

Episode 225: Interview with General Michael Hayden

Stewart Baker: [00:00:03] Welcome to Episode 225 of The Cyberlaw Podcast brought to you by Steptoe & Johnson. Thanks for joining us. We're lawyers — mostly lawyers — talking about technology, security, privacy, and government. I'm joined today here in the studio by General Michael Hayden who was the director — the only director — of NSA and the CIA, currently a principal at the Chertoff Group, and bestselling author of two books now, one on his career in intelligence and one on intelligence in the age of Trump. And we'll be talking about all of those topics. General, welcome.

Michael Hayden: [00:00:43] Thank you. Thanks very much, Stewart.

Stewart Baker: [00:00:45] And were you really in Australia?

Michael Hayden: [00:00:48] I was. I got back very late Friday. Then what made the weekend blessedly hectic is that our son and his family had been in Turkey for five years came back, PCS, on Saturday.

Stewart Baker: [00:01:00] Terrific.

Michael Hayden: [00:01:01] So we've had three little ones — eight, six, and four — added on to the jet lag.

Stewart Baker: [00:01:05] Those are great years.

Michael Hayden: [00:01:08] And they've got jet lag too!

Stewart Baker: [00:01:09] So, yes! So they're running around, and they're breaking down. Yes. It's exciting. Okay. We've also, speaking of running around and breaking down, we have a great team for our News Roundup. Paul Rosenzweig, familiar to all listeners, founder of Red Branch Consulting, deputy assistant secretary for policy at DHS when I was there. We've got David Kris, former assistant AG in charge of the Justice Department's National Security Division. Nate Jones, who's a veteran of the Justice Department, the National Security Council's counterterrorism office, and was an assistant general counsel to Microsoft until recently. We've also got Nick Weaver — the irrepressible Nick Weaver — a senior researcher at the International Computer Science Institute in Berkeley and a lecturer at the computer science department at UC Berkeley. And I'm Stewart Baker, your host, formerly with NSA and DHS and holding the record for returning to Steptoe to practice law more times than any other lawyer. That's the intro. Let's jump right in. Tony Rutkowski when he read the tweets that I sent out of the topics we are going to cover said you know you really ought to call this an "administration of neocoms." They are spoiling for a fight with China over communications. David, it looks as though they may arrive at a solution with ZTE. What do you think?

David Kris: [00:02:39] Right. Well on July 2nd the Commerce Department granted a one-month reprieve to the prior ban from April on purchases from American providers which was really pretty close to a death sentence for ZTE given that it needs hardware and software elements. And we'll see what happens between now and August 1st. Maybe they can work out some kind of an understanding. The funny thing here is that the sanctions on ZTE were originally imposed for trading with Iran and our new friend North Korea, whereas the reason for a lot of the concern today is actually on sort of the other side which is that people think they are effectively a supply chain arm of the People's Liberation Army of China. And that mismatch I think between the underlying conduct behind some of the sanctions and the actual concern I think only contributes to the somewhat unstable environment with respect to ZTE that we're currently seeing.

Stewart Baker: [00:03:37] Yeah I thought the one-month reprieve was about as grudging as it could be, but real. And it will allow ZTE to say we're starting up the hill

and we ought to be able to sell your products soon. And the likelihood frankly that Congress is going to be able to overturn this I think is relatively low. But that's just the export control problem. It's highly likely that Congress is going to pass additional legislation that makes it harder for Americans to buy ZTE and Huawei products.

David Kris: [00:04:19] Right.

Stewart Baker: [00:04:19] And on top of that. After it had been pending for something like seven years China Mobile's request to provide mobile service to Americans has finally been denied. I think probably they were getting the hint. But it looked as though the Obama administration just didn't want to actually deliver the news, and the “neocoms” were quite happy to deliver the news. Nate?

Nate Jones: [00:04:46] Yeah, I mean to be fair it was six years and ten months, so they moved a little faster than that. You know the executive branch finally weighed in last week with their recommendation which is that China Mobile offering services it was proposing would raise substantial and unacceptable national security and law enforcement risks and found that those risks could not be mitigated. I found a couple of things interesting about the letter. One is despite the length of time that it took in that being a little bit excessive it does seem like the government gave China Mobile a chance to explain itself and among other things put in writing for the first time the factors it considers when reviewing these applications and gave a pretty extensive explanation of how it looks at those factors. The other thing was they were pretty honest about the mitigation and the fact that it's — you know they rely a lot on the company itself to follow the mitigation measures that it has put in place and that the government has pretty limited capacity to make sure that they're doing so. And it seems like the biggest place where this fell apart was that they just had no faith that China Mobile would actually adhere to any mitigation measures they put in place. And we don't know which ones they considered because that was all blacked out on the letter, but whatever they thought through, it seems like they just decided in the end that they couldn't trust China Mobile to actually abide by them.

Stewart Baker: [00:06:20] Yeah, you can understand why that would happen especially after ZTE which really just blew off the requirements of US law. I'm guessing that the reason that they listed the factors that they considered was because this administration has learned that saying "national security" doesn't get you a pass from judicial review. And they wanted to say we actually gave these guys due process, we told them what the standards were, we let them give us whatever information they wanted to give us, and then we made a decision. And they didn't make it. And that is more likely to withstand review than simply saying well we thought about it, and national security requires that we say no.

Nate Jones: [00:07:05] Yeah, I think that's right.

Stewart Baker: [00:07:07] Alright. The European Parliament has failed to live down to my expectations which are low indeed. They actually voted against a remarkably maximalist copyright bill, one that would have made it very hard for people smaller than YouTube to take user uploads of media. And the question I guess Nick is, is this for real, or is this just a PR move?

Nick Weaver: [00:07:43] It's for real, but it's not dead yet. So the vote was not up or down. It was either up or go back and look at it in more detail. So do not expect the general coalition of Internet advocates to rest on their laurels at this point because this has real potential to rise up and try to once again kill European Internet.

Stewart Baker: [00:08:16] Yeah, this is a fairly unique European legislative review of proposals — a process — and they have a kind of veto, but it's a veto that sends it back to the commission and the commission can stew on it and then send them back something that is very close to the last version and say we thought about it and now we've fixed all your problems, please take this one. And that's what you're afraid of. And I have to say this is my episode for saying nice things about the Europeans. They are also leaving us in the dust in terms of digging into the social media of immigrants for security purposes. Paul, did you have a twinge of envy when you read this story?

Paul Rosenzweig: [00:09:09] [Unintelligible] than a twinge, I guess. It certainly is the case — it's undeniable — that social media provides a robust set of information about people for all sorts of purposes. The EU is using access to social media of potential immigrants to identify or attempt to identify the differences between those who are legitimate asylum seekers and those who are fraudsters. It reminds us that in the United States we've had basically a knife fight over whether or not CBP — Customs and Border Protection — can ask for similar access to social media when and if foreigners attempt to enter the United States. And so the obvious delicious irony in all this is that the European Union continually tries to screw the American government on how protective of privacy rights they are and then turns around and disregards its own rhetoric when it comes to protecting its own borders. So it's quite a bit of schadenfreude, if you will, at least for me.

Stewart Baker: [00:10:32] I am reminded of the saying that the dark night of fascism is always falling on the United States, but it always seems to land in Europe. And this is a measure where they're actually getting — demanding in Denmark, they're actually demanding passwords so that they can look at even the private postings.

Nick Weaver: [00:10:54] Another thing that they've been doing is actually doing phone forensics because EU law on asylum seekers is you're supposed to claim asylum in the EU country you arrive at. So if you arrive in Greece and then try to claim asylum in Germany, they can deny you. And so they've been looking at that too using phone forensics to show, oh wait you passed through Greece on your way to Germany.

Stewart Baker: [00:11:21] So can't you beat that just by eating the SIM [card]?

Nick Weaver: [00:11:28] No, because you'd have to nuke your phone, not the SIM, and they could still also get the data from the cell phone company metadata.

Paul Rosenzweig: [00:11:40] Yeah, what's really interesting here is how that sort of decision would play out in America after the *Carpenter* cell site location information data assuming that foreigners have any Fourth Amendment rights at all which they tend to

when they're in the United States. I'm not even sure we could do the forensics on it on an immigrant or an asylum seeker.

Stewart Baker: [00:12:06] Once they're here, maybe not, although you might be able to argue that it's a border search. But I think for the refugees that — well refugees we usually screen outside the US, but the asylum seekers are here. We could say you need to consent to our search before we decide where you're going to spend the next six months. And if you don't consent, then that's one more reason why you might be one of the lucky people who goes into Sturr instead of getting a bus ticket.

Paul Rosenzweig: [00:12:35] Yep.

Stewart Baker: [00:12:36] So what about the Israelis? They're also putting us to shame with their use of social media, aren't they?

Paul Rosenzweig: [00:12:42] Yeah, well I mean this is a recent report that they've been monitoring Palestinian social media, and they report that the monitoring is a factor in a significant reduction in adverse terrorist incidents — shootings on buses and bombings and things like that. You know, it's just come across our attention in the last day or so. I'm not sure how detailed their inquiries are, but it looks to me like they are monitoring Palestinian social media feeds as part of their anti-terrorism program, and it's working. It should be pretty easy for them because my understanding is that all Palestinian telecoms are routed out through Israel, both from Gaza and the West Bank. So they should have kind of the same home-field advantage that the United States used to have, that General Hayden used to talk about, with respect to Internet transmissions and media here in the United States.

Stewart Baker: [00:13:49] I'm skeptical. I'm going to express skepticism. I think TLS and HTTPS Everywhere [have] reduced that home-field advantage. They're going to have to go to the social media to get access to this, although they can monitor the public side of it. So my guess is that they have found a way to induce social media to

give them some kind of access to a broad range of expressions of sentiment on the West Bank.

Paul Rosenzweig: [00:14:21] Would be interesting to see how that works out. Who's cooperating with the Israeli government?

Stewart Baker: [00:14:27] Yup. Alright. The DNC, having been burned you know to the ground by Russian hackers who got in by famously spoofing Google's security, have launched an effort to train their staff not to fall prey to phishing attacks. And they said — and I think it's fair to say they bragged — that they had gotten 80% of their staff not to click on bad links. You know using one of these commercial phishing services which is actually what's deeply troubling about this, Nick, is that's a pretty good number, and it's utterly inadequate.

Nick Weaver: [00:15:17] Yes. And this is why I'm a huge believer in security keys. So any campaign should be using Google for their email and set up with security keys for login because the security key design is such that you cannot be phished. And that phishing works at all is a failure of the computer security posture these days, that you can build systems and deploy that using U2F security keys where you don't actually need to worry about the user giving up their password.

Stewart Baker: [00:15:56] So let me ask you a user helpdesk question. I signed up for 2FA with Google, and I use it and it works fine. But it still doesn't seem to work with Firefox. And Google assured me that Firefox was on the verge of adopting FIDO and that it would all work seamlessly together. I'm not seeing that. Have you encountered that issue?

Nick Weaver: [00:16:23] Yes. And it's the reason why I'm using Chrome rather than Firefox. It's because Firefox still has the answer of: if you want U2F, you have to install a third-party extension, blah blah blah. No. Sorry, this is not a[n] optional feature in a browser these days.

Stewart Baker: [00:16:43] Fair enough. Okay. Alright. It's sad, but I agree with you. This is just something where you need a well-trained staff, and then you need something more. What about — I'm going to give you a chance to talk about a story that's actually about 10 days old because you were all over it when it broke, and I didn't get to ask you last week. It looks as though the feds have figured out a pretty good way to break down Dark Web drug sales — maybe not all of them, but to really put a dent in those sales.

Nick Weaver: [00:17:20] Yes, and it's the fundamental criminal bandwidth for so many things is not the crime, but the money laundering. And this is especially true in the cryptocurrency space. All the drug dealers hate Bitcoin, but it's the only game in town if you're selling online. And so what has happened is there's these local Bitcoin sales, etc., where basically they're money launderers. And so what happens is that drug dealers are selling their Bitcoin to these entrepreneurs in bulk who are then selling at retail to the drug customers. And so what the Homeland Security Agency investigators did is they arrested one of these guys and rather than just busting him for unlicensed money transmitter, they took over his identity and basically acted as the serious Bitcoin conduit for a huge number of these online drug dealers and then just arrested them all.

Stewart Baker: [00:18:22] Pretty — you know it's going to be hard for people to get around that. Especially because you kind of have to deal with the sleazy side of the cryptocurrency if you're looking for people who will do this for you.

Nick Weaver: [00:18:38] Correct. You can't use Coinbase. You can't use any of these other services. So this is a nice robust mechanism that I assume they'll keep up because it's really effective.

Stewart Baker: [00:18:52] Sweet. Alright. Last topic. David, these topics are sort of opportunities to get comments from people on stories that are a little old on which they have special expertise. You wrote a piece for Lawfare about the NSA's mass destruction of data because they couldn't trust the numbers that they were getting in their metadata program from the carriers, and they couldn't figure out even how to go

back and take out the suspect numbers. And so they just threw away three years' worth of data. And in your closing paragraph you said well you know they can fix this going forward, they believe, but it shows this is a really complicated program. And complicated programs are hard to run without screw ups, and it's an unforgiving climate for screw ups. And maybe the juice isn't worth the squeeze. Do you want to elaborate a little on that, maybe give us the background on what went wrong and then why you wonder whether the juice is really worth the squeeze?

David Kris: [00:20:10] Sure. I do think that this whole experience shows how optimizing the balance between security and privacy — which Congress tried to do in the USA Freedom Act of 2015 — can generate so much complexity that you end up with significant threats to both security and privacy because the program is just too hard to operate. And that's what seems to have happened here. The USA Freedom Act of 2015 was a response to the disclosures in 2013 by Edward Snowden of the bulk metadata collection program that NSA had been running under the supervision of the FISA court for several years prior to that. The key features of that bulk collection program was that NSA would ingest huge amounts of call detail records — records of phone calls between one telephone number and another — and then contact chain through them and query them under special rules approved by the court. But NSA had all the raw data sitting in its data repositories and was doing the call chaining and connecting for the queries by itself. The key innovation, the key privacy-enhancing feature, of the USA Freedom Act was to leave the raw data with the telephone companies.

Stewart Baker: [00:21:38] And if I can stop you just there. I've put "privacy enhancing" in quotes. It was more about vindicating a particular and slightly idiosyncratic view of the Constitution which is that the government could never acquire this stuff without particularized suspicion. And that was never the Justice Department's view or the Court's view. But it was Congress's, and they said you're not allowed to have this data. You've got to leave it with the telecoms.

David Kris: [00:22:14] Look, Stewart, I don't think the USA Freedom Act was a statute enacted on a constitutional theory. I mean it's an interesting question I think after

Carpenter whether there's a constitutional issue, but it was a policy choice. And it was designed to just reduce the amount of data that the government was holding in raw form. The difficulty is that it made NSA engineer a much more technologically complicated system to do iterative queries across essentially a federated database environment using all of the providers separately, building pipes between them, and running queries across all of them in an iterative fashion. Just a lot more difficult to set up and manage that system. And what happened here is that it failed, and it failed apparently totally. And because NSA doesn't have the raw data, they apparently can't go back and clean it up. So instead they're just jettisoning everything, purging it all out, and the net result is we've been dark on this program for three years. It just didn't work. The juice and the squeeze comment that I made is just to sort of ask whether the government is going to try to renew this USA Freedom Act which will otherwise sunset at the end of 2019. When you set up a system like this that is this complicated and where you have the telephone companies apparently screwing up and sort of making a mess of things and NSA unable to fix it now, you do have to ask: is it worthwhile? How valuable is this program, and how much complexity can we tolerate? I don't know the answer to that question. We're going to find out. But I do think it is now serious question.

Stewart Baker: [00:24:05] Well they clearly have reconstituted the program. The question is whether having reconstituted it they're going to have a fight over reauthorizing it.

David Kris: [00:24:14] Right. Presumably reauthorization will cost them some political capital. If they push for it, they'll have a fight on their hands at least to some extent. We'll have to see how things look at the end of '19. But if they weigh and balance it, they may very well decide the fight here that they have to have to renew this statute just isn't worth it given the benefits that it's producing and the difficulties that they may have in implementing it.

Stewart Baker: [00:24:38] So how much do you think we've lost by destroying three years' worth of data? We still have the suspected terrorist numbers abroad, and we can go back and put them all under watch again and start collecting the social graph of

those terrorist numbers. So what we've lost is the social graph from two or three years ago or maybe even last week.

David Kris: [00:25:07] Right. I mean the way this program works is it picks a seed number as to which there's reasonable suspicion that it's being used for terrorism or by terrorists and then it goes out one hop and two hops into the numbers that are one, two degrees of separation from there. There are some ways to get at it through the 702 program, the other programs that they do abroad. And that I think is open question: what's the affirmative value here? The best description of the affirmative value of the bulk collection program, the predecessor to this, I thought came from Chris Inglis who described it sort of as a third layer of defense. You know the Velcro that you need on top of the belt and suspenders. And it is useful in that regard, but the question is: you know how useful is it given its other drawbacks?

Stewart Baker: [00:25:57] Alright.

David Kris: [00:25:58] I don't know [unintelligible], but we'll probably find out because the government's going to vote with its feet one way or the other.

Stewart Baker: [00:26:03] Yup. And indeed we got an inexplicable or difficult to explain tweet from the president in which he suggested he thought this was somehow tied to the Mueller investigation and that it was a disgrace that NSA had been collecting this or maybe the NSA was destroying this. Who knows?

Michael Hayden: [00:26:28] And an uncaredful reading of the tweet would have said it was content.

Stewart Baker: [00:26:32] Yeah. Yes. David?

David Kris: [00:26:36] Oh, I'm sorry. I just want to take credit for the president's about face because he did another reversal as he did with respect to the FISA amendments act where he was against it in the morning and for it in the afternoon. In the morning

here he was criticizing NSA because this was all part of the "witch hunt." I then responded to his tweet by pointing out that this program is only for terrorism. It's not for espionage or covert action or clandestine intelligence activities. So unless his "collusion" was of a different sort than we thought, he had nothing to worry about personally. And then in the afternoon he sent out a separate tweet praising the fine people at NSA, so I'd like to say there's a causation there.

Stewart Baker: [00:27:16] Sounds right to me, although God knows there are — there must be a million snowflakes in this country who believe they've been terrorized by the president. Okay. Thanks to David, to Nick, to Nate, to Paul. Let's get on to our interview with General Michael Hayden. So the general's new book is *The Assault on Intelligence: American National Security in an Age of Lies*. It's doing very well on Amazon. My first question is: you've already written one book, how come the second one and so soon after?

Michael Hayden: [00:27:59] It's so infectious!

Stewart Baker: [00:27:59] My joke about this is that writing books for authors is like having babies for women. You don't start on the second one until you've forgotten how painful the first was.

Michael Hayden: [00:28:10] Well this was a different kind of exercise. A memoir's a memoir. This was more topical, and frankly the memoir was a fairly narrow lane. It was you know intel; it was me. This was broader. It was a broader scope, and I actually did it because I wanted to. It was enjoyable. Stewart, it got me out of my lane. I talked to philosophers. I talked to historians. I talked to historians of philosophy. I talked to philosophers of history. I talked to a bunch of people in the back room of a bar in Pittsburgh. I talked to foreign journalists in the United States observing the United States. And so it was as much an education for me as for anyone. And believe me when I started writing I had no idea how it was going to end. Seriously. You know I sat about a year ago in my kitchen with a big bunch of butcher paper and little Post-It notes and wrote down thoughts and said, "Well that should come before that." And I kind of got it

into five or six categories which kind of became chapters that until I wrote chapter eight, which was the last chapter. I didn't know what chapter eight was going to be.

Stewart Baker: [00:29:34] Ok. Well it's...

Michael Hayden: [00:29:36] It was a journey, an exploration, personally. Yeah.

Stewart Baker: [00:29:40] Well I think of it as a little like Jimmy Carter deciding to run for president. He's sitting down there in Georgia as governor, and all these candidates for the Democratic nomination are coming through town meeting with him. And after he's met about five of them, he says, "Hell, I can do this!"

Michael Hayden: [00:29:57] Well it wasn't quite that, but you know there's a lot going on and there are a lot of our tribe involved with it. And so I just felt as if I (A) wanted to understand it better and then (B) maybe try to express that understanding.

Stewart Baker: [00:30:14] So let's start with the Russians 'cause...

Michael Hayden: [00:30:19] Which is good. I'm going to do that. But you know after going through this journey the Russians are the top 15% of our problem. The base 85% is us.

Stewart Baker: [00:30:30] Yes, I agree with you, and we'll get to that. It's just that we're not going to agree on the bottom half of the cake.

Stewart Baker: [00:30:39] So the Russians are obviously engaged in information warfare. And part of it obviously is they're starting with divisions that already exist.

Michael Hayden: [00:30:49] Right.

Stewart Baker: [00:30:50] What do you think we should be doing about this though? This is not a state of affairs that I'm inclined to think we should tolerate.

Michael Hayden: [00:30:58] Right.

Stewart Baker: [00:30:58] But the question then is...

Michael Hayden: [00:30:59] ... and then what happens? Yeah. So there and this is chapter eight. So number one there are some technical things that we can do. I mean we have it within our technical ability to an adequate level of confidence. I listened to the last conversation about reasonable articulable suspicion and so on to a certain level of confidence that that's a human being and that's not a human being when it comes to posts and Twitter and so on. And so I do think there can be some filtering out so that we aren't tickled by botnets. We are... Fair enough.

Stewart Baker: [00:31:32] We at least know this is a Russian trying to get our goat.

Michael Hayden: [00:31:35] Exactly right. So that's within our ability. I think it's also within our ability — another thing I discovered particularly talking to a lot of folks — is that you and I and probably a generation or two behind us have all been socialized to get our news in digestible doses from curated sources. And none of those conditions pertain. And so we do need a serious education effort as to how then does one handle a tsunami of information from a variety of sources whose validation we can't be sure of. And there are projects out there to do kind of a Rotten Tomatoes look at news sites. Actually one by Steve Brill who's got some credentials in this area called NewsGuard that actually grades a site, not a story, but a site as to what its history has been, its transparency, of what's known and not known about it.

Stewart Baker: [00:32:35] I've got to say Steve Brill is remarkable in his ability first to diagnose what he thinks is a social problem and then to attract investors for a business that will address it. He's been doing that since he started Legal Times.

Michael Hayden: [00:32:53] So my journey on this, alright, is on the Bill Maher show. And so I'm there being interviewed — not for the book, although you know the book is

being pushed — and then Maher says to me — talking about fake news and so on — "Hey, General, you got this kind of interesting story here about Rotten Tomatoes." And I quickly did the explanation as to what Rotten Tomatoes is and how it works, and I said, "Hey look I've gone to movies with bad ratings, but at least I knew what I was getting into." And I got the adequate laugh and so on. Before I got off stage my iPhone was buzzing with emails, some of them from Steve Brill, of course...

Stewart Baker: [00:33:30] He's a very persistent man!

Michael Hayden: [00:33:30] "Hey I've got something you might find useful!" So that's another approach. A third approach is to extend to social media some of the controls, prohibitions we have with regard to broadcast media when it comes to political advertising. Alright so you can nibble away at that there. But I say clearly in the book, Stewart, that you know that's taking an aspirin. That's not a cure.

Stewart Baker: [00:33:55] Right.

Michael Hayden: [00:33:55] And the cure is in the base 85%. As I think I say in the book, they try this crap on Norway. It doesn't work because the Norwegians are different.

Stewart Baker: [00:34:04] Well they have an elite they still trust. And you know I'll be candid. I would no more believe *The New York Times's* choice of framing for 60% of the stories that they write than I would accept it from you know Vladimir Putin...

Michael Hayden: [00:34:24] ... or Breitbart.

Stewart Baker: [00:34:25] Yes exactly. They have an agenda. It has gotten — they've gotten worse about pushing it, not better. They are less trustworthy than they used to be on this. And so if the solution is we should just go back to trusting *The New York Times* and Walter Cronkite, we ain't going to get there.

Michael Hayden: [00:34:41] No, I didn't say we need to go back to curated news. What I said was we have to be taught how to handle uncurated news.

Stewart Baker: [00:34:50] I think that's fair, and it is. The trick is finding people whose prejudices we understand and largely agree with and whom we still trust to tell the truth.

Michael Hayden: [00:35:03] Yeah look, there is being anchored and there's being unanchored, and there's a whole big area in between. And so I get your suspicion of *The Times*. I work for CNN. Under contract. Cards face up. And my complaint with them is not so much truth/untruth. My concern is fixation/not fixation.

Stewart Baker: [00:35:27] Yeah there's something to that.

Michael Hayden: [00:35:29] Okay. I mean it is. I mean they seem consumed. And you know when I go on there I answer the questions I'm asked.

Stewart Baker: [00:35:35] Yup.

Michael Hayden: [00:35:36] And so again to me it's not so much the prejudgment in the literal meaning of the word. It's that the news gets — it all gravitates to the personality of the president.

Stewart Baker: [00:35:51] Right. Yes. And I think it is *The Onion*... No it was some Christian satire group that talked about CNN I think buying an industrial-size dryer so they could spin the news more efficiently. And remarkably that was taken down by some social medias as having been a provably false story and it's fake news and shouldn't be on their systems.

Michael Hayden: [00:36:20] Well again back — you know if you go across the three 7x24s...

Stewart Baker: [00:36:25] Right.

Michael Hayden: [00:36:25] Okay. We can make the case for each one of them in terms of focus...

Stewart Baker: [00:36:30] Yes, exactly.

Michael Hayden: [00:36:31] ... maybe kind.

Stewart Baker: [00:36:33] I'm not going to use any time to defend other people's choices for the story either. So...

Michael Hayden: [00:36:41] Let me go on because you do ask. Let me give you a sense as to how I think this works. And I tell this story in the book, and I actually researched it carefully — and you know I have exchanged thoughts prior to our meeting — has to do with take-a-knee. Right? And the take-a-knee story — you know we're not arguing the merits, okay? Although I have an argument... But we're just talking about how the story evolved. So the president gives a speech on a Friday night in Huntsville, Alabama, [and] does the take-a-knee thing that fundamentally creates a division that we didn't need as a society. Russian bots are alive before he gets back to the East coast, and they're playing both ends. Tastes great, less filling. It's patriotic. It's free speech. The alt-right media grabs it. And really drives it. And they're getting incredible echoes between Russian bots and the alt-right media.

Stewart Baker: [00:37:31] Right.

Michael Hayden: [00:37:32] And by the way this thing is already in the American vernacular. The Russians don't have to create the narrative.

Stewart Baker: [00:37:39] That's right.

Michael Hayden: [00:37:40] And so then you've got this echo chamber between the alt-right media and Russian bots. The alt-right takes it pretty racial pretty fast, and I spin

that out a couple more rounds in the book because it actually directly hits my hometown team, the Steelers. And then Fox picks it up, and all the non-news portions of Fox — which is a pretty big fraction — gets fixated on this story. And the president then tweets his approval as he watches Fox and Friends. And so we have this not a virtuous cycle, but it's certainly a cycle. And I point out in the book that's not collusion. That's convergence. Everybody played it for their own reasons: the president to feed the base, the Russians to mess with our heads, the alt-right because they're conspiratorially, and Fox to feed the demographic. But we end up a more divided society than we otherwise would be, and then I hit the punch line. You know this is pre bye weekends, so all 32 teams are playing the Sunday before the president talked. That's 1,750 American athletes, and all but six stood at attention. Not a national crisis. So back to what do we do about this: quit shooting ourselves.

Stewart Baker: [00:38:51] Or quit take-a-knees.

Michael Hayden: [00:38:54] I get the issue. Okay? And I actually wrote — you know there's a backstory to everything. I write for *The Hill*, alright, and they call me on Monday after the Friday after the Sunday.

Stewart Baker: [00:39:08] Right.

Michael Hayden: [00:39:08] Okay? And says, "Hey you're a football guy. You're a national security guy. This is a story made in Heaven. Write it up, Hayden." And I go, "Eh." I actually pushed back pretty hard. I actually called the Steelers...

Stewart Baker: [00:39:20] Right.

Michael Hayden: [00:39:20] ... because of [the] call they became focused on this because of Alejandro Villanueva, the blindside tackle, West Point graduate, and so on, whom I've talked to. I mean I told you this journey for the book was really interesting. And so I go home. I was teaching.

Stewart Baker: [00:39:34] I'm guessing you worked pretty hard to make that relevant to your book because talking to him would be an exciting tale.

Michael Hayden: [00:39:41] No. Actually I was called in by the Steelers afterwards. Okay? I sat there with the Steeler leadership and the Pittsburgh VFW, the Pittsburgh American Legion, Rocky Bleier. Okay? And you know so I mean like I said the book — I enjoyed the research. If you enjoy reading it that's you know that's even a plus. But where was I?

Stewart Baker: [00:40:04] Okay. So you were talking about using divisions, and you were I think a little unfairly blaming the president for expressing a view on a topic that everybody was expressing a view on.

Michael Hayden: [00:40:18] Yeah. And you and I exchanged some notes on Friday about isn't he entitled to his own view.

Stewart Baker: [00:40:24] Yeah.

Michael Hayden: [00:40:24] And the answer is no. He's the president. Harry Truman tells a wonderful story about himself. It's in Merle Miller's biography of Truman in which Truman is now president. He's working in the White House. Some member of the personal staff doesn't do something quite up to snuff, and he barks out at him as if he were Harry Truman from Kansas City. And he realizes he's just shattered another human being because he's no longer Harry Truman from Kansas City.

Stewart Baker: [00:40:52] Would Harry Truman really believe that? Yes.

Michael Hayden: [00:40:54] He's the President of the United States.

Stewart Baker: [00:40:56] Harry Truman was — and it was admirable. He said, "I'm just this guy from Missouri, but the president has to do certain things."

Michael Hayden: [00:41:04] Right! That's... You got it. That's the issue. And so, no, he's not entitled to do that because he cannot divorce himself from the presidency the same way he sends out this stupid tweet on the USA Freedom Act collection out at NSA.

Stewart Baker: [00:41:22] He's popping off. He's watching TV, and he pops off.

Michael Hayden: [00:41:25] We deserve better. That's my argument, Stewart.

Stewart Baker: [00:41:27] Okay. But you know you only get one president. He was elected.

Michael Hayden: [00:41:34] Oh and by the way unlike some of our colleagues, I do not challenge his legitimacy as President of the United States. You know some of those guys do!

Stewart Baker: [00:41:45] I know. So let me get to the legitimacy thing because this was a fraught transition.

Michael Hayden: [00:41:53] Yeah. It was.

Stewart Baker: [00:41:53] It was fraught in part by a building investigation that had built all the way through the campaign in which large parts of the Justice Department, the FBI thought there was evidence of true Russian subversion, subornation of the Trump campaign.

Michael Hayden: [00:42:18] You got a severable thing here. You've got the case with regard to Russian intervention, and I think you and I totally agree on that one. And then the follow on question is: did they have any help?

Stewart Baker: [00:42:31] Yes. And it's clear that the administration believed — and with some justification — that the Russians were going beyond just a few random

tweets or even releases of documents and trying to make it personal, trying to get close to members of the campaign. And they launched an investigation, and they did a lot of stuff — some of it probably unprecedented in terms of [unintelligible]...

Michael Hayden: [00:43:02] Yeah, I get it. And I've got my complaints about what Director Comey did a couple of times. But I try to be soft. You know Jim and I have a history, not all of it great. But he's always been an honorable guy, you know, trying to do the right thing. And he was truly in uncharted space.

Stewart Baker: [00:43:21] He was...

Michael Hayden: [00:43:21] I think he made decisions I think — I hope — I would not have made. But I try to try to impose that additional degree of understanding that he's making it up.

Stewart Baker: [00:43:33] I think... I'm actually putting aside the whole discussion about Hillary Clinton's emails and looking at the question of the Trump campaign and their relationship to the Russians. And there my question I guess is: what could he have done differently? Or maybe I'll put it to you this way. Let's suppose it's 2020, and the president has continued to be cozy with Vladimir Putin and to stick it to the Chinese. The Chinese really want Kamala Harris to win. And they start working to contact her campaign to open up Trump correspondence and leak it. And the FBI is asked, "What are you going to do about this indication that the Harris campaign is being infiltrated by Chinese actors?"

Michael Hayden: [00:44:35] By the way. We've seen a history of this in Canada by the way with members of parliament. You know it's been several years now, but we...

Stewart Baker: [00:44:43] No, clearly they do it because it works. But at the same time, as we all know, that can go really bad for the national security investigators.

Michael Hayden: [00:44:55] So again trying to think this through, which you have to do when you write it down. Right? I compare it to 9/11. Bear with me. I know all the differences. But it was an attack from an unexpected direction against a previously unknown weakness. And the weakness — somewhat like 9/11 — was part and parcel of our strengths of what it is we viewed our essence as a society. So this is really hard. Which is why in my case of particulars about how I underappreciate this president. One of them is he hasn't said, "Huddle up." He hasn't. He has no... We went extraordinary after 9/11. We just talked about [Section] 215 which became this and so on. All of it controversial — most of it controversial — but at least we realized unexpected direction, previously unappreciated weakness. You[‘ve] got to restructure. You've got to go extraordinary: extraordinary structures, people, resources, law, policy. And we only go extraordinary when the president says, as I said, "Huddle up." And Donald Trump cannot call the huddle. He has not called the huddle.

Stewart Baker: [00:46:11] He's not interested in painting. He is not...

Michael Hayden: [00:46:13] He is incapable of calling the huddle.

Stewart Baker: [00:46:16] To give him his due, he thinks that this is an attack on his legitimacy. And for large parts of the body politic including significant parts of the federal workforce it is.

Michael Hayden: [00:46:28] So I again tried to describe this in the book. There is actually some sensitivity in the book. It's not Jim Comey's book. Okay?

Stewart Baker: [00:46:40] It's not Jim Comey's tweets either.

Michael Hayden: [00:46:41] Yeah. Right. Right. Alright. I do try to avoid the — by the way back to working for CNN. I've made it very clear I will comment on anything the president says or does. But don't ask me to characterize the president.

Stewart Baker: [00:46:52] Yeah.

Michael Hayden: [00:46:53] Okay. Don't make me be a judge of the man. So he owes it to the office. He owes it to the nation that he's got to get beyond this. And so I do talk about this perfect storm — that's how I describe it in the book. Number one I spent a lot of ink describing how we have to adjust to every president. Okay?

Stewart Baker: [00:47:18] Every single president has come in and done at least one thing that everybody said, "Oh you can never do that in Washington." And they do it, and what do you know? It either works, or at least they get away with it.

Michael Hayden: [00:47:30] So I got a lot of anecdotes about my life briefing presidents. And I actually spent chapter two — alright — is all about President Obama so no one is under the impression that we left the Garden of Eden on the 20th of January [2017]. And so we always have to adjust to the president...

Stewart Baker: [00:47:47] We might have left the faculty lounge.

Michael Hayden: [00:47:50] He said that, folks! Not me! Yeah and that's actually my complaint — that you know are we ever going to stop meeting on this?

Stewart Baker: [00:47:58] Right. That was one of the best lines in the book where you said people coming to these endless meetings and finally somebody from the intelligence community said at least in the Bush administration the fake meetings started on time.

Michael Hayden: [00:48:12] Right. So we always knew this was going to be a higher than average adjustment because of the way God made Donald Trump: instinctive, intuitive, not reflective, gives weight to arguments based on who told him rather than what the evidentiary trail was. Okay. It was always going to be hard. I say in the book, Stewart, it is a national tragedy that the first time we had to try to close that gap was over an issue that some of America — and I don't think it's the people in the room with him on 6 January — but some of America was trying to use to delegitimize his selection

as President of the United States. I cannot imagine anything being more harmful to the relationship.

Stewart Baker: [00:48:55] Right. So let's say you're back at CIA and it is 2020 and all the shoes are on the other feet. And the question is: what are we going to do about a Chinese effort to promote one party over the other? But this time it's against Donald Trump, not for him, so anything he does is going to be at a minimum suspect.

Michael Hayden: [00:49:25] I got it. And so back to my understanding for Jim Comey in uncharted waters. I think in retrospect we all know the Obama team went too late, too light on all and everything having to do with what the Russians...

Stewart Baker: [00:49:39] No one would have believed them.

Michael Hayden: [00:49:41] I get all the reasons. But in retrospect, "Oh man that was a bad choice." And so we have got to build up a better political culture that allows actions like this to be taken without them being injected immediately into zero-sum political gamesmanship. And to throw blame around, I mean Mitch McConnell had a shot.

Stewart Baker: [00:50:03] Yeah. No. That's right.

Michael Hayden: [00:50:05] And he said no.

Stewart Baker: [00:50:06] I'm guessing that in 2020 Chuck Schumer is going to have the same view: "You're not going to trash our candidate by saying she's the Chinese candidate."

Michael Hayden: [00:50:14] So it gets me back to the 85% problem: it's us, not them.

Stewart Baker: [00:50:19] Yeah.

Michael Hayden: [00:50:20] And you know I didn't put this in the book but it's how I explain the book when I'm you know out at Politics and Prose. I say it's a three-layer cake. And the biggest layer is us, broad political culture. And then the second layer, smaller but important, is the administration. And then the third layer, smaller still but not trivial, are the Russians. But the basic layer is us. And here I talked to Ed Luce of the *Financial Times*. I listened to David Brooks. I watched his observations. I talked to a philosopher of the Enlightenment. And I try to track our movement as a people into this post-truth culture [that] is basing decision making less on evidence and data and facts and more on feeling, preference, emotion, tribe, loyalty, and grievance. And that's what I saw amongst a lot of people I know in that...

Stewart Baker: [00:51:14] Oh yeah they feel they've been dismissed and betrayed and you know talked down to, sold out, and then called racists.

Michael Hayden: [00:51:24] Yeah agreed. And frankly a little bit of the style of the 44th president obviously contributed to that. So I was in the back room in Pittsburgh talking to folks. Here's an anecdote that kind of captures what I'm trying to describe. I thought, "Oh come on, give me a break. How many people really think Barack Obama wiretapped Trump Tower?" Now I know you've got some thoughts on this, but hear me out. And you know two thirds of the hands in the room shot up...

Stewart Baker: [00:51:50] Yeah, because they don't trust him.

Michael Hayden: [00:51:51] ... and I said, "Oh for God's sake. I used to run NSA. I know how this works. The plumbing doesn't work that way. Why in God's name do you believe that?" One person in the front to general nods, not unanimous but general nods of approval, puts hers hands out, shrugs her shoulders, and goes, "Obama!"

Stewart Baker: [00:52:11] Yeah.

Michael Hayden: [00:52:12] Stewart, QED!

Stewart Baker: [00:52:14] Yeah.

Michael Hayden: [00:52:14] It's been proven!

Stewart Baker: [00:52:18] It's too bad there's nobody now that people will accept is an authority who can say you might believe this but it isn't true. It's very hard. I do think the constant refrain that he is lying about wiretapping Trump Tower is you know given how approximate — his gross motor skills are a lot better than his fine motor skills. And there was an investigation...

Michael Hayden: [00:52:47] But you know what I mean the facts of the case: the only tap is against one guy. It wasn't when he was part of the administration, and everything else — and you know this — and everything else is incidental collection.

Stewart Baker: [00:52:59] [unintelligible]

Michael Hayden: [00:53:05] ... every presidential transition because you want to know what these foreign governments are saying about your new guy.

Stewart Baker: [00:53:12] So let me...

Michael Hayden: [00:53:12] By the way, who should really want to know? The new guy!

Stewart Baker: [00:53:16] Yeah. And of course he should be. But there is one aspect of that that really bothers me — and I think bothers people who otherwise don't have the time of day for Donald Trump — and that is that wiretap, incidental collection though it was...

Michael Hayden: [00:53:36] Okay, so we are talking about the incidental collection on foreign targets.

Stewart Baker: [00:53:39] Right. Presumably of the Russian ambassador.

Michael Hayden: [00:53:43] Or others. And would you agree that the overwhelming proportion of the US material was about rather than to-or-from?

Stewart Baker: [00:53:54] Yeah. I'm sure that was the case. And a lot of that stuff that was unmasked should have been unmasked, etc., etc. And there is reason to be cautious about unmasking, and that's why we have unmasking rules. But I have yet to see anything from the House Committee that says here is a suspect unmasking, even though there were people who plausibly said — we think they learned that by reading wiretaps of the Israelis — they could learn a lot about the Republican strategy on Israel.

Michael Hayden: [00:54:28] You know — you know because of your life history — you know what a dilemma that creates for that analyst out at NSA.

Stewart Baker: [00:54:36] Oh no, it's miserable.

Michael Hayden: [00:54:38] And by the way, it doesn't show up in the intelligence for the third party to read until that analyst at NSA goes through this agony of what it is can I legitimately report.

Stewart Baker: [00:54:50] Right. So all of that is true. The biggest problem that I had was somebody — and if I were Donald Trump I would suspect the intelligence community — used the wiretap that had Mike Flynn on it basically to destroy him.

Michael Hayden: [00:55:14] So that actually is an unarguable sin. I'm not as reflexive saying it was our tribe who leaked it given all the knife fighting. I mean the original White House had three separate groups you know: the traditionalist, the populist, and what I would call the "religious warriors" — the Bannon group. And you know the long knives were out. So it's plausible — and that's as strong a word as I can use — that it wasn't the intel guys. But you know I know Mike. Mike doesn't deserve this. I mean he would not have been my first choice for national security adviser. But you know all I've allowed

myself to say is he's done wonderful things for America. He deserves to get on with his life and live it with his family. And so that was really bad.

Stewart Baker: [00:56:05] So I want — but I want to say it was really bad and no one is asking the question: what do we do? This was a political use of NSA's capabilities that we have not seen since the '70s — maybe not even then. To take that information and use it to win a political battle and destroy a career...

Michael Hayden: [00:56:27] ... either from the "deep state" against the new team — there are air quotes out here around those words — or within the new team as they struggle for dominance because you know this was a chaotic transition. Actually it wasn't a transition. It was just chaos.

Stewart Baker: [00:56:45] Yes. It was. But I will say I've read John Brennan's tweets about and to the president, and they are scathing.

Michael Hayden: [00:56:53] This is John now, present tense?

Stewart Baker: [00:56:58] Yes. The stuff he's writing now which probably reflects views that he had before he left government, maybe more confirmed now.

Michael Hayden: [00:57:07] So you and I touched on this just a second ago. So yeah I'm under contract to CNN. You brought this up, and I wanted to come back to it. Michael Morrell has a little buyer's remorse. He's actually written that he underappreciated how much some of the things he was saying and doing during the campaign might blow back on the intelligence community writ large should Donald Trump win. Okay? I've pushed back against Michael's argument along lines of "Michael, you and I've been on TV for six years before that happened." And that just happened to be the set of questions we were now getting, and we were answering the questions to the best of our ability. Now that said, Stewart, going forward — and you know we're all imperfect human beings, but I try hard — going forward I view my only legitimacy...

Stewart Baker: [00:58:00] ... to talk about the intelligence...

Michael Hayden: [00:58:02] ... is to be the fact witness. So apropos the earlier discussion let me tell you about unmasking. Let me show you how this works. Now I cannot read Susan Rice's heart. And any power — any power — can be abused, but on the surface this looks normal to someone like me. Let me explain why. And you just I mean — you know you can pick up anybody on North Capitol Street to go into CNN and shoot off an opinion.

Stewart Baker: [00:58:29] I think they've picked me up on this block!

Michael Hayden: [00:58:30] So again I think the legitimacy of folks like John [Brennan] and Jim [Comey] and me and Michael [Morrell] and John McLaughlin and Phil Mudd is to — well we kind of know how this works. Let me give you our impression.

Stewart Baker: [00:58:45] Look, it was a surprise to everybody. Trump's strength was that he pissed off everybody who'd been making policy for 25 years in Washington. And that's why people voted for him. And so it's not a surprise that people from Bush 43 or even Bush 41 weren't comfortable with him.

Michael Hayden: [00:59:11] Yeah, but it's more. I mean...

Stewart Baker: [00:59:18] There's a personal style issue.

Michael Hayden: [00:59:20] I mean it's — the man is a bit post-truth himself. And by the way instincts are sometimes okay. After all his instincts got him elected president when the data suggested it wouldn't happen. But he doesn't — again I spent some time, and I try to write very carefully in the book, Stewart, and I simply say you know putting aside the-lie-don't-lie thing, I'm just telling you that very often his departure point for what he says or does not seem to be a view of objective reality. It's something else.

Stewart Baker: [00:59:56] I'm going to recommend a book to you. Conrad Black's book. He was a very wealthy man for a while, and then he was totally disgraced, went to jail, has come back as a commentator — good commentator. He's written a book about Trump, basically a biography. And the part that is really new and insightful is the early stuff where he talks about Trump's career in the '70s and '80s. And basically Trump became a very wealthy man by saying things that weren't exactly true until they became — he made them true by saying them.

Michael Hayden: [01:00:36] He's a promoter.

Stewart Baker: [01:00:37] Yeah. Stone soup.

Michael Hayden: [01:00:38] You know Fareed Zakaria's famous line: "He's a bullshitter. He's not a liar." But he is a promoter, and we're seeing it play out, Stewart, in ways that scare me because the event in Singapore was like a prize fight. I mean it was the image that was created. And now you[ve] got poor Mike Pompeo trying to shovel some reality in behind the image. And I fear — although we've let the air out of the balloon now, and I think the air will be out of the balloon for seven or eight months — having engaged at the head-of-state level, which is not normal, there are no off-ramps when — that's the word I'm using — this goes south when the North [Korea] doesn't do what he thinks they said they're going to do.

Stewart Baker: [01:01:33] Well they're already talking about gangsterism.

Michael Hayden: [01:01:34] There is great danger here that it is the promotion — oh for God's sake. We're interrupting live...

Stewart Baker: [01:01:42] They should have given it a name. It should have been the Ring Ding Dinga in Singapore.

Michael Hayden: [01:01:46] Exactly, like the Thrilla in Manila. And we're going to interrupt our regular broadcast tonight, folks, to tell you who the new Supreme Court

justice is. And I get that times change, and he's a master of Twitter and he communicated with the population in a way no other candidate has ever done that. But now that you're president, it's kinda back to: no, you don't get to criticize athletes like you're the guy at the end of the bar — and not the nice one either, the other one. You don't get to do that as the president because it carries — well it carries me and you. That's what worries me.

Stewart Baker: [01:02:24] We're going to live with the consequences. Alright, well General Michael Hayden your book is ...

Michael Hayden: [01:02:33] *The Assault on Intelligence*.

Stewart Baker: [01:02:33] Yes! I'm sorry! I lost it. *The Assault on Intelligence*:...

Michael Hayden: [01:02:38] ... *American National Security in an Age of Lies*.

Stewart Baker: [01:02:41] Okay, I apologize. I lost the title.

Michael Hayden: [01:02:46] But I know you've read it.

Stewart Baker: [01:02:46] I have read it. And as I like to say to people why they should listen to this podcast if they don't agree with me, you can take the podcast to the gym and you don't even have to work out to get your heart rate up over 100. So yes I had a lot of fun liberally commenting on your book. But it's a great conversation, and it goes a long way toward showing that it is possible to disagree without coming to blows or opening a door for Putin. Thanks to Paul Rosenzweig, to David Kris, to Nate Jones, and Nick Weaver for joining us. This has been Episode 225 of The Cyberlaw Podcast brought to you by Steptoe & Johnson. Mike, do you have any upcoming events that you want to talk about?

Michael Hayden: [01:03:38] No, actually we've done a lot of things for the book now. I just recommend folks have an interest in this go ahead and pick it up. It's a point of view. But again it's one where I did some exploration, and I just try to share it.

Stewart Baker: [01:03:53] You did at least as good a job writing this book as Jimmy Carter did as president — probably better. I was in the Carter administration. To our guests if you send us people that should be on the show and they come on the show we will send you a coveted Cyberlaw Podcast mug. We have Mike Hayden's just sitting in the corner here.

Michael Hayden: [01:04:16] Alright!

Stewart Baker: [01:04:17] And just send those suggestions to cyberlawpodcast@steptoe.com. We are tweeting out and using LinkedIn and Facebook to preannounce the stories we're thinking about talking about. So you get a chance to comment and in some cases maybe even provide the best line of the show, as Tony Rutkowski did with the "neocoms" suggestion. So watch for @StewartBaker on Twitter, LinkedIn, and Facebook. If you want to leave us a voicemail: 202-862-5785. And please if you do any of those things, before you do that go rate us on iTunes or Google Play or Stitcher because that's how other people find us. Upcoming this month because we're taking August off: Bobby Chesney and Danielle Citron are going to provide a discussion of sex and cybersecurity as we get into the question of whether you can create plausible fake videos of famous people engaged in a variety of pornographic activities and what that means for Vladimir Putin's next act. Woodrow Hartzog has a new book on privacy. We'll hear from him. And Noah Phillips, brand new FTC commissioner, will come on the show and talk about where the FTC is likely to take cybersecurity, privacy, and negotiations with the EU over the Safe Harbor/Privacy Shield discussion. And finally show credits: Laurie Paul and Christie Jorge are our producers; Michael Beaver is our intern — and today is also handling the sound, so if you don't like the sound, send your comments to Michael Beaver; and I'm Stewart Baker, your host. We hope you're going to join us for future episodes as we once again provide insights into the latest events in technology, security, privacy, and government.

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