or other objects."[29]

The scope of rulemaking authority assumed by courts is broad, and (unlike congressional rules in most instances) it is often applied directly against individual citizens. Thus, it seems reasonable to extrapolate that congressional rules adopted pursuant to express constitutional authority should be given at least an equal scope of legitimacy and deference, not only because the authority is expressly vested, but also because the smooth function of the legislature is an essential part of the broader constitutional structure.[30]

The Constitution also explicitly contemplates the potential for secrecy in congressional proceedings, specifically providing that each House shall publish a journal of its proceedings, "excepting such Parts as may in their judgment require Secrecy . . . ."[31] Therefore, Congress is given direct authority to withhold certain portions of its proceedings from the public and to determine what matters require secrecy "in their judgment."[32]

B. Congressional Rules Relating to National Security

Against this backdrop, Congress has adopted several procedural rules relating to the consideration and management of sensitive national security issues. First, each house has provided for the conduct of secret sessions to discuss sensitive matters. The

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[27] FED. R. CRIM. P. 6(e). See Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1 (1996), for a thorough discussion of the roots and implications of grand jury secrecy.
[28] FED. R. CRIM. P. 15(a)(1).
[29] FED. R. CRIM. P. 17(c)(1).
[30] Vermeule, *supra* note 24, at 363. Professor Vermeule identifies several reasons why congressional rulemaking should be constitutionalized, among them contributing to well-informed and cognitively undistorted deliberation about policy, and making technically efficient use of legislative resources. *Id*. at 381-83.
[31] U.S. CONST. art. I, § 5.
[32] *See id.*

Senate has a procedural rule relating to secret sessions,[33] under which any Senator may move for a closed session. The move need only be seconded in order to pass.[34] Similarly, Clause 9 of House Rule XVII provides for a secret session whenever a confidential communication is received from the President or an individual Member informs the House that he or she has communications that he or she believes "ought to be kept secret for the present."[35] The House as a whole then determines whether to hold a secret session to receive the material.[36] The House held a secret session relating to surveillance in 2008.[37]

Both bodies also have rules that require Members and staff to observe secrecy with respect to classified information.[38] In the House, Members and staff are required to execute an oath before accessing classified information, and any violation of the oath is considered a violation of the Code of Official Conduct subject to action from the Ethics Committee.[39] The House and Senate also each have explicit rules that allow committee proceedings to be closed if public discussion would endanger national security.[40]

Although not expressly described in the House or Senate Rules, it is important to understand two basic procedural

[33] S. COMM. ON RULES & ADMIN, 113th Cong., STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 15 Rule XXI (2013) [hereinafter Senate Rules] ("Session with closed Doors").
[34] *Id*.
[35] RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 112-161, at 30 (2013) [hereinafter House Rules].
[36] BROWN ET AL., *supra* note 21, at 446.
[37] Press Release, House Republican Leader John Boehner, Historic Session Gives Speaker Pelosi, Democratic Leaders an Opportunity to Ask—and Answer—Key Questions on the Terrorist Surveillance Program (Mar. 12, 2008), http://www.speaker.gov/general/house-republicans-request-democrats-agree-secret-session-fisa-modernization#sthash.mUgo7FyK.dpuf.
[38] Senate Rules, *supra*, note 33, Rule XXIX ("All confidential communications made by the President of the United States to the Senate shall be by the Senators and the officers of the Senate kept secret; and all treaties which may be laid before the Senate, and all remarks, votes, and proceedings thereon shall also be kept secret, until the Senate shall, by their resolution, take off the injunction of secrecy."); *see also* House Rules, *supra* note 35, Rules 4, 6, 38.
[39] House Rules, *supra* note 35, Rule 25.
[40] Senate Rules, *supra* note 33, Rule XXI; House Rules, *supra* note 35, Rule 16.

mechanisms that can be employed relating to the management and consideration of legislation that has sensitive national security aspects: the classified schedule of authorizations and the classified annex. As a matter of practice, these processes are usually used in connection with the annual authorizations and appropriations bills for national security activities. Both the annual public authorizations and appropriations bills and their respective accompanying classified materials provide budget and basic programmatic authorization for the conduct of day-to-day national security operations.

As an example of how these two processes come into play, consider the Intelligence Authorization Act for Fiscal Year 2013.[41] Section 102 of the law provides and publicly states that the funding amounts provided for authorized programs are those stated in the accompanying Classified Schedule of Authorizations.[42] Similarly, the report of the House Permanent Select Committee on Intelligence accompanying the bill expressly notes the existence of, and incorporates, the classified annex accompanying the bill, which discusses issues and Committee guidance underlying the funding levels provided in the authorization.[43] Without the use of these procedural mechanisms, it would be virtually impossible for the congressional intelligence committees to legislate the implementation of their oversight findings for Intelligence Community activities and programs because the legislation and accompanying materials could include only unclassified material.[44] Moreover, both documents were made available for review by all Members of Congress contemporaneously with the bill's

[41] Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, 128 Stat 1390.
[42] *Id.*
[43] H.R. Rep. No. 112-490, at 7 (2012).
[44] Press Release, Mike Rogers, Chairman Rogers & Ranking Member Ruppersberger Applaud House Passage of FY13 Intelligence Authorization Bill (June 1, 2012), http://mikerogers.house.gov/news/documentsingle.aspx?DocumentID=297928 ("The current challenging fiscal environment demands the accountability and financial oversight of our classified intelligence programs that can only come with an intelligence authorization bill. The bill's comprehensive classified annex provides detailed guidance on intelligence spending, including adjustments to costly but important programs.").

consideration, with the documents' availability publicly announced on the House floor.[45]

While these procedural mechanisms are important to understanding the basic framework and mechanisms used to handle classified issues relating to legislation, they relate predominantly to processes governing the handling of classified matters by each House of Congress with respect to potential disclosure incident to legislation. Neither the passage nor any subsequent renewal of the PATRIOT Act involved the use of any of these parliamentary procedures, which are the hallmarks of any law that contains any "secret" matter explaining intent with respect to the plain and publicly available legislative text.[46]

More relevant to bulk telephony metadata collection under Section 215 are a final group of relevant House congressional procedures that provide for internal processes with respect to *oversight* of sensitive intelligence matters. Clause 11 of House Rule X provides for the creation of the Permanent Select Committee on Intelligence, and provides the Committee with legislative jurisdiction for the Central Intelligence Agency, DNI, the National Intelligence Program, and "intelligence and intelligence-related activities of all other Departments and agencies of the Government . . . ."[47] The rule further includes a number of specific items relating to committee procedures for handling of classified information, including requirements for staff to obtain a security clearance and agree to rules and restrictions on disclosure of that information.[48]

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[45] 158 CONG. REC. H7466 (daily ed. Dec. 30, 2012) (statement of Rep. Rogers). Technically, the Committee votes to authorize the release to maintain consistency with its general procedures limiting release of classified information before the Committee. *See infra* note 66.

[46] The 2008 secret session of the House of Representatives occurred incident to consideration of the FISA Amendments Act. *See* Jonathan Weisman, *House Passes a Surveillance Bill Not to Bush's Liking*, WASH. POST (Mar. 15, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/03/14/AR2008031400803_2.html.

[47] House Rules, *supra* note 35, Rule 10, cl. 11(b)(1)(B).

[48] *Id.* Committee Rule 12 further restricts disclosure by Committee members and staff of the "classified substance" of the work of the Committee, and certain related

With that general background, it is particularly important to emphasize two specific rules that appear to provide special exclusionary authorities to the Permanent Select Committee on Intelligence with respect to intelligence sources and methods. First, a different rule relating to oversight contains a unique additional provision. Clause 3(m) of House Rule X relates to "special oversight functions" and specifies that the Permanent Select Committee on Intelligence shall "study on an exclusive basis the sources and methods of entities described in clause 11(b)(1)(A)," which in turn includes "the Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence Program, as defined in section 3(6) of the National Security Act of 1947."[49] The National Intelligence Program is statutorily defined to include "all programs, projects and activities of the intelligence community."[50]

The use of the word "exclusive" in the context of "special oversight" in House Rule X is highly significant. It is the only "exclusive" jurisdiction provided for anywhere in the Rules of the House.[51] Also, "special" oversight is specifically delegated by rule to certain committees, in contrast to "general legislative oversight," which is performed by all standing committees.[52]

Second, House Rules specifically *require* Committee members and staff not to make available to "any person" classified information in their possession relating to classified intelligence

information such as material received in executive session. RULES OF PROCEDURE FOR THE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, UNITED STATES HOUSE OF REPRESENTATIVES, 113TH CONG. [hereinafter Intel. Rules], *available at* http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/HPSCI%20Rules%20of%20Procedure%20-%20113th%20Congress.pdf.

[49] House Rules, *supra* note 35, Rule 10, cl. 3(m), cl. 11(b)(1)(A). Section 3(6) of the National Security Act of 1947 is codified at 50 U.S.C. § 401(a).

[50] 50 U.S.C. § 401(a)(6).

[51] This fact is confirmed by a text search of the Rules of the House of Representatives for the word "exclusive." The word appears in three other instances in relation to the calculation of certain time limitations. Notably, the House effectively lifted this exclusivity in 2014 when it created and extended such jurisdiction to the Select Committee to Investigate the Events Surrounding the 2012 Terrorist Attacks in Benghazi. H.R. Res. 567, 113th Cong. (2014) (enacted).

[52] BROWN ET AL., *supra* note 21, at 248.

activities.[53] This provision literally prohibits sharing such information with other Members of Congress not on the Committee. Two additional rules reinforce this information-sharing prohibition. Clause 11(d)(1) of House Rule X expressly exempts the Committee from another rule requiring that all Members of Congress be given access to any Committee records "to the extent not inconsistent with this clause."[54] Further, Committee Rule 14 specifically provides a mechanism for Members not on the Committee to formally request access to information held by the Committee, as well as procedures for Committee consideration of such a request.[55]

These provisions together manifest a procedural intention in House Rules—adopted pursuant to the Rulemaking Clause—to provide for the delegation of oversight of sensitive intelligence matters, with particular emphasis on intelligence sources and methods, to the House Intelligence Committee, and to limit discussion and disclosure of such matters even to other Members of Congress outside of the provided exceptions and access procedures.[56]

C. The Aftermath of Disclosure

Notwithstanding congressional rules of procedure, the situation became significantly more complicated following the

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[53] House Rules, *supra* note 35, Rule 10, cl. 11(g)(3)(A).

[54] With respect to right of access to Committee records, House Rule 11, cl. 2(e)(2)(A) otherwise would provide that "each Member, Delegate, and the Resident Commissioner shall have access thereto" absent the exemption. This conclusion appears to be further reinforced by the House Practice manual, which specifically notes that the Permanent Select Committee on Intelligence is exempted from the rule. BROWN ET AL., *supra* note 21, at 272.

[55] Intel. Rules, *supra* note 48.

[56] A full discussion of the rationale and justification underlying such procedural mechanisms is for another day. Briefly, however, the procedural restriction supports an overall compelling governmental interest to protect sensitive national security information with respect to intelligence sources and methods. Arguably, restrictions on access to such information by Members of Congress outside the relevant congressional committees also furthers the interest of facilitating congressional oversight of intelligence programs. The absence of such protections is a significant disincentive to the executive branch to share information on such programs with Congress. *See* Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 815-18 (1985).

disclosure of the bulk metadata collection. Many Members of Congress were concerned about being "out of the loop" with respect to the details of the program. The facts and circumstances relating to who knew what and when are now a continual part of the debate. This Article is not intended to address those facts in detail beyond establishing that differently situated legislators had access to different information at different times, and that disputes now exist with respect to both the general issue and the specific understanding of some Members of Congress as to how the law was being interpreted. However, a few largely uncontested facts from the public record must first be understood in order to comprehend the background for the discussion below.

First, prior to 2006, the executive branch appears to have provided briefings on the TSP only to the congressional intelligence committees, the chair and ranking member of the appropriations committee and defense subcommittees, and certain congressional leadership.[57] Second, in May of 2006, the government transitioned telephony metadata collection to approval by the FISC under the authority of Section 215.[58] Third, in January of 2007, the Department of Justice informed the House and Senate Judiciary Committees that it had fully transitioned TSP activities to FISC authorities and offered briefings on the details of the orders.[59] In connection with this letter, it is important to note that, as a parliamentary matter, the House and Senate Judiciary Committees had been given primary referral of legislation relating to FISA. Fourth, following this notification, the Department of Justice regularly provided material to both the Judiciary and Intelligence Committees.[60]

[57] Letter from John Negroponte, Dir. of Nat'l Intelligence, to J. Dennis Hastert, Speaker of the House of Representatives (May 17, 2006), *available at* http://thinkprogress.org/wp-content/uploads/2007/07/may_17_tsp.pdf

[58] IC ON THE RECORD, *supra* note 14.

[59] Letter from Alberto Gonzales, Att'y Gen., to Patrick Leahy and Arlen Specter, Chairman and Ranking Member of the Sen. Comm. on the Judiciary (Jan. 17, 2007), a*vailable at* http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf.

[60] *See, e.g.,* Letter from Ronald Weich, Asst. Att'y. Gen., to Patrick Leahy, John Conyers Jr., Dianne Feinstein, and Silvestre Reyes, Chairman of the Senate & House

As Section 215 approached renewal, the Department of Justice provided a letter in December 2009 to the congressional intelligence committees describing the nature of the bulk collection and asked that it be made available to all Members of the House and Senate.[61] Congress temporarily extended Section 215 for an additional year in 2010.[62] Prior to the expiration of that extension, the Department of Justice again provided a descriptive letter and asked that it be made available to all Members of the House and Senate.[63] Section 215 was renewed for an additional four years in 2011.[64]

Following the public disclosure of the bulk collection, some Members of Congress publicly expressed various concerns. Congressman James Sensenbrenner, former Chairman of the House Judiciary Committee, sent a letter to Attorney General Holder suggesting that he had been given the impression that Section 215 authorities had been used "sparingly," and expressing his view that the interpretation underlying the FISC authorization was

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Committees on the Judiciary, Chairman of Select Comm. on Intelligence, and Chairman of Permanent Select Comm. on Intelligence (Sept. 3, 2009), *available at* http://www.dni.gov/files/documents/section/pub_Sep%203%202009%20Cover%20letter%20to%20Chairman%20of%20the%20Intelligence%20and%20Judiciary%20Committees.pdf.

[61] *See, e.g.*, Letter from Ronald Weich, Asst. Att'y Gen., to Silvestre Reyes, Chairman of the House Permanent Select Comm. on Intelligence (Dec. 14, 2009), *available at* http://www.dni.gov/files/documents/2009_CoverLetter_Report_Collection.pdf. At this point, the reader may justifiably be confused how such a letter might be made available to all Members of Congress given the constraints on disclosure of classified information by members and staff of the House Intelligence Committee described earlier. Under Committee Rules, information may be shared with Members of Congress outside the Committee at the discretion of the Chairman if it is provided on a nonexclusive basis by the Executive Branch for the purpose of review by Members of Congress outside the Committee. Intel. Rules, *supra* note 48, Rule 13(c).

[62] USA PATRIOT—Extensions of Sunsets, Pub. L. No. 111-141, 124 Stat. 37 (2010).

[63] *See, e.g.*, Letter from Ronald Weich, Assistant Att'y General, to Dianne Feinstein and Saxby Chambliss, Chairman and Vice Chairman of the Senate Select Comm. on Intelligence (Feb. 2, 2011), *available at* http://www.dni.gov/files/documents/2011_CoverLetters_Report_Collection.pdf.

[64] USA PATRIOT—Extensions of Sunsets, Pub. L. No. 111-141, 124 Stat. 37 (2010).

inconsistent with the scope of the statutory authorization.[65] Other Members of Congress raised concerns publicly that the Department of Justice letter had not been made available to them in advance of the 2011 vote to renew Section 215, or that they had not been able to obtain information with respect to intelligence activities that they had requested be provided to them.[66]

Common to the issues raised, however, is a central theme *not* that Section 215 was itself "secret law," but instead that some individual Members of Congress believed that they had not had an opportunity to participate in oversight of the programs (notwithstanding the limitations and processes provided for by the rules), or that they had not been fully aware of how the law was being *interpreted* and implemented with respect to bulk metadata collection. While these disputes are of heightened attraction and interest in the context of foreign intelligence, in reality they are merely a manifestation of longstanding issues respecting the evolving interpretation of statutes and the degree to which the views of individual legislators play into the understanding and interpretation of those statutes. Although such questions flow from the legislative process itself and will continue to feed substantial analysis in the future, it is worth a brief review of how the issues raised fit into broader scholarship on such interpretive questions.

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[65] Letter from F. James Sensenbrenner, Member of Cong., to Eric Holder, Att'y Gen. (June 6, 2013), http://sensenbrenner.house.gov/uploadedfiles/holder_fisa_letter.pdf. At the same time, however, it has been pointed out that Congressman Sensenbrenner previously served as Ranking Member at a Judiciary Committee hearing in which a Department of Justice official testified that "[s]ome orders have also been used to support important and highly sensitive intelligence collection operations, on which this committee and others have been separately briefed" (quoting statement by Todd Hinnen, Acting Ass't. U.S. Att'y Gen. for National Security, before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security). Wells Bennett, *Sensenbrenner on DOJ Testimony Regarding Section 215*, LAWFARE (June 7, 2013, 4:26 PM), http://www.lawfareblog.com/2013/06/sensenbrenner-on-doj-testimony-regarding-section-215/.

[66] *See, e.g.,* Spencer Ackerman, *Intelligence Committee Withheld Key File Before Critical NSA Vote, Amash claims*, GUARDIAN (Aug. 12, 2013), http://www.theguardian.com/world/2013/aug/12/intelligence-committee-nsa-vote-justin-amash.

III. DOES "SECRET INTERPRETATION" UNDERMINE LAW?

As previously described, the legal basis and justification for bulk metadata collection has shifted and evolved frequently over the life of the program. It began rooted in constitutional authority reported to Congress strictly as a matter of oversight, moved under the broad auspices of the already-adopted Section 215 with the approval of federal judges, and ultimately was reauthorized. With respect to Congress, at least the leadership of multiple legislative committees knew or should have known that the renewal of the law was in part intended to facilitate the conduct of the program.[67] If similar questions in the past are any guide, shifting legal architecture and interpretation viewed in differing perspectives of lawmakers cannot alter the underlying scope of the statute beneath it nor undermine its legitimacy.[68]

This part will make two concluding observations why the use of Section 215 authorities to support activities that individual Members of Congress might not have specifically contemplated at the law's enactment or renewal should not undermine its legal force and effect for both practical and interpretive reasons.

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[67] The FISC and the U.S. District Court for the Southern District of New York have both considered the issue and held that the legislative ratification doctrine is applicable with respect to the renewal of Section 215 authorities as applied to bulk telephony metadata collection. *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. BR 13-09 (FISA Ct. Aug. 29, 2013), at 23-28, *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf ; ACLU v. Clapper, 959 F. Supp. 2d 724, 745-46 (S.D.N.Y. 2013). A notice of appeal was filed on January 2, 2014, in the Southern District of New York, and the Second Circuit heard oral arguments on September 2, 2014.

[68] Although not immediately relevant to the retrospective legal analysis, it is important to point out that the evolution and previous secrecy with respect to the program is not without legislative consequence or cost. The program now faces a difficult path to further renewal exacerbated in part by the way it was handled in the past. Secrecy and carefully controlled process arguably may be suitable for sensitive intelligence matters, but it should conversely be apparent that these attributes may not be of help in winning broader political support. *See* Austen D. Givens, *The NSA Surveillance Controversy: How the Ratchet Effect Can Impact Anti-Terrorism Laws,* HARV. NAT'L SEC. J., Online Content (July 2, 2013), http://harvardnsj.org/2013/07/the-nsa-surveillance-controversy-how-the-ratchet-effect-can-impact-anti-terrorism-laws/.

A. *The Evolving Nature of Section 215's Legal Foundation Does Not Undermine Its Legitimacy Any More than the Evolutionary Interpretation of All Statutes*

The constant evolution of the use and interpretation of Section 215 with respect to telephony metadata is certainly nothing new in the post-9/11 landscape, which was developed *ad hoc* and forced to grow into its application.[69] In fact, it echoes the interpretation of the AUMF, which has been used as authority to support a range of activities that in many instances have been similarly secret and do not appear to have been specifically contemplated by Congress when the resolution was enacted.[70]

Even before Congress adopted the PATRIOT Act in the wake of 9/11, it passed the AUMF.[71] The nature and scope of the operative provision was short and simple. It provides:

> Section 2 – Authorization For Use of United States Armed Forces
>
> (a) IN GENERAL—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[72]

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[69] Fundamental legal authorities for the post-9/11 national security landscape have proven remarkably adaptable and flexible. At the same time, however, the flaws and imperfections of the legal regimes surrounding these architectures have become apparent both over time and in light of over a decade of operational and interpretive experience. My argument is not that these laws are beyond reconsideration – in fact, the time is overdue to review and rationalize these authorities and develop a durable framework for the future. The point is instead a much more discrete one that existing statutes must continue to be understood and interpreted as they stand today until reformed.

[70] Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224 (2001).

[71] *Id.*; USA PATRIOT Act, Pub. L. 107–56, 115 Stat 272 (2001).

[72] Authorization for Use of Military Force § 2(a).

The AUMF was enacted on September 18, 2001,[73] at a time when little was known about either the specific nature of the threat faced after the 9/11 attacks or precisely how the United States intended to respond to them.[74] Since then, the quoted passage has served as the legal basis for an immensely broad array of activities. It has been cited as a justification for operations in Afghanistan, the Philippines, Georgia, Yemen, Djibouti, Kenya, Ethiopia, Eritrea, Iraq, and Somalia.[75] It has been cited to support a broad range of discrete activities, including warrantless surveillance,[76] a broad detention regime that even includes American citizens,[77] and targeted drone strikes against terrorists around the globe.[78]

The text of the AUMF does not expressly authorize any of these activities. Nor is there any indication that any of them (with the likely exception of military activity in Afghanistan) were specifically contemplated at the time of its passage.[79] Instead, the AUMF is generally understood as a manifestation of congressional intent to ratify and provide general authority to take necessary steps to accomplish a broader, known objective—an outcome consistent

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[73] *Id.*

[74] For one account of the circumstances surrounding the initial development and evolution in interpretation and use of the AUMF, see Gregory D. Johnsen, *60 Days and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History*, BUZZFEED (Jan. 16, 2014, 11:52 PM), http://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most. For a comprehensive review of broad legal issues underlying it, see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*," 118 HARV. L. REV. 2047 (2005). This article is not intended to explore substantive issues related to the AUMF beyond drawing a parallel in the evolution and expansion of its use and interpretation to Section 215.

[75] Memorandum from Matthew Wood, Cong. Res. Serv., to Congresswoman Barbara Lee (July 10, 2013), *available at* https://www.fas.org/sgp/crs/natsec/aumf-071013.pdf.

[76] LEGAL AUTHORITIES, *supra* note 13.

[77] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[78] John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Remarks at Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012), *available at* http://www.lawfareblog.com/2012/04/brennanspeech/.

[79] *See generally* 147 CONG REC. S9440-61 (daily ed. Sept. 14, 2001); 147 CONG REC. H5632-80 (daily ed. Sept. 14, 2001).

with its status as emergency legislation.[80] In a political sense, legislators frequently have similar broad and undefined intentions in supporting a bill.[81]

As a recent example outside the national security context, equally fierce debate has arisen with respect to the question of whether and to what extent congressional Members and staff were to be included or exempted from requirements of the Affordable Care Act.[82] On its face, the statute literally provides that

> [n]otwithstanding any other provision of law . . . the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are: (I) created under this Act (or an amendment made by this Act); or (II) offered through an Exchange established under this Act (or an amendment made by this Act).[83]

The Office of Personnel Management subsequently issued a proposed (and later final) rule "delegat[ing] to the employing office of the Member of Congress the determination as to whether an

[80] *See* Bradley & Goldsmith, *supra* note 74, at 2111 (stating that "at least in those situations where constitutionally protected liberty interests do not mandate a clear statement requirement, delegations in the war context should be construed broadly to give the President flexibility to achieve the purposes for which the delegation was made."). For arguments that clear statements are required, see Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059 (2009).

[81] Johnsen, *supra* note 74 ("'I say bomb the hell out of them,' Democratic Sen. Zell Miller of Georgia had told The New York Times a day earlier. 'If there's collateral damage, so be it. They certainly found our civilians to be expendable.'"); *see also*147 CONG. REC. H5643 (daily ed. Sept. 14, 2001) (statement of Rep. Berman) ("I rise in support of this resolution …We must do whatever it takes, including the use of military force, to track down bin Laden and destroy his organization. But this is not just about bin Laden …To win the war against terrorism, we must eliminate the entire infrastructure that sustains these organizations.").

[82] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); John Fund, *Congress's Exemption from Obamacare,* NAT'L REV. ONLINE (Sept. 16, 2013, 4:00 AM), http://www.nationalreview.com/article/358550/congresss-exemption-obamacare-john-fund.

[83] Patient Protection and Affordable Care Act § 1312(D).

employed individual meets the statutory definition."[84] The effect was to allow each Member of Congress to make the determination on her own, even though Members believed (and the statutory text plainly seemed to indicate) that staff members would be subject to the law.[85] A heated controversy emerged between Members of Congress with respect to the meaning of the provision and how it should have been interpreted.[86]

Thus, the evolution and broad scope of application of the AUMF or potentially any statute is certainly not without controversy, but it has not been substantially argued that such evolving interpretation constitutes "secret law" or that legislators did not understand what they were voting for given such evolution.[87] Similarly, many of the activities undertaken under the AUMF are not publicly disclosed in detail or affirmatively briefed to all Members of Congress. As a practical matter, these similarities only further reinforce the notion that issues raised with respect to the interpretation of Section 215 ultimately are no different than core issues of statutory interpretation that arise in all legislative contexts.

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[84] Federal Employees Health Benefits Program, 78 Fed. Reg. 48,337 (proposed Aug. 8, 2013), with the cited text also found on that page; Federal Employees Health Benefits Program, 78 Fed. Reg. 60,653 (Oct. 2, 2013) (to be codified at 5 C.F.R. pt. 890).

[85] *See* Ron Johnson, *I'm Suing Over ObamaCare Exemptions for Congress*, WALL ST. J. (Jan. 5. 2014), http://online.wsj.com/news/articles/SB10001424052702304325004579296140856419808.

[86] *See* Elise Viebeck, *GOP senator hits Sensenbrenner, says O-Care suit not a 'stunt'*, THE HILL (Apr. 29, 2014), http://thehill.com/policy/healthcare/204678-gop-sen-hits-sensenbrenner-says-o-care-suit-not-a-stunt; Bill Cassidy, *No Congressional Obamacare Exemptions*, THE HILL (Sept. 30, 2013), http://thehill.com/blogs/congress-blog/healthcare/325201-no-congressional-obamacare-exemptions; Jon Terbush, *For the Last Time, Congress is Not Exempt From ObamaCare*, THE WEEK (Jan. 7, 2014), http://theweek.com/article/index/254747/for-the-last-time-congress-is-not-exempt-from-obamacare.

[87] The closest argument is that Administration's legal opinions underlying its interpretations should be more fully disclosed. *See, e.g.*, *Secret Law and the Threat to Democratic and Accountable Government: Hearing before the Subcomm. on the Constitution of the Comm. on the Judiciary U.S. S.*, 110 Cong. (2008) (statement of Dawn E. Johnsen, Professor, Indiana Univ. School of Law-Bloomington), *available at* http://www.judiciary.senate.gov/imo/media/doc/08-04-30Johnsen_Dawn_testimony.pdf.

B. Limited Understanding by Legislators of Section 215 Does Not Undermine Its Legitimacy Any More than the Differing Understandings among Legislatures for All Statutes

As an interpretive matter, differing understandings of the intended scope and effect of enacted laws among legislators are also nothing new, and cannot operate against the otherwise plain meaning of the statutory text.[88] Both the FISC and the U.S. District Court for the Southern District of New York have already considered the question and determined that Congress ratified the authorities.[89] For the FISC, Judge Claire Eagan wrote:

> It is unnecessary for the Court to inquire how many of the 535 individual Members of Congress took advantage of the opportunity to learn about how the Executive Branch was implementing Section 215 under this Court's Orders. Rather, the Court looks to congressional action on the whole, not the preparatory work of individual Members in anticipation of legislation. In fact, the Court is bound to presume regularity on the part of Congress. *See City of Richmond vs. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) ("The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary." (citing cases)). The ratification presumption applies here where each Member was presented with an opportunity to learn about a

[88] The plain text of Section 215 is extremely broad on its face, authorizing an order for "the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities." 50 U.S.C. § 1861(a)(1) (2006). There is currently ongoing litigation with respect to whether bulk collection of telephony metadata can meet the statutory requirement that an application include a statement of facts "showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation." ACLU v. Clapper, 959 F. Supp. 2d 724, 733 (S.D.N.Y. 2013). The District Court granted the government's motion to dismiss after considering and rejecting this argument, among others. *Id.* at 746-49. A notice of appeal was filed on January 2, 2014, in the Southern District of New York, and the Second Circuit heard oral arguments on September 2, 2014.

[89] *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted], No. 13-109 at 23-28 (FISA Ct. Aug. 29, 2013) (memorandum opinion); *Clapper*, 959 F. Supp. 2d at 28-32.

> highly-sensitive classified program important to national security in preparation for upcoming legislative action.[90]

These rulings are fully consistent with recent scholarship considering similar issues within a broader general context of statutory interpretation. One particularly relevant theory in this context is that statutory interpretation must consider the legislative context and congressional rules that shaped the law's development. Professor Victoria Nourse has observed that "[m]ore than occasionally, law professors reveal a stunning lack of knowledge about Congress's rules," and argued that statutory interpretation should defer to "*Congress's own rules.*"[91] This concept is particularly important with respect to metadata collection pursuant to Section 215 given the clear and unique structures provided for in congressional rules to govern oversight and consideration of intelligence matters described earlier.

Professor Nourse's theory "posits that Congress's rules dominate members' preferences" in considering and acting on legislation.[92] A similar argument with respect to oversight and reauthorization of Section 215 within that framework might suggest, for example, that individual Members are aware that the rules largely delegate and cabin oversight responsibility to the intelligence committees (and possibly the Judiciary Committees with respect to legislative jurisdiction) and take broad cues and advice from members of those Committees when considering and voting on related legislation.[93] Such a conception is also consistent with longstanding interpretivist views of certain actors as favored

[90] *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted] at 26, n.24.
[91] Victoria Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 72-73 (2012).
[92] *Id*. at 89.
[93] To be clear, Professor Nourse's points are much more complex and nuanced. The article nowhere suggests that congressional rules command rote adherence to the views of any specific group of legislators favored in the rules or inherently dictate any particular interpretive outcome, but rather that "[l]egislative history is at its best when understood within Congress's own rules." *Id*. at 91.

"congressional agents" with respect to legislation, a conception most prominently associated with Judge Learned Hand.[94]

Conversely, however, individual Members of Congress ultimately have a variety of independent legislative tools at their disposal to study, debate, and vote on bills even where the rules may make this more complicated than usual (as in the case of Section 215). As one example, a number of members of the Judiciary Committee publicly expressed concern as early as 2008 with respect to a legislative grant of immunity to telecommunications providers.[95] Any Member could have considered these issues in connection with the reauthorization of Section 215 in 2010 or 2011, as well as available and abundant other public speculation and commentary expressing concern about government intelligence activity generally and Section 215 in particular.[96] Indeed, several amendments were considered on related issues at various times incident to reauthorization.[97] While specific information related to sources and methods may have been controlled, the fact that Section 215 was controversial and raised potential issues was in no way a secret to any individual Member of Congress, and such disagreement was of course no different than with issues before Congress on a daily basis.

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[94] Note, *Why Learned Hand Would Never Consult Legislative History Today*," 105 HARV. L. REV. 1005, 1014 (1992). The interpretivist view is relevant to the extent that it offers tools to weigh the views of different legislators, but it is important to emphasize that the question here is not really one of interpreting the meaning of text.

[95] Nancy Pelosi, *Judiciary Committee Members: Administration Has Not Made the Case for Telecom Immunity*, DEMOCRATIC LEADER BLOG (Mar. 12, 2008), http://democraticleader.house.gov/?p=1204.

[96] *See, e.g.*, Laurie Thomas Lee, *The USA PATRIOT Act and Telecommunications: Privacy Under Attack*, 29 RUTGERS COMPUTER & TECH L.J. 371 (2003); Conor Friedersdorf, *Russ Feingold Tried to Warn Us About Section 215 of the Patriot Act*, THE ATLANTIC (Jun. 14, 2013, 8:00 AM), http://www.theatlantic.com/politics/archive/2013/06/russ-feingold-tried-to-warn-us-about-section-215-of-the-patriot-act/276878/.

[97] For example, the Center for Democracy and Technology compiled an extensive list of proposed amendments and reforms in 2009. Kim Zetter, *Handy Chart Tracks Proposed Amendments to Patriot Act*, WIRED (Nov. 16 2009, 2:06 PM), http://www.wired.com/2009/11/patriot-act/.

IV. CONCLUSION

However individual legislators may feel about intelligence programs generally, or the interpretation of Section 215 specifically, as a statutory, procedural, and interpretive matter, there can be little question that Section 215 should be considered as properly enacted and reauthorized. Further, while there may be grounds for substantive procedural and policy debate with respect to these issues, this discourse is no different from the ongoing give-and-take seen every day in legislation across the spectrum of issues considered by Congress. Indeed, procedural rules governing legislation of sensitive intelligence matters can be viewed as deliberate efforts to manage the political process in this unique context.

Is the authority secret? Not if the statutory text is plain and oversight is conducted at a minimum in the manner provided for by congressional rules. Is it law? Despite all the sound and smoke around the issue, that question appears yet to be significantly challenged with respect to congressional intent and process.