HINT: USA FREEDOM ACT WOULD HAVE RATIFIED FISC'S "RELEVANT TO" INTERPRETATION, TOO

Steve Vladeck has an uncharacteristically silly post at Just Security, warning that, because Congress has not moved to reform Section 215, making it more likely Congress will pass a straight reauthorization of Section 215, that will amount to an endorsement of FISC's ridiculous definition of "relevant to."

> As Congressman Schiff suggested, among other things, the absence of significant advance debate dramatically increases the likelihood that there will simply be a last-minute push to reauthorize section 215 in its *current* form (since there wouldn't be time for meaningful debate over reforms/alterations to the existing language and statutory authorities).
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> Even though such a result would vindicate a post I wrote after USA FREEDOM died last November, it would be more than just a missed opportunity on Congress's part. Far more importantly, although many might argue that it would simply shift the onus for resolving the legality of the telephone metadata program to the courts, it seems likely that, given what we *now* know about the government's interpretation of section 215, there'd be no way to view such a "clean" reauthorization as anything *other* than congressional ratification of that (dubious) reading of the statute — which would leave the Fourth Amendment challenge as the only remaining issue to be resolved by the

> Second, Ninth, and D.C. Circuits (and, perhaps, the Supreme Court). In other words, the closer we get to June 1 without meaningful discussion in Congress about section 215 reform, the more likely it is that we'll get a result that's *worse* than no reform—unqualified congressional validation of the government's deeply contested interpretation. That's not reform; that's entrenchment.

While I agree with his contention that a straight reauthorization is bad for reform, I'm gobsmacked by his claim that the biggest problem with that is that a straight reauthorization would be an endorsement of FISC's "relevant to" interpretation.

Because so would have passage of USA Freedom Act.

Indeed, that's one reason it was important not to pass it as it was — because it would have accelerated the trumping of legal challenges by ratifying FISC's perverse interpretation before any of the circuits could rule.

USAF did nothing to the "relevant to" language in Section 215 (or PRTT). Indeed, it adopted that interpretation, unchallenged, even in the new section permitting the prospective call record collection:

> '(i) there are reasonable grounds to believe that the call detail records sought to be produced based on the specific selection term required under subparagraph (A) are relevant to such investigation;

What it did, instead, was limit the application of that interpretation from "all" to "very very many" by use of discriminators that — for actual tangible things — probably doesn't require any change from the status quo. The bill would still have permitted the government to use

"MasterCard" or "Caesars Palace" or "Western Union" as their discriminator, as it currently permits the use of "Verizon" as a discriminator. The bill would still permit the collection of all MasterCard records of all Americans — if the government can prove it were necessary for part of its investigation (more likely, however, it would permit the collection of all MasterCard records of pressure cooker and acetone and fertilizer purchases). And in the process, the bill would have still permitted the records of millions of innocent Americans to be collected in the name of terrorist (or intelligence) investigations; it would only — for just communications records — require more tailoring before those millions of records were collected.

Plus, if we're worried about ratification, USAF would also have ratified the notion that wide swaths of government surveillance can be deemed too difficult to count, including back door searches of US person content off Section 702 data. Effectively, USAF would have endorsed the principle that FBI's spying — the spying that can send you directly to prison — doesn't need the same kind of transparency as purportedly more sensitive intelligence activities.

Again, none of this is to say that straight reauthorization would be good (I think many reform advocates have completely forgotten how obstruction in 2005 on the PATRIOT Act and 2008 on FAA actually did bring more reforms).

But both USAF and a straight reauthorization would trump a statutory challenge to Section 215.