

# The Potential Impact of the Second Circuit's Ruling Against Bulk Collection on USA PATRIOT Act Reauthorization

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On May 7, 2015, a federal appeals court issued a decision in [American Civil Liberties Union v. Clapper](#) that could have significant implications for both the [telephone metadata collection program](#) operated by the National Security Agency (NSA) and the legislative debate surrounding consideration of the USA FREEDOM Act of 2015 ([H.R. 2048 S. 1123](#)) currently taking place in the House and the Senate. While the ruling did not reach the question of whether the collection itself was a violation of the [Fourth Amendment](#), the court did reject the government's use of [Section 215](#) of the [USA PATRIOT Act of 2001](#) (as [amended](#)) to effectuate the bulk collection of telephone records by the NSA.

In brief, the court in *ACLU v. Clapper* held:

1. that the plaintiffs had standing to challenge the NSA program;
2. that Congress did not preclude judicial review of whether the NSA program exceeded the authority provided under Section 215; and
3. that the government had failed to demonstrate that the bulk telephone records held by telephone service providers were relevant to an authorized foreign intelligence investigation, as required by Section 215.

The Second Circuit's decision arrives in the midst of Congress's consideration of legislation that would reauthorize Section 215, which is scheduled to expire on [June 1, 2015](#). Much of the debate has centered on whether Section 215 should be allowed to lapse, be reauthorized without modification (e.g., [S. 1035](#)), or be amended to limit its use for programs like the NSA telephone metadata program (e.g., the [USA FREEDOM Act](#)). While the full implications of the decision in *ACLU v. Clapper* may not be known for some time (particularly with respect to its holdings on standing and preclusion of judicial review), it is likely that the decision will have a substantial impact on the current legislative debate surrounding reauthorization. In particular, legislators may wish to keep the following observations in mind.

**The decision does not immediately bar operation of the NSA telephone metadata program.** Though the Second Circuit ruled against the government, the court neither ordered the government to cease operation of the NSA telephone metadata program, nor to cease collection of telephone records in bulk under Section 215. Instead, the court remanded the case to the district court to determine whether a preliminary injunction is appropriate in this case.

**The decision is based on statutory language that can be amended by Congress.** As noted above, the court reached its decision after concluding that the government had not met its statutory burden of showing that the bulk telephone records were "relevant to an authorized investigation," as required by Section 215. The court acknowledged the argument that such collection may be a violation of the Fourth Amendment, but did not reach the merits of that question. As a statutory decision, Congress is free to exercise its legislative authority to amend the statute, potentially modifying or limiting the scope or effect of the Second Circuit's decision. The court commented expressly on the ongoing legislative debate surrounding potential reform of Section 215, and strongly suggested that Congress, and not the judiciary, is the more appropriate forum for balancing the unique national security and privacy interests at stake with this and other foreign intelligence programs.

As a procedural matter, amending Section 215 to either expressly permit or prohibit bulk collection may render the

statutory question in the case moot, precluding any Supreme Court review of this particular opinion by the Second Circuit.

**If the decision is upheld, or adopted by other courts, it may change what a “clean” reauthorization means.** Prior to the decision by the Second Circuit, it had been generally thought that a reauthorization of Section 215 without substantive amendment would allow the NSA telephone metadata program to continue without modification. With the widespread publicity and [declassification](#) of many details about the program, a “clean” reauthorization could be considered a ratification of the administration and the [Foreign Intelligence Surveillance Court’s](#) interpretations of the statute (though the program would still be subject to claims of unconstitutionality). Now that the Second Circuit has issued its decision against the government, a clean reauthorization would be, at most, a continuation of the *status quo ante*, preserving the NSA program’s use of Section 215 while the litigation surrounding the issue progressed. This potential change in the understanding of what Section 215 allows in its current form may alter how a bill like [S. 1035](#), which would extend Section 215 through 2020 without amendment, would be viewed by opponents and proponents of the NSA telephone metadata program. To a lesser extent, it may also be pertinent to consideration of bills like [H.R. 2048](#), the USA FREEDOM Act, which does make substantive changes to Section 215, but delays those changes for six months. This is because the underlying Section 215 orders authorizing bulk collection of telephone metadata program are typically issued for 90-day periods, and are likely to come up for renewal during that six-month window.