USA Patriot Act	Senate Bill S. 1389	House Bill HR 3199
SECTION 215 IS KNOWN AS THE "LIBRARY RECORDS" PROVISION, BUT IT APPLIES TO ANY TANGIBLE THING — MEDICAL, TAX, GUN AND OTHER RECORDS. **Allows government to get a secret court order for any records or other "tangible things" by certifying merely that they are "sought for" an authorized counter-intelligence or counter-terrorism investigation.** **Lacks facts.** The Patriot Act eliminated the requirement that there be "specific and articulable" facts connecting records sought to a target about whom there was probable cause to believe was an agent of a foreign power. **Secrecy forever.** These orders are automatically and permanently secret. **Business has no right to challenge.** The order may not be disclosed to anyone not necessary to comply with it. (The FISA court has never allowed someone outside DOJ to argue to it—its procedures are non-adversarial. The same is true of criminal search warrants, but with that criminal power the subject is notified and may challenge when charged.) Subjects of 215 orders may never get notice their records were obtained or ever be charged. The business recipients are barred from ever telling their customers about them.	**Section 7** **Requires facts.** Does not reinstate previous standard but does require a "statement of facts showing that there are reasonable grounds to believe" the records are "relevant to" counter terrorism or counter intelligence investigation, and that items "pertain to" a foreign power, agent of a foreign power, or person in contact with a suspected agent or are "relevant to" the activities of a suspected agent who is being investigated. **Requires description.** Requires records or other things to be described with "sufficient particularity"—so can't be just blanket order. **Provides right to counsel.** **Gives right to challenge under long-standing rules.** Gives recipient of the order right to challenge both the order itself (on same basis as for a grand jury subpoena), *but* only in the FISA court where DOJ can use secret evidence in secret session. **Right to challenge secrecy is very limited.** Court must accept government claims of harm to national security as "conclusive." **Higher approval for some records.** Requires personal approval of FBI Director or Deputy for library, bookstore, firearms or medical records. **Increased reporting.** Detailed reporting in unclassified form, but may include a classified annex for Congress.	**Section 107** **No facts required.** Provides that any record can be obtained if the government specifies they are "relevant to" a counter terrorism or counter intelligence investigation instead of specifying that they are "sought for" such an investigation, but the Justice Department has maintained that "relevant" is what "sought for" means. No statement of facts or connection between the records and a foreign agent is required, let alone specific and articulable facts. **No description required.** **Provides right to counsel.** **Very narrow (illusory) right to challenge order.** Allows the recipient of an order to challenge the order, but only in special "petition review panel" of the FISA court and only to determine "legality" of the order. Challenge not allowed on same grounds as grand jury subpoenas. And, DOJ can use secret evidence in secret session to argue that a challenge should be denied. **Right to challenge secrecy is very limited.** Court must accept government claims of harm to national security as "conclusive." **Higher approval for one type of record.** Director of FBI must personally approve any request for records from a library or bookstore. **No increased reporting required.**

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SECTION 505 OF THE PATRIOT ACT (AND THE INTELLIGENCE BILL) EXPANDED THE POWER OF THE FBI TO ISSUE NATIONAL SECURITY LETTERS (NSLS) FOR CREDIT REPORTS, ELECTRONIC COMMUNICATIONS SERVICE PROVIDER RECORDS, AND FINANCIAL RECORDS. **Does <u>not</u> require any court approval.** **Lacks facts.** The Patriot Act eliminated the requirement that there be "specific and articulable" facts connecting records sought to a target about whom there was probable cause to believe was an agent of a foreign power. **Secrecy forever.** These demands are automatically and permanently secret. **Business has no right to challenge.** The NSL may not be disclosed to anyone not necessary to comply with it. Subjects of NSLs may never get notice their records were obtained or ever be charged. The business recipients are barred from ever telling their customers about them. **Declared unconstitutional.** In a case involving an internet service provider that received one of these demands, a federal court found that the power unconstitutional under the 1st and 4th Amendments. DOJ appealed. Another case is pending in Connecticut.	**Section 8** **Still no court approval.** **Provides right to counsel.** An attorney can be consulted. **Gives right to challenge under long-standing rules.** Gives recipient of an NSL a right to challenge the order in the local district court (not the FISA Court) on same bases as for a grand jury subpoena--court may set aside if "unreasonable," "oppressive," or would violate a constitutional or legal right. **Limited right to challenge secrecy.** Secrecy order can be set aside if challenged in court, but standard is whether making public would harm national security, interfere with an investigation, interfere with diplomatic relations, or endanger life or physical safety and if the government certifies this would result, the certification must be treated as "conclusive." **Gives the government the power to enforce an NSL.** Under current law, there is no provision for the FBI to get a court to hold a business in contempt if they don't comply. The Senate bill would allow the government to enforce the demand by going to court. **Gives protection for classified information.** Classified Information Procedures Act standards apply to ensure against disclosure of classified information.	**Sections 116 through 119** **Still no court approval.** **Provides right to counsel.** An attorney can be consulted. **Gives right to challenge as overly burdensome.** Gives recipient of an NSL a right to challenge the order in the local district court on the grounds that it is unreasonable or oppressive. Arguments can be made to judge secretly with secret evidence. **Limited right to challenge secrecy.** Secrecy order can be set aside if challenged in court, but if government certifies that disclosure would harm national security, interfere with diplomatic relations, harm an investigation or endanger life or physical safety, the certification is conclusive unless in bad faith. However, each year the FBI must re-certify the need for secrecy. **Gives the government the power to enforce an NSL and adds criminal penalties.** Government may enforce order in court. Non-compliance punished as contempt. New penalties for violating gag order of up to 1 year in prison, or up to 5 years if committed with intent to obstruct an investigation or judicial proceeding (no explicit penalties now exist). **Increased (secret) reporting.** Reports to intelligence committees must also go to judiciary committees.

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SECTION 213, THE "SNEAK AND PEEK" POWER, CREATES A NATIONAL RIGHT FOR FEDERAL LAW ENFORCEMENT TO DELAY NOTICE OF SEARCH WARRANTS FOR HOMES OR BUSINESSES—NOT LIMITED TO TERRORISM CASES. **Allows delayed notice searches for unspecified "reasonable time" where notice may cause specified harms (endanger life/physical safety; cause flight; cause loss of evidence; cause witness tampering) and gives a "catch-all" basis: if notice would "seriously jeopardize an investigation or unduly delay a trial."** **Not limited to terrorism.** DOJ recently acknowledged that 88% of the search warrants issued under this section have been used in cases that have nothing to do with terrorism. **Catch-all is too broad.** Most of the 155 search warrants courts have approved have been based in part on the catch-all, jeopardy to an investigation, rather than a specific harm. A good prosecutor could fit almost any case into this clause. **No time limit on delay.** Before the Patriot Act, most circuit courts had <u>not</u> approved reasonable but short delay in notice of physical searches. The minority allowed rare 7-day delays.	**Section 5** **No restriction to terrorism.** **Preserves catch-all** for delays on the vague ground of jeopardizing an investigation but not if it would "unduly delay a trial." **Limits initial delay to 7 days.** Creates a presumption that notice of a search of a home or business can be delayed for up to 7 days for specified reasons. Initial delay can be longer if justified. However, extensions allowed for "periods of 90 days or less, unless the facts of the case justify a longer period of delay." No firm end-date of delay in notice required. **Increased reporting.** Requires reporting of delayed notice warrant applications, extension granted, modified, or denied, period of delay in giving notice, number and duration of extension, and offense specified in warrant or application.	**Sections 114 and 121** **No restriction to terrorism.** **Preserves catch-all** for delays on the vague ground of jeopardizing an investigation but not if it would unduly delay a trial. **Limits initial delay to 180 days.** Defines "reasonable delay" as not more than 180 days after a search warrant is executed. An unlimited number of extensions are allowed for periods of not more than 90 days each. No firm end-date of delay in notice required. **Increased reporting.** Requires reporting by the Administrative Office of the U.S. Courts of the number of search warrants, number of delayed notice warrants, and reasons for delay. No requirement of reporting of the criminal offense involved in the use of this power.

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SECTION 206 OF THE PATRIOT ACT, AS AMENDED BY THE INTELL BILL ,ALLOWS "JOHN DOE" ROVING WIRETAPS WHERE NEITHER THE IDENTITY NOR THE PHONE IS REQUIRED IN FOREIGN INTELLIGENCE INVESTIGATIONS. **Since 1986, roving taps have been available in criminal investigations (including criminal terrorism investigations), subject to two safeguards – 1) that the "roving" tap identify the target, and 2) that agents check ("ascertain") the target is using the phone being tapped. The Patriot Act created roving taps in intelligence investigations – approved by the FISA court --that don't require probable cause of crime.** **Permits roving wiretaps without identifying the target.** Roving taps in intelligence investigations do not require agents to identify the target if his name is not known (only a "physical description" is required). **Lacks needed ascertainment requirement.** Not limited to circumstances where agents ascertain the target is using the telephone or facility. The lack of controls makes it more likely email and phone conversations of innocent people will be monitored, and that business, hotels or apartments could have many of phones tapped at once and for months at a time.	**Section 2** **Identity still not required.** **Adds some particularity to identity.** For John Doe roving wiretaps, where the name of the target is not known, requires "sufficient information to describe a specific target with particularity." This would prevent a description of the known but unnamed person to be so broad that anyone of a certain race or age could be tapped. **Does not require ascertainment prior to tap.** **Requires after-the-fact ascertainment/justification.** Requires after-the-fact notice (within 10 days) to the court of "facts and circumstances relied on by the applicant which justify his believe that the target will use such facilities that are under surveillance" **Increased reporting.** Requires a report including total number of applications for orders and extensions of orders approving electronic surveillance where nature and location of facilities at which electronic surveillance is directed is not known and each criminal case in which information acquired under electronic surveillance	**Section 107** **Identity still not required.** **Does not require more particularity about target.** **Requires more information about facility tapped.** Requires notice to judge to explain why government believes target is using facility and requires greater specificity in application (but not with respect to target). **If other businesses are required to assist with a wiretap,** requires government to specify reasons why someone other than a communications provider should be required to furnish information necessary to assist interception. **Requires after-the-fact ascertainment/justification.** If place is not know at the time the order is issued, requires applicant to notify issuing judge at the earliest reasonable time, as determined by the court, but in no case later than 15 days, of the change of surveillance from the initial facility or place to a new one of reasons that justify belief target is using facility. **No new reporting.**

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SECTION 802 CREATES A DEFINITION OF DOMESTIC TERRORISM THAT ALLOWS FOR FORFEITURE OF AN ORGANIZATION'S ASSETS WITHOUT ADEQUATE NOTICE OF WHAT OFFENSES WOULD TRIGGER SUCH A PENALTY, INCLUDING MISDEMEANORS. **Activities are "domestic terrorism" if they violate any state or federal criminal law, involve acts "dangerous to human life," and "appear to be intended" to influence government policy or a civilian population "by intimidation or coercion." Section 802 does not create a new crime, but can trigger enhanced seizure of assets, disclosure of educational and tax records as well as longer sentences and use of nationwide search warrants.** **Chills civil disobedience and risks assets.** Domestic terrorism is defined so broadly that it could include acts of civil disobedience, such as protestors who block access to facilities or roads or trespass. Punishing civil disobedience is one thing but calling it terrorism and seizing assets is another and could chill citizens from protesting policies of any administration. Assets can be seized without criminal conviction and without a prior hearing.	**Does not amend.**	**Specifies which acts can trigger designation as domestic terrorism for asset forfeiture penalties.** Changes the reference in the forfeiture statute from domestic terrorism to the federal crime of terrorism definition. **Adds new specific offenses for trigger.** Adds offenses to the federal definition of criminal terrorism to include receiving military-type training from a foreign terrorist organization and offenses relating to nuclear and weapons of mass destruction threats.

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SUNSETS **THE PATRIOT ACT DESIGNATED 16 PROVISIONS TO EXPIRE ON DECEMBER 31, 2005 IF NOT REAUTHORIZED.**	**Extends sunsets for 4 years for 3 provisions.** Makes almost all of the expiring provisions of the Patriot Act permanent. Extends the expiration date on Section 215 (FISA orders for personal records) and Section 206 (John Doe roving wiretaps) for 4 years, as well as a provision in the Intelligence Act (the lone wolf provision). **Increases leverage and accountability.** This increases the leverage of Congress to get prompt and responsive answers to how these powers are being used, but the number of powers subject to sunset should be greater and reach some of the most troubling permanent provisions, like Sections 505 and 213. The suggestion that law enforcement won't use powers that may expire years later is not grounded on any facts.	**Extends sunsets for 10 years for 2 provisions.** Makes almost all of the expiring provisions of the Patriot Act permanent. Extends the expiration date on Section 215 (FISA orders for personal records) and Section 206 (John Doe roving wiretaps) for 10 years. **Delays accountability and diminishes leverage.** This date is so far into the future that it skips the next present. It diminishes the leverage of Congress to make sure these powers are not being misused or to otherwise get prompt and responsive answers to how they are being used. The sunset period should be shorter and the number of powers subject to sunset should also be greater, reach some of the most troubling permanent provisions, like Sections 505 and 213.

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Other significant issues.	**Does not amend.**	**SECTION 132 OF THE PATRIOT ACT REAUTHORIZATION BILL WOULD REQUIRE A REPORTING ABOUT DATA MINING.** **Data-mining is a fast-growing technology many federal agencies use for a variety of purposes. It involves linking disparate and primarily lawful behaviors to identify people who may be engaging in criminal activity, including terrorism. Because this "pattern-based" data mining can involve governmental monitoring of a wide variety of lawful activities, it raises serious privacy and other civil liberties concerns.** **Increased reporting.** This provision does not restrict data-mining for these purposes; it merely requires a survey of those federal programs that use "pattern-based" data-mining to identify a "pattern indicating terrorist or criminal activity." This provision would require the first full cataloguing and assessment of government programs that employ this emerging technology. It would also require the Justice Department to identify legal impediments, if any, to the use of such technology. This will aid congressional oversight.