

# IN WHICH THE NATIONAL SECURITY COUNCIL DISCOVERS THE GRAND JURY SUBPOENA

Back when Jim Comey ate 20 journalists for lunch, he said that if Congress imposed more controls on National Security Letters, FBI would just get more grand jury subpoenas, which require fewer approvals than NSLs anyway.

Which is one reason I find National Security Council spokesperson Ned Price's promise that if Section 215 lapses, "a critical national security tool" used in other contexts would be lost to be so interesting.

NSC spokesman Ned Price told Reuters the administration had decided to stop bulk collection of domestic call metadata unless Congress re-authorizes it.

Some legal experts have suggested that even if Congress does not extend the law the administration might be able to convince the Foreign Intelligence Surveillance Court to authorize collection under other authorities.

Price made clear the administration does not intend to do so. The administration is encouraging Congress to enact legislation in the coming weeks that would allow collection to continue.

"If Section 215 (of the law which covers the collection) sunsets, we will not continue the bulk telephony metadata program," he said.

"Allowing Section 215 to sunset would result in the loss, going forward, of a critical national security tool that is used in a variety of additional contexts that do not involve the collection of bulk data."

This reaffirms what Bob Litt said last month at Brookings, that the government claims it won't continue the phone dragnet under Section 215 under a grandfather approach. But it also emphasizes the stuff journalists often ignore or don't understand: that most Section 215 orders are for other things, and the government may or may not find those sufficiently important to panic over.

Still, at least some of what the government is doing with those other Section 215 orders could be done with grand jury subpoenas.

Or maybe it couldn't. Maybe they're collecting this stuff without the underlying predicate for an investigation, and therefore need to do it via Section 215?? Maybe the collection is so Constitutionally problematic that data collected using a subpoena – with the greater chance it would be reviewed by a judge in an adversarial proceeding – would get thrown out?

But if so, perhaps we should revisit the collection?

Or, just as provocatively, if this other collection is so important and cannot be done with a grand jury subpoena, then maybe the government should ditch the phone dragnet – it could do it instead in limited form with NSLs – so it can save the other programs it doesn't want to talk about?

Would the government be willing to trade the phone dragnet – which has never IDed any plot – for the other programs Section 215 supports?