

MATT OLSEN ADMITS HE DIDN'T BARGAIN ON A PRESIDENT TRUMP

Something predictable, but infuriating, happened at last week's Cato conference on surveillance.

A bunch of spook lawyers did a panel, at which they considered the state of surveillance under Trump. Former White House Director of Privacy and Civil Liberties Tim Edgar asked whether adhering to basic norms, which he suggested would otherwise be an adequate on surveillance, works in a Trump Administration.

In response, former NSA General Counsel Matt Olsen provided an innocuous description of the things he had done to expand the dragnet.

I fought hard ... in the last 10 [years] when I worked in national security, for increasing information sharing, breaking down barriers for sharing information, foreign-domestic, within domestic agencies, and for the modernization of FISA, so we could have a better approach to surveillance.

Then, Olsen admitted that he (who for three years after he left NSA headed up the National Counterterrorism Center managing a ton of analysts paid to imagine the unimaginable) did not imagine someone like Trump might come along.

As I fought for these changes, I did not bargain on a President Trump. That was beyond my ability to imagine as a leader of the country in thinking about how these policies would actually be implemented by the Chief Executive.

It was beyond his ability [breathe, Marcy, breathe] to imagine someone who might abuse power to come along!!!

What makes Olsen's comment even more infuriating that I called out Olsen's problematic efforts to "modernize" FISA and sustain the phone dragnet even in spite of abuse in September, in arguing that Hillary could not, in fact, be supporting a balanced approach on intelligence if she planned on hiring him, as seemed likely.

Olsen was the DOJ lawyer who oversaw the Yahoo challenge to PRISM in 2007 and 2008. He did two things of note. First, he withheld information from the FISC until forced to turn it over, not even offering up details about how the government had completely restructured PRISM during the course of Yahoo's challenge, and underplaying details of how US person metadata is used to select foreign targets. He's also the guy who threatened Yahoo with \$250,000 a day fines for appealing the FISC decision.

Olsen was a key player in filings on the NSA violations in early 2009, presiding over what I believe to be grossly misleading claims about the intent and knowledge NSA had about the phone and Internet dragnets. Basically, working closely with Keith Alexander, he hid the fact that NSA had basically willfully treated FISA-collected data under the more lenient protection regime of EO 12333.

These comments were used, in this post by former NSA Compliance chief John DeLong and former NSA lawyer Susan Hennessey (the latter of whom was on this panel) to unbelievably dishonestly suggest that surveillance skeptics, embodied by me and EFF's Nate Cardozo (who has been litigating some of these issues for years), took our understanding of NSA excesses from one footnote in a FISA Court opinion, rather than from years of reading underlying documents.

Readers are likely aware of the incident, which has become a persistent

reference point for NSA's most ardent critics. One such critic recently pointed to a FISC memorandum referencing the episode as evidence that "NSA lawyers routinely lie, even to the secret rubber stamp FISA court"; another cited it in claiming DOJ's attorneys made "misleading claims about the intent and knowledge NSA had about the phone and Internet dragnets" and that "NSA had basically willfully treated FISA-collected data under the more lenient protection regime of EO 12333."

These allegations are false. And by insisting that government officials routinely mislead and lie, these critics are missing one of the most important stories in the history of modern intelligence oversight.

Never mind that I actually hadn't cited the footnote. Never mind that then FISA Judge Reggie Walton was the first to espouse my "false" view, even before seven more months of evidence came out providing further support for it.

The underlying point is that these two NSA people were so angry that I called out Matt Olsen for documented actions he had taken that they used it as a foil to make some pretty problematic claims about the oversight over NSA spying. But before they did so, they assured us of the integrity of the people involved (that is, Olsen and others).

It's tempting to respond to these accusations by defending the integrity of the individuals involved. After all, we know from firsthand experience that our former colleagues—both within the NSA and across the Department of Justice, the Office of the Director of National Intelligence, and the Department of Defense—serve the public with a high degree of integrity. But we think it is important to move beyond the

focus on who is good and who is bad, and instead explore the history behind that footnote and the many lessons learned and incorporated into practice. After all, we are ultimately a “government of laws,” not of people.

We are a government of laws, not people, they said in October, before laying out oversight that (they don't tell you, but I will once I finally get back to responding to this post) has already proven to be inadequate. I mean, I agree with their intent – that we need(ed) to build a bureaucracy that could withstand the craziest of Executives. But contrary to what they claim in their piece and the presumably best intent of DeLong, they didn't do that.

They now seem to realize that.

In the wake of the Trump victory, a number of these people are now admitting that maybe their reassurances about the bureaucracy they contributed to – which were in reality based on faith in the good intentions and honesty and competence of their colleagues – were overstated. Maybe these tools are too dangerous for an unhinged man to wield.

And, it turns out, one of the people largely responsible for expanding the dragnet that its former defenders now worry might be dangerous for Donald Trump to control *never even imagined* that someone like Trump might come along.