On June 5, 2013, the *Guardian* reported that the National Security Agency (NSA) has been collecting “the communication records of millions of US citizens . . . indiscriminately and in bulk.” The NSA collects “unique identifiers, and the time and duration of all calls.” This revelation about the telephony metadata program was met with outrage by many. Recently, the Obama Administration responded to this outrage by releasing a White Paper outlining the legal justifications for the program. The White Paper argues that the program is legal under section 215 of the USA PATRIOT Act (Patriot Act) because repositories of Americans’ phone records are “relevant” to discrete authorized investigations under this provision. However, despite the Administration’s claim that relevance is construed broadly in other civil and criminal contexts, the cases the White Paper cites are distinguishable because they involved much more narrowly focused data collection.

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2. Id.
3. See, e.g., Press Release, Am. Civil Liberties Union, ACLU Calls for End to Program, Disclosure of Program’s Scope, Congressional Investigation (June 5, 2013), available at https://www.aclu.org/national-security-technology-and-liberty/massive-nsa-phone-data-mining-operation-revealed (“Now that this unconstitutional surveillance effort has been revealed, the government should end it . . . .” (quoting Michelle Richardson, Legislative Counsel, ACLU Washington Legislative Office) (internal quotation mark omitted)); Cindy Cohn & Mark Rumold, *Confirmed: The NSA Is Spying on Millions of Americans*, ELECTRONIC FRONTIER FOUND. (June 5, 2013), https://www.eff.org/deeplinks/2013/06/confirmed-nsa-spying-millions-americans (“It’s time to end the NSA’s unconstitutional domestic surveillance program.”); Al Gore, TWITTER (June 5, 2013, 6:39 PM), https://twitter.com/algore/status/34245565057211393 (“Is it just me, or is secret blanket surveillance obscenely outrageous?”).
5. 50 U.S.C. § 1861–1862 (2006 & Supp. V 2011). Section 215 was passed as part of the Patriot Act and expanded the government’s ability to seek business records in investigations related to terrorism. Michael J. Woods, *Counterintelligence and Access to Transactional Records: A Practical History of USA PATRIOT Act Section 215*, 1 J. NAT’L SECURITY L. & POL’Y 37, 55 (2005). While there has been controversy over section 215, particularly over its use in compelling production of library records, see id. at 58, Congress has repeatedly renewed the section, see WHITE PAPER, supra note 4, at 18.
than the NSA’s program does. Furthermore, the White Paper’s argument that Congress intended to give section 215’s relevance standard a broader meaning than similar standards in other contexts lacks textual support. Since Congress was not fully informed of the program when it renewed section 215, the White Paper’s argument that Congress acquiesced to the program stretches implied ratification doctrine. While President Obama recently suggested that the government might start having third parties hold the data, section 215’s relevance standard could still be violated by the government’s compelled collection of this data. As a result, the government should either alter the program to conform with section 215 or Congress should change section 215’s language to authorize broader data collection.

In 2006, the Foreign Intelligence Surveillance Court (FISC) first authorized the telephony metadata program under section 215 of the Patriot Act. The program was designed to detect threats, helping the government “rapidly identify” terrorist operatives and networks. Under the program, the Federal Bureau of Investigation (FBI) obtains prospective orders from the FISC directing telecommunications companies to provide their users’ communication records, which the NSA stores and analyzes. These records include information “about what telephone numbers were used to make and receive . . . calls, when the calls took place, and how long the calls lasted.” The program does not involve the collection of information about the content of calls. In order to access the information gathered, an NSA official must find that there is a “reasonable, articulable suspicion” that a seed identifier used to query the data . . . is associated with a particular foreign terrorist organization.” Due to this requirement, while the government gathers vast amounts of data from telecommunications providers,

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6 See Remarks on the United States Signals Intelligence and Electronic Surveillance Programs, 2014 DAILY COMP. PRES. DOC. 30 (Jan. 17, 2014) [hereinafter Presidential Remarks].
7 WHITE PAPER, supra note 4, at 1.
8 Id. at 2.
9 See id. at 3.
10 Id. at 1.
11 Id.
12 Id. at 3 (quoting rules established by the FISC). A “seed identifier” is a datum, such as a telephone number known to be associated with a terrorist organization, which is used as the launching point for the query. Id. The program, as recently modified by President Obama, allows NSA officials to obtain information about those in contact with that number (the first “hop”) and those in contact with the first hop (the second hop). See Presidential Remarks, supra note 6. Furthermore, as President Obama recently announced, the database can only be queried “after a judicial finding or in the case of a true emergency.” Id.

No more than twenty-two NSA officials can be authorized to make a finding of “reasonable, articulable suspicion.” WHITE PAPER, supra note 4, at 5. Those decisions are subject to audits and reviews by “several entities within the Executive Branch,” including offices within the NSA and the Justice Department. Id.
“only a tiny fraction of the bulk telephony metadata records stored at the NSA are authorized to be seen by an NSA intelligence analyst.”\textsuperscript{13}

The White Paper describes the program and offers statutory and constitutional defenses of its legality. To begin, the White Paper analyzes the program’s compliance with section 215 of the Patriot Act. Under section 215, the FISC may issue an order for the “production of any tangible things (including books, records, papers, documents, and other items) for an investigation . . . to protect against international terrorism.”\textsuperscript{14} To receive an order, the government must show that there are “reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation.”\textsuperscript{15}

After concluding that telephony metadata records are “tangible things” under section 215\textsuperscript{16} and are sought for authorized investigations,\textsuperscript{17} the White Paper moves to relevance, arguing that the telephony metadata program collects records that are likely “relevant to an authorized investigation.”\textsuperscript{18} The White Paper first argues that relevance is a well-settled legal term that is interpreted quite broadly.\textsuperscript{19} In making this argument, the White Paper explains how “relevance” is defined in three other contexts: civil discovery, grand jury subpoenas, and administrative subpoenas.\textsuperscript{20} Essentially, legal rules in these contexts allow compelled production of documents as long as there is a reasonable possibility that the documents could lead to information that bears on the case.\textsuperscript{21} The White Paper cites multiple cases that use this broad relevance standard to “permit[] requests for the production of entire repositories of records” that could contain some directly relevant information, “even when any particular record is unlikely to directly bear on the matter being investigated.”\textsuperscript{22} Thus, the White Paper argues that the existence of a broad relevance standard in other

\begin{itemize}
\item \textsuperscript{13} \textit{White Paper, supra} note 4, at 4.
\item \textsuperscript{15} Id. § 1861(b)(2)(A).
\item \textsuperscript{16} The White Paper argues that electronically stored information is considered a tangible thing in other statutes and that section 215 itself lists “records” and “documents” — either of which could describe telephony metadata — as examples of tangible things. \textit{See White Paper, supra} note 4, at 7–8.
\item \textsuperscript{17} The White Paper states that the program is used only in authorized investigations because the metadata is queried only when there is an “articulable factual basis” for an investigation into international terrorism. \textit{Id.} at 6 (quoting U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S GUIDELINES FOR DOMESTIC FBI OPERATIONS 23 (2008)) (internal quotation mark omitted); \textit{see id.} at 6–7.
\item \textsuperscript{18} Id. at 8 (quoting 50 U.S.C. § 1861(b)(2)(A)) (internal quotation mark omitted).
\item \textsuperscript{19} \textit{See id.} at 9.
\item \textsuperscript{20} \textit{See id.} at 9–10.
\item \textsuperscript{21} \textit{See id.} at 9 (providing the legal standards for determining the appropriateness of compelled production in the context of civil discovery and grand jury subpoenas).
\item \textsuperscript{22} \textit{Id.} at 10; \textit{see also id.} at 10 nn. 7–9 (citing numerous cases related to broad requests for production).
\end{itemize}
contexts indicates that Congress intended there to be at least as broad a standard in section 215.23

Acknowledging that the metadata program is more expansive than existing precedent has permitted,24 the White Paper further argues that Congress intended section 215 to be uniquely “flexible” and “broad.”25 First, the White Paper observes that section 215 requires only “reasonable grounds to believe” the information is relevant, a particularly broad standard.26 Second, it argues that Congress merely required that the requested documents be relevant to “an ‘authorized investigation,’”27 allowing inclusion of “information relevant to the investigative process.”28 The White Paper emphasizes the standard’s broadness by pointing out that “Congress specifically rejected proposals to limit the relevance standard” to “only records pertaining to individuals suspected of terrorist activity.”29 Third, the White Paper posits that terrorism investigations are uniquely focused on prevention rather than on “retrospective determination of liability” and “often have a remarkable breadth,” requiring expansive investigative tools.30 Fourth, the White Paper argues that because the metadata program contains particularly “robust protections regarding collection, retention, dissemination, and oversight,” an even broader reading of relevance is justified.31

The White Paper then states that “[u]nless the data is aggregated, it may not be feasible to identify chains of communications,”32 which would “significantly diminish the effectiveness of NSA’s investigative tools.”33 Thus, the White Paper argues that bulk collection in this context is necessary for effective investigation.34 According to the White Paper, this broad relevance standard would not authorize bulk production of other types of records such as “medical records or library or book sale records” because investigations of those records do not require “discover[ing] connections between individuals.”35

23 See id. at 11.
24 See id. (“[T]he cases that have been decided in these contexts do not involve collection of data on the scale at issue in the telephony metadata collection program . . . .”).
25 Id.
27 Id. (quoting 50 U.S.C. § 1861(b)(2)(A) (emphasis added)).
28 Id. at 12.
29 Id.
30 Id.; see id. at 12–13.
31 Id. at 13.
32 Id.
33 Id. at 14.
34 See id. at 13–14.
35 Id. at 14.
After addressing the FISC’s issuance of prospective orders to produce telephony records, the White Paper argues that Congress implicitly acquiesced to the FISC’s interpretation of the statute by renewing section 215. The White Paper cites Lorillard v. Pons, which states that “Congress is presumed...to adopt [an administrative or judicial] interpretation [of a statute] when it re-enacts a statute without change.” For this presumption to apply, Congress must be “aware of the interpretation.” The White Paper claims that “[t]he Executive Branch...worked to ensure that all Members of Congress had access to information about this program and the legal authority for it.” Furthermore, the Senate and House Intelligence and Judiciary Committees were “briefed numerous times” about the “classified use of [section 215] authority.” Since Congress renewed section 215 after it was given means to learn of the FISC’s interpretation, the White Paper concludes that Congress adopted that interpretation.

The White Paper ends with an analysis of the program’s constitutionality. It finds that phone data collection does not violate the Fourth Amendment since people making phone calls “lack a reasonable expectation of privacy in the numbers they call.” The White Paper then concludes the program does not violate the First Amendment since the government conducts the program in good faith.

By basing the “relevance” argument on cases in other contexts, the White Paper fails to fully account for two key facts: (1) the vast majority of people whose records the NSA collects have no relation to a suspected terrorist, and (2) these records are not, themselves, potential evidence of illegal behavior. Nor does the White Paper’s argument that Congress intended section 215 to have a broader relevance standard than the standard used in these other contexts hold up to a close textual examination of the statute or to conventional implied ratification doctrine. President Obama’s recent proposal that third parties should hold the metadata would not make the data collection legal under section 215. Thus, to ensure the program’s legality, the government...
should either properly conform the program to section 215’s text or broaden section 215’s language.

While the White Paper cites an extensive number of cases dealing with relevance in other contexts, that case law is distinguishable from the telephony metadata program. Specifically, the cited cases all have two things in common that are not present in the metadata collection context. First, there was some nexus between the various persons whose records were sought and the subject of the investigation. While the White Paper cites an extensive number of cases dealing with relevance in other contexts, that case law is distinguishable from the telephony metadata program. Specifically, the cited cases all have two things in common that are not present in the metadata collection context. First, there was some nexus between the various persons whose records were sought and the subject of the investigation. In each case, a party sought records from the subject itself or from employees or clients of the subject. In contrast, as the White Paper itself admits, only a “tiny fraction” of the metadata records have any nexus with suspected terrorists being investigated, even when the category is expansively defined to include contacts once and twice removed from the original suspect.

Second, the records sought in the cited cases potentially demonstrated illegal behavior, typically fraud. However, call-record metadata does not demonstrate illegality; it merely gives a hint of who may be involved in illegal activity based on associations evinced by the phone calls. These distinguishing factors are particularly important because they show that aspects of the metadata program may violate the limits that courts have placed on “relevance” in other contexts.49


47 WHITE PAPER, supra note 4, at 4.

48 See, e.g., Cheney v. U.S. Dist. Court, 542 U.S. 367, 383–91 (2004) (finding a discovery request seeking “everything under the sky,” id. at 387, in a suit alleging Vice President Cheney and others had failed to disclose required materials, to be “anything but appropriate,” id. at 388); Bowman Dairy Co. v. United States, 342 U.S. 214, 221 (1951) (finding that a subpoena asking for all documents regardless of whether they constituted evidence regarding guilt or innocence was a “fishing expedition to see what may turn up”); In re Sealed Case, 42 F.3d 1412, 1418 (D.C. Cir. 1994) (denying a subpoena for records about “other wrongdoing, as yet unknown” because the government does not have “unfettered authority to cast about for potential wrongdoing”); In re Fontaine, 402 F. Supp. 1219, 1221 (E.D.N.Y. 1975) (finding that the relevancy standard does not allow a party “to explore matter which does not presently appear germane on the theory that it might conceivably become so” (quoting In re Sur. Assoc. of Am., 388 F.2d 412, 414 (2d Cir. 1969) (internal quotation mark omitted)). Furthermore, “no single [grand jury] subpoena discussed in a reported decision is as broad as the FISC’s telephony metadata orders.” David S. Kris, On the Bulk Collection of Tangible Things, 1 LAWFARE RES. PAPER SERIES 1, 26 (2013).
While the White Paper acknowledges that the metadata program is more extensive than case law supports and therefore also argues that section 215 is textually exceptional, section 215’s text indicates that Congress actually intended its relevance standard to be akin to the standard employed in similar contexts. The White Paper says that section 215’s relevance standard — which requires merely showing that there are reasonable grounds to believe the records are relevant to an authorized investigation — is “particularly broad.” However, statutes and Supreme Court precedent indicate that this standard is no broader than that used elsewhere. For example, in the grand jury context, the Supreme Court has ruled that the government satisfies its relevance requirement unless “there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject” of the investigation. Textually, this holding seems to give the government the exact same authority as section 215 does; under both rules, the government can order document production unless it is unreasonable to think the documents are relevant to an investigation. Many statutes also have similar wording to section 215. For instance, 18 U.S.C. § 2709(b)(1) authorizes the FBI Director to compel production of telephone toll billing if he or she simply certifies that the records are “relevant to an authorized investigation.” 20 U.S.C. § 1232g(j)(1)(A) allows the Attorney General to compel production of education records if they are “relevant to an authorized investigation.” Again, these statutes seem to give the government virtually identical power as that given by section 215. In light of section 215’s strong similarity to both past court rulings and other statutes, it seems unlikely that Congress intended section 215 to be an exceptional departure warranting an unprecedented use.

In fact, Congress specifically limited section 215’s relevance standard based on existing legal standards. The statute states that section 215 orders may only require production of a thing “if such thing can be obtained . . . in aid of a grand jury investigation or with any other order.” Thus, Congress made section 215 no broader than other document production contexts; if a document cannot be produced in another context, section 215 does not authorize its production.

Moreover, the White Paper’s argument that Congress implicitly acquiesced to the executive’s interpretation of section 215 by renewing the statute requires a questionable extension of implied ratification doctrine. This doctrine requires that the statute’s interpretation be

50 White Paper, supra note 4, at 11.
“broad and unquestioned,” which the White Paper attempts to establish by showing that Congress was provided a briefing paper mentioning the program. Case law suggests implied ratification occurs when “Congress [has] considered [the interpretation] in great detail,” possibly evidenced by “[e]xtensive hearings, repeated efforts at legislative correction, and public controversy.” Due to the program’s secrecy, the program was neither debated in Congress nor subject to public controversy when section 215 was renewed. Thus, the White Paper’s argument stretches implied ratification doctrine beyond previously accepted bounds.

Alluding to these legal concerns in his recent speech, President Obama suggested “alternative approaches” in which third parties, rather than the government, would hold the metadata. However, while such approaches would transfer retention of the data to private parties, the government would still be allowed to request and receive an order compelling bulk metadata collection. Thus, the relevance issue would remain. In discussing changes to the metadata program, either the government should consider changes that conform to a textual reading of section 215’s relevance standard, or Congress should tweak section 215’s language to authorize broader data collection capabilities.

In claiming that the telephony metadata program meets section 215’s relevance requirement, the White Paper cites to distinguishable case law in which the bulk data potentially constituted evidence of illegal activity and was collected from a party with a nexus to the party being investigated. The metadata program collects the vast majority of its data from people who have no direct nexus to a terror suspect and the phone calls are not themselves evidence of illegal activity. Furthermore, the White Paper’s argument that Congress intended to make section 215 particularly broad — justifying such unprecedented use — is not supported by the statute’s text, which is quite similar to other data collection standards. The government should neither rely on the White Paper’s dubious extension of implicit acquiescence doctrine, nor assume that President Obama’s recent proposals will cure the metadata program’s legal issues. Instead, Congress should expand section 215’s language or the government should limit the bulk collection of data to make it consistent with section 215’s current wording.

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56 See White Paper, supra note 4, at 17–19.
58 Butterbaugh v. Dep’t of Justice, 336 F.3d 1332, 1342 (Fed. Cir. 2003).
60 Presidential Remarks, supra note 6.