

PCLOB MEMBER RACHEL BRAND ASKED NSA GENERAL COUNSEL TO HELP HER DISSENT FROM PCLOB

Let me say straight out: Privacy and Civil Liberties Oversight Board member Rachel Brand is no slouch. She's very smart and very accomplished.

All that said, I am rather intrigued by the way she consulted NSA General Counsel Raj De several times – as illustrated by these emails Jason Leopold liberated from PCLOB – as she worked on her dissent to the Democratic PCLOB members' conclusion that the Section 215 dragnet is illegal.

On January 6, Brand emailed De. "Do you have a couple minutes to talk about a PCLOB matter today or tomorrow?" They scheduled some time to talk at midday the next day – though a request from Keith Alexander appears to have forced De to delay. Nevertheless, by 1:30 on January 7, it appears De and Brand spoke, because De forwarded two things: I Con the Record's press release announcing the FISA Court had reauthorized the dragnet even after Judge Richard Leon ruled it unconstitutional (De makes no mention in his email, but the order had considered Leon's ruling before reauthorizing the program), and the GPO transcript of Robert Mueller's claim in a June 2013 House Judiciary Committee hearing that the dragnet would have prevented 9/11.

Ten days later, on January 17, Brand was emailing De again, after having seen each other that morning (that was the morning President Obama announced his own reforms to the dragnet, so it may have been in that context). She sent NSA's General Counsel a paragraph, with one sentence highlighted, asking if it was accurate.

He responded with “some suggestions for accuracy for your consideration ... Feel free to give a call if you want to discuss, or would like more detail.”

Then, over that weekend, Brand and De exchanged the following emails:

Saturday, January 18, 12:31: Brand sends “the current draft of my separate statement” stating she wants “to be sure there is nothing factually or legally inaccurate in it;” she says it is currently 5 pages and tells De she needs to give PCLOB Chair David Medine the final by Sunday night

Saturday, January 18, 2:11: De responds, “happy to”

Sunday, January 19, 10:51: De responds, saying, “not that you need or want my validation, but for what’s [sic] it is worth it really reads quite well.” De then provides 3 “additional factual details” which “might fit in if you wanted to use them;” those bullets are redacted

Sunday, January 19, 3:47: Brand replies, stating that Beth (Elisebeth Collins Cook, the other Republican on PCLOB) “explicitly makes the first two in her separate statement” and that she’s “trying to keep this short, so have to forego making every available point”

Four days later, PCLOB would officially release the finalized version of the Section 215 report along with Brand’s and Cook’s dissents (it had been released to select journalists the night before).

Given the redactions and withholdings, we can’t tell how much influence NSA’s General Counsel had over Brand’s dissent. The draft Brand sent De was the only document entirely withheld (on deliberative grounds). It did

expand over the course of the weekend, from the 5 pages she sent him to the 6 pages in her final dissent.

She did cite the Mueller testimony De had sent on January 7, as well as several other sources falsely claiming that the dragnet would have changed 9/11 (see footnote 5). And she mentioned the earlier judicial opinions (see footnote 2), but did not focus on Judge Hogan's January 3 reauthorization of the program (the other detail De sent after the first exchange).

But we don't know whether Brand incorporated De's last bullet as part of the page that got added in the last hours of her drafting work.

Several things to keep in mind as you see how closely Brand worked with the primary Agency she was supposed to be overseeing:

First, PCLOB had very few staffers at that point, so I can't fault the Board Members from trying to get research work wherever they could get it (though Brand appears to have been working with DOJ detailee Peter Winn on the statement as well).

Moreover, it's not clear Brand will do anything while serving on PCLOB except moderate more reformist views of her colleagues. She served as DOJ's Assistant Attorney General for Legal Policy when it implemented the phone dragnet; there was zero chance she was going to oppose a program she gave legal sanction to in 2006.

Though that does raise questions about why she would need De's review on these issues; she, more than any other PCLOB member, should know these issues cold.

Ultimately, though, this simply confirms what we already knew. Brand (and with her, Cook, who used her Wilmer Hale email to discuss PCLOB matters with people like National Security Division Assistant Attorney General John Carlin and Homeland Security Czar Lisa Monaco directly) is working closely with the national security officials she has been appointed to oversee.

Surely that happens all the time in DC; I'm sure Mike Rogers' emails to Raj De go far further in conspiring to undercut any criticism of the dragnet.

But given that PCL0B was created to give an independent review of these issues, Brand's close collaboration with the Agency she was supposed to be reviewing is worth noting.