

NSA REFUSED TO CONFIRM AUTHENTICITY OF FOREIGN POWER CERTIFICATION

There's an odd detail in yesterday's WaPo confirmation that the US may target every country in the world that's not a part of the Five Eyes partnership. After having suggested publicly and repeatedly that it has certifications for counterterrorism, counterproliferation and cyber, it refused to confirm that the certification for foreign powers was authentic.

NSA officials, who declined to comment on the certification or acknowledge its authenticity, stressed the constraints placed on foreign intelligence-gathering.

So it's willing to confirm all those other uses, but not this one?

The section immediately reminded me of these two sections of Judge Garr King's opinion refusing Mohamed Osman Mohamud's challenge to the use of Section 702 against him.

If I use defendant's proffered standard in a facial challenge, that there would be a substantial risk the statute would be applied unconstitutionally, rather than the government's proffered standard, that the statute would survive a facial challenge if there is any set of circumstances in which it could be constitutionally applied,² I would be required to speculate about the other applications. Under the government's standard, if the statute survives an as-applied challenge, it automatically survives a facial challenge because there is at least one constitutional

application. I am unwilling to speculate on other applications with a statute this complex.

[snip]

Defendant is concerned the government could interpret the "conduct of the foreign affairs of the United States" broadly enough to cover such items as international trade, rather than just threats to national security.

I note the discovery in this case all concerned protecting the country from a terrorist threat and did not stray into the broader category of the conduct of foreign affairs.

The government has just survived a constitutional challenge to Section 702 by refusing to speculate that the government might do something like spy for advantage in international trade.

Which, we now have proof, it does.

Spying for advantage in international trade is a much higher reach for the special needs analysis King and the FISCR have used to deem Section 702 reasonable.

Given the government's extensive efforts to hide this application of Section 702, you might even think they don't believe it's reasonable!