THE GOVERNMENT'S CLASSIFIED BRIEFING TO HJC: A NEW CERTIFICATE?

As I noted, after years of legislating Section 702 of the FISA Amendments Act in public, yesterday the House Judiciary Committee had a closed hearing on it, which raises all sorts of questions about what has changed.

The agencies presenting to the committee did provide an unclassified statement for the record that is mostly stuff we know (one of the most interesting details is that it considers upstream telephony collection to be a different kind of collection than upstream Internet collection). But it does provide 3 examples of things that it would explain to the committee in classified session. One is utterly predictable: examples of counterterrorism intelligence obtained under Section 702.

> Section 702 collection is a major contributor to NSA's counterterrorism reporting and on other topics as well. Since its enactment in 2008, the number of signals intelligence reports issued by NSA based at least in part on Section 702 collection has grown exponentially. CIA and FBI state that they have acquired highly valuable and often unique intelligence through Section 702 collection. Numerous real-life examples that demonstrate the broad range of important information that the Intelligence Community has obtained can be provided to the Committee in a classified setting. While these examples which identify specific targets and operations must remain classified, the following declassified example provides just one instance of the many contributions Section 702 has made to

> our national security.

Of course, the IC shouldn't be permitted to present such things in secret, as so many of their cases have been shown to be bogus (or not provided 702 notice) in the past. It is now down to one unclassified case – Najibullah Zazi – where they used 702, and that wasn't even all that central (which may be why they never did get 702 notice).

The other two are more interesting. They include:

- What certificates the government has approved: "The Government will describe in a classified setting the certification or certifications under which the Government is currently acquiring foreign intelligence information."
- The contributions of Section 702 data to other kinds of foreign intelligence collection: "The Board further acknowledged the Section 702 program's value in acquiring other foreign intelligence information, examples of which can be provided in a classified setting."

Recall, as late as 2011, the IC was known to have 3 certificates a counterterrorism certificate, a counterproliferation one, and a foreign government one, which serves as a grab bag. Because it was so obvious the IC was using Section 702 for cybersecurity, I mistakenly claimed they had a cyber certificate, but as

late as 2012, they had not yet obtained one. Perhaps the IC needed classified session to explain all this.

But how weird would it be to brief HJC on a Section 702 cyber certificate while DHS and DOJ are implementing OmniCISA, which will enable upstream searches for cyber signatures within the US? Perhaps that's what they were doing, but it would be interesting timing.

Which makes me wonder, again, about whether there's another kind of certificate, perhaps one targeted at Tor?

In any case, there is something significant about the set of certificates the IC has or is asking for (probably the former, given that it makes a big show here of releasing the documents tied to the 2014 certification process, but not those tied to the 2015 certification process).

I'm sure that's not the only thing the IC wanted to brief HJC on in secret. But it does appear to be one thing they did brief in secret. (Side note: I have reason to believe the IC did not tell the truth, even within the IC, about what certificates they got at the beginning of the PRISM process, so at least this would suggest they're now being more forthcoming.)