THE SESSIONS NOMINATION AND THE "EMERGENCY EXCEPTION"

Donald Trump will nominate Jefferson Beauregard Sessions III to be Attorney General.

Most of the uproar over the appointment has, justifiably, focused on the fact that Sessions is such a racist he was denied confirmation to be a District Court Judge in the 1980s. We will also learn, going forward, about how deeply embedded in Alabama's unique kind of corruption Sessions is.

But something more recent is as alarming, albeit for different reasons.

In June, Sessions proposed an amendment to ECPA reform that would mandate providers turn over communications content if a government official declared that it was an emergency.

> (1) IN GENERAL.—A provider of electronic communication service or remote computing service shall disclose to a governmental entity a wire or electronic communication (including the contents of the communication) and a record or other information pertaining to a subscriber or customer if a representative of the governmental entity reasonably certifies under penalty of perjury that an emergency involving the danger of death or serious physical injury requires disclosure without delay.

As Al Gidari explained in a post on this provision, providers already can, at their discretion, turn over such communications in case of an emergency.

> For the last 15 years, providers have routinely assisted law enforcement in emergency cases by voluntarily disclosing stored content and transactional information as permitted by section 2702 (b)(8) and (c)(4) of Title 18. Providers recently began including data about emergency disclosures in their transparency reports and the data is illuminating. For example, for the period January to June 2015, Google reports that it received 236 requests affecting 351 user accounts and that it produced data in 69% of the cases. For July to December 2015, Microsoft reports that it received 146 requests affecting 226 users and that it produced content in 8% of the cases, transactional information in 54% of the cases and that it rejected about 20% of the requests. For the same period, Facebook reports that it received 855 requests affecting 1223 users and that it produced some data in response in 74% of the cases. Traditional residential and wireless phone companies receive orders of magnitude more emergency requests. AT&T, for example, reports receiving 56,359 requests affecting 62,829 users. Verizon reports getting approximately 50,000 requests from law enforcement each year.

This amendment would have eliminated that discretionary review, which – as Gidari went on to explain – often serves to weed out requests for which there isn't really an emergency or in which authorities are just fishing to further an investigation.

> Remember, in an emergency, there is no court oversight or legal process in advance of the disclosure. For over 15 years, Congress correctly has relied on providers to make a good faith determination that there is an emergency

> that requires disclosure *before legal process can be obtained*. Providers have procedures and trained personnel to winnow out the non-emergency cases and to deal with some law enforcement agencies for whom the term “emergency” is an elastic concept and its definition expansive.
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> Part of the problem, and the temptation, is that there is no *nunc pro tunc* court order or oversight for emergency requests or disclosures. Law enforcement does not have to show a court after the fact that the disclosure was warranted at the time; indeed, no one may ever know about the request or disclosure at all if it doesn’t result in a criminal proceeding where the evidence is introduced at trial. In wiretaps and pen register emergencies, the law requires providers to cut off continued disclosure if law enforcement hasn’t applied for an order within 48 hours. But if disclosure were mandatory for stored content, all of a user’s content would be out the door and no court would ever be the wiser. At least today, under the voluntary disclosure rules, providers stand in the way of excessive or non-emergency disclosures.
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> A very common experience among providers when the factual basis of an emergency request is questioned is that the requesting agency simply withdraws the request, never to be heard from again. This suggests that to some, emergency requests are viewed as shortcuts or pretexts for expediting an investigation. In other cases when questioned, agents withdraw the emergency request and return with proper legal process in hand shortly thereafter, which suggests it was no emergency at all but rather an inconvenience to procure process. In

> still other cases, some agents refuse to reveal the circumstances giving rise to the putative emergency.

In other words, if this amendment had passed, it would have created a black hole of surveillance, in which authorities could obtain content simply by declaring an emergency (remember, from 2002 until 2006, there was a highly abusive FBI phone metadata program that worked by invoking an emergency).

I raise this not to minimize the biggest reason Sessions is unsuitable to be AG: his racism and his regressive ideas on immigration.

Rather, I raise it to point out that in addition to selectively pursuing people of color (and delegitmizing those who defend their due process), Sessions would undoubtedly seek tools that would make it easier to do so without any oversight.

All Trump's named nominees thus far save Reince Preibus couch their racism in terms of claims of "emergency." Those claims, tied to Sessions' views on legal process, would make for an unchecked executive.