

## Patriot Act Amendment Comparison 8-22-05

Patriot Act Section	HR. 3199 (as passed by House)	S. 1389 (as passed by Senate)
<p><b>Section 203</b> <i>Sharing of Electronic, Wire, and Oral Communication</i></p>	<p>Authorizes sharing of sensitive criminal information, including grand jury information, criminal wiretap information, and other information (e.g., products of search warrants) with intelligence officials; notice is required for grand jury information sharing.</p> <p><i>Sections 102 (makes permanent) and 105 (changes)</i></p> <p>Makes permanent authorization for sharing of criminal information with intelligence and other security agencies; increases notice for sharing of wiretap information.</p> <p>Requires within a reasonable time after disclosure of criminal wiretapping information that a government attorney to file with a judge “<b>whose order authorized or approved the interception of that communication</b>” a notice that the <b>contents</b> were disclosed to other agencies</p>	<p><i>Section 9 (makes permanent)</i></p> <p>Makes section permanent without change.</p>
	<p><b><u>POSITIVE</u></b>: Provides judge with notice that information from a criminal wiretap was disclosed and to whom it was disclosed (modeled on existing notice requirement for sharing grand jury information)</p> <p><b><u>NEGATIVE</u></b>: Provides no amendment specifying that information can only be shared with officials fighting terrorism; does not amend the broad standard for sharing information; does not include any notice to court for sharing of other, equally sensitive information (e.g., information gathered with search warrants)</p>	<p><b><u>NEGATIVE</u></b>: Does not provide judge with notice that the information was disclosed and to whom it was disclosed (which is required for sharing of grand jury information) for any other sensitive criminal information.</p> <p>Provides no amendment specifying that information can only be shared with officials fighting terrorism; does not amend the broad standard for sharing information.</p>

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Patriot Act Section	HR. 3199	S. 1389
<p><b>Section 201 and 202</b> <i>New criminal predicates for wiretapping</i></p>	<p>The USA Patriot Act added 8 new predicate crimes for criminal wiretap orders, including the “guilt by association” crime of providing support for a designated terrorist organization (including for lawful, non-violent activities)</p> <p><i>Sections 102 (makes permanent) and 122 (expands)</i></p> <p>The House bill makes these provisions permanent and adds 8 new predicate offenses.</p>	<p><i>Section 9 (makes permanent)</i></p> <p>The Senate bill makes this provision without change.</p>
	<p><b><u>POSITIVE:</u></b> When government uses criminal wiretapping statute, it must show probable cause of criminal activity, must provided delayed notice, and is subject to stricter safeguards than for FISA wiretaps.</p> <p><b><u>NEGATIVE:</u></b> Makes permanent and expands already very long list of crimes for which government may obtain a wiretap order.</p>	<p><b><u>POSITIVE:</u></b> When government uses criminal wiretapping statute, it must show probable cause of criminal activity, must provided delayed notice, and is subject to stricter safeguards than for FISA wiretaps.</p> <p><b><u>NEGATIVE:</u></b> Makes permanent new predicates for which government may obtain a wiretap order.</p>

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Patriot Act Section	HR. 3199	S. 1389
<p><b>Section 206</b></p> <p><i>Roving Surveillance Authority under FISA</i></p>	<p>Unlike criminal wiretaps, FISA roving wiretaps currently 1) allow wiretaps that do not name a target or a facility (e.g., a telephone), and 2) do not require the government to check (or “ascertain”) that the target is using the facility or phone.</p> <p><i>Sections 102(b) (10 yr sunset); 107 (changes)</i></p> <p>Extends FISA roving wiretaps for ten years, with changes to require “specificity” and “notification”:</p> <p>Require applicant to specify reasons why someone other than a communications provider should be required to furnish information necessary to assist interception (<b>Issa amendment</b>)</p> <p>If place is not know at the time the order is issued, requires applicant to notify issuing judge <b>at the earliest reasonable time</b>, 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. (<b>Issa Amendment</b>)</p>	<p><i>Sections 9 (4 yr sunset) and 2 (changes)</i></p> <p>Extends FISA roving wiretaps for four years, with changes:</p> <p>(a) Includes a <b>particularity requirement</b> for wiretaps that do not name a target or a facility (e.g., a telephone) requiring “sufficient information to describe a specific target with particularity”</p> <p>(b) Requires <b>after-the-fact</b> notice (within ten days) to the court of the “facts and circumstances relied on the applicant which justify his believe that the target will use such facilities that are under surveillance” and of minimization procedures.</p> <p>(c) 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</p>
	<p><b><u>POSITIVE:</u></b> Requires notice to judge to explain why government believes target is using facility; requires greater specificity in application (but not with respect to target).</p> <p><b><u>NEGATIVE:</u></b> Continues to permit roving surveillance without identifying the target and does not limit the order to circumstances where government ascertains that the target is using the telephone or other facility; specificity and notification requirements much less than Senate bill.</p>	<p><b><u>POSITIVE:</u></b> Includes a requirement to “describe” particular target with “particularity” and justify (after the fact) reasons for use of wiretap; enhanced reporting.</p> <p><b><u>NEGATIVE:</u></b> Continues to permit roving surveillance without identifying the target and does not limit the order to circumstances where government ascertains that the target is using the telephone or other facility.</p>

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Patriot Act Section	HR. 3199	S. 1389
<p><b>Section 207</b></p> <p><i>Duration of FISA Surveillance of Non-United States Persons</i></p>	<p>Extends duration of FISA surveillance for much longer periods of time without going back to the FISA court to get a new surveillance order.</p> <p><i>Sections 102 (makes permanent) and 106 (expands)</i></p> <p><b>Same language as S. 1389</b> Makes permanent, and expands, extended duration for FISA surveillance.</p> <p>(a)-(b) Changes “as defined in section 101(b)(1)(A)” to “who is not a United States person” in sections (a)(1)(B); (a)(2)(B); (b)(1)(B); (b)(2)(B): these are for electronic surveillance and physical searches respectively</p> <p>Allows for an extension of electronic surveillance for more than 90 days where the applicant certifies that surveillance does not concern a United States person. This extension can be for as long as an entire year.</p>	<p><i>Sections 9 (makes permanent) and 3 (expands)</i></p> <p><b>Same language as HR. 3199</b> Makes permanent, and expands, extended duration for FISA surveillance.</p> <p>(a)-(b) Changes “as defined in section 101(b)(1)(A)” to “who is not a United States person” in sections (a)(1)(B); (a)(2)(B); (b)(1)(B); (b)(2)(B): these are for electronic surveillance and physical searches respectively</p> <p>Allows for an extension of electronic surveillance for more than 90 days where the applicant certifies that surveillance does not concern a United States person. This extension can be for as long as an entire year.</p>
	<p><b><u>NEGATIVE</u></b>: No new sunset; expands power to secretly search and wiretap individuals in the United States to as long as a year with no new judicial order.</p>	<p><b><u>NEGATIVE</u></b>: No new sunset; expands power to secretly search and wiretap individuals in the United States to as long as a year with no new judicial order.</p>

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Patriot Act Section	HR. 3199	S. 1389
<p><b>Section 212</b></p> <p><i><b>Emergency Disclosure of Information</b></i></p>	<p>Allows disclosure of confidential subscriber information by communications providers in the event of an emergency; exempts such “voluntary” disclosures from wiretapping law safeguards, such as court order, reporting, etc.</p> <p><i>Sections 102 (makes permanent) and 108 (reporting)</i></p> <p>Makes permanent and requires annual report to AG on number of accounts from which DOJ has received voluntary disclosures (summary of the basis for disclosure in instances where <b>voluntary disclosure</b> was made to DOJ <b>and</b> the investigation pertaining to those disclosures was closed <b>without the filing of criminal charges</b>)</p>	<p><i>Sections 9 (makes permanent) and 4 (reporting)</i></p> <p>Makes permanent and requires internal and Congressional <b>reporting</b>, which must be filed with the AG within 90 days after the disclosure, and a summary report must be submitted to Congress</p>
	<p><b><u>POSITIVE:</u></b> enhanced Congressional oversight</p> <p><b><u>NEGATIVE:</u></b> Does not restore the <b>immediate danger</b> standard for allowing emergency disclosure.</p>	<p><b><u>POSITIVE:</u></b> Increases oversight on the use of this emergency power to ensure it is not abused.</p> <p><b><u>NEGATIVE:</u></b> Does not restore the <b>immediate danger</b> standard for allowing emergency disclosure.</p>

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Patriot Act Section	HR. 3199	S. 1389
<p><b>Section 213</b></p> <p><b>“Sneak and Peek” Delayed Notice Search Warrants</b></p>	<p>Allows delayed notice searches for unspecified “reasonable time” not only where notice may cause specified harms (endanger life/physical safety; cause flight; cause loss of evidence; cause witness tampering) but also where notice would “seriously jeopardize an investigation or unduly delay a trial.”</p> <p><i>Sections 114 and 121</i></p> <p><b>preserves catch all for delays</b> that would “otherwise seriously jeopardize an investigation” but eliminates delayed searches where notice will only “unduly delay a trial” (Flake Amendment)</p> <p>Defines reasonable delay as not more than <b>180 days</b> after its execution, and can renew the delay in notice for additional periods of not more than <b>90 days</b> each</p> <p>Requires reporting by the Administrative Office of the Courts on number of search warrants, number of delayed notice warrants, and reasons for delay (Flake Amendment)</p>	<p><i>Section 5</i></p> <p><b>preserves catch all</b> for delays that would “otherwise seriously jeopardize an investigation” but not where notice will “unduly delay a trial”</p> <p>Initial period of delay limited to “not later than <b>7 days</b> after the date of its execution, <b>or on a later date certain if the facts of the case justify</b> a longer period of delay”</p> <p>Extensions allowed for “periods of <b>90 days or less, unless the facts of the case justify a longer period of delay</b>”</p> <p>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.</p>
	<p><b><u>POSITIVE:</u></b> Increases Congressional oversight; puts outer limit on delays; slight modification of catch all provision.</p> <p><b><u>NEGATIVE:</u></b> Modifications do not even come close to constitutionally-required “reasonable, but short” delay period; catch all largely intact; reporting does not break down by offense.</p>	<p><b><u>POSITIVE:</u></b> Initial period of delay (seven days) satisfies court understanding of constitutionally required “reasonable, but short” time limit; Slight modification of catch all provision; reports require specificity increasing congressional oversight.</p> <p><b><u>NEGATIVE:</u></b> Time limits includes broad loophole; catch-all allowing broad use of secret searches is largely intact.</p>

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Patriot Act Section	HR. 3199	S. 1389
<p><b>Section 214</b></p> <p><i><b>FISA Pen Register and Trap and Trace Authority</b></i></p>	<p>Allows government to obtain detailed information about Internet use (including header information of an e-mail and URL or other “addressing” information for web browsing) without probable cause as long as government certifies information is relevant to a counter-intelligence or counter-terrorism investigation.</p> <p><i>Section 102 (makes permanent)</i></p> <p>Makes permanent without amendment.</p>	<p><i>Section 9 (makes permanent) and 6 (expands; reporting)</i></p> <p>Expands surveillance by requiring more information about the identity of the person under investigation, and the attributes of the communication; must include the name of the customer or subscriber, address, telephone or instrument number, length of provision of service by such provider, etc.</p> <p>Requires reporting to Senate and House Select Intelligence committees and the House and Senate Judiciary Committees</p>
	<p><b><u>NEGATIVE:</u></b> Does not require any individual suspicion that target of the surveillance is involved in terrorism or espionage.</p>	<p><b><u>POSITIVE:</u></b> Increases reporting.</p> <p><b><u>NEGATIVE:</u></b> Does not require any individual suspicion that target of the surveillance is involved in terrorism or espionage; expands amount of information obtained with a pen/trap order by including detailed subscriber information.</p>

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Patriot Act Section	HR. 3199	S. 1389
<p><b>Section 215</b></p> <p><i>FISA records orders</i></p>	<p>Allows government to get an order for any records or other “tangible things” by certifying to FISA court that they are “sought for” an authorized counter-intelligence or counter-terrorism investigation.</p> <p><i>Section 102 (10 yr sunset) and 107 (changes)</i></p> <p>Extends power for ten years with changes:</p> <p>Makes standard for an order that items be “<b>relevant to</b>” a counter-terrorism or counter-espionage investigation, judge must issue order if judge finds relevance.</p> <p>Director of FBI must personally approve any request for records from a library or bookstore.</p> <p>Allows disclosure to “<b>any person necessary</b> to produce the tangible things pursuant to an order under this section” or “<b>an attorney</b> to obtain legal advice <b>with respect to an order under this section.</b>”</p> <p>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. Government may use secret evidence in secret session to argue that a challenge should be denied.</p> <p>No modification to automatic secrecy order.</p>	<p><i>Sections 9 (4 yr sunset) and 7 (changes)</i></p> <p>Extends power for four years with changes:</p> <p>Makes standard for an order a “<b>statement of facts showing</b> that there are <b>reasonable grounds to believe</b>” that records are “<b>relevant to</b>” counter terrorism or counter intelligence investigation, and that items “<b>pertain to</b>” a <b>foreign power, agent of a foreign power, or person in contact with a suspected agent</b> or are “<b>relevant to</b>” <b>the activities of a suspected agent who is the subject of the investigation.</b></p> <p>Allows disclosure to “<b>any person necessary</b> to produce the tangible things pursuant to an order under this section” or “<b>an attorney</b> to obtain legal advice <b>in response to an order under this section.</b>”</p> <p>Requires records or other things to be described with “<b>sufficient particularity</b>” to allow them to be identified; requires a “return date” on which things must be produced; gives recipient of the order <b>right to challenge</b> both the order itself (on same basis as for a <b>grand jury subpoena</b>) and can <b>challenge the secrecy order</b>, but only in the FISA court. Government may use secret evidence in secret session to argue against challenges.</p> <p>Requires personal approval of Director or Deputy Director of the FBI for library, bookstore, firearms or medical records, although the standard of relevance is the same.</p> <p>Requires detailed reporting on use of section, in unclassified form but may include a classified annex.</p>

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	<p><b><u>POSITIVE:</u></b> Provides explicit relevance standard; provides explicit right to challenge; explicitly permits attorney to be consulted; requires high level approval for orders for library and bookstore records.</p> <p><b><u>NEGATIVE:</u></b> Does not require any individual suspicion that target of the surveillance is involved in terrorism or espionage</p> <p>No standards for secrecy order, which is still automatic and permanent; secrecy order not explicitly made subject to any meaningful challenge or other judicial review.</p> <p>Right to challenge may not be meaningful because limited to FISA court and standard is “legality.” Allows the use of secret evidence, closed proceedings when the recipient challenges the legality of a production order.</p> <p>No requirement of statement of facts or high level approval for firearm records, medical records; no enhanced reporting.</p>	<p><b><u>POSITIVE:</u></b> Requires individual suspicion that target of surveillance is involved in terrorism or espionage. Provides explicit relevance standard, which also requires a specific “statement of facts” based on “reasonable grounds to believe” that is made explicitly reviewable by the judge; provides explicit right to challenge order and gag order; explicitly permits attorney to be consulted.</p> <p>Allows challenges based on same standards as grand jury subpoena. Requires high level approval for orders for library records, firearm records and medical records.</p> <p><b><u>NEGATIVE:</u></b></p> <p>No standards for secrecy order, which is still automatic and permanent; secrecy order not explicitly made subject to any meaningful challenge or other judicial review.</p> <p>Right to challenge may not be meaningful because limited to FISA court. Allows the use of secret evidence, closed proceedings when the recipient challenges the legality of a production order.</p>
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<b>Patriot Act Section</b>	<b>HR. 3199</b>	<b>S. 1389</b>
<p><b>Section 224</b></p> <p><i>Modification of Sunset Provision for Trap and Trace and Business records production orders</i></p>	<p>Sixteen provisions of the original Patriot Act were subject to a four year sunset period which expires at the end of 2005.</p> <p><i>Section 102</i></p> <p>Sections 206 and 215 only are extended for another 10 years (until 2015), while all other expiring provisions are made permanent.</p>	<p><i>Section 9</i></p> <p>Extends the sunset of 206 and 215 (only) for four years, i.e., until the end of 2009.</p>
	<p><b><u>NEGATIVE:</u></b> Includes only two provisions within an extended, extremely long ten-year sunset.</p>	<p><b><u>POSITIVE:</u></b> Sunset period is reasonable.</p> <p><b><u>NEGATIVE:</u></b> Includes only two provisions within the new sunset.</p>

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<b>Patriot Act Section</b>	<b>HR. 3199</b>	<b>S. 1389</b>
<p><b>Section 505</b> <i>National Security Letters</i></p>	<p>NSLs are FBI records demands, issued without a court order, for credit reports, communications service provider records, and financial records.</p> <p><i>Sections 116 through 119</i></p> <p>Recipient of a national security letter may challenge national security letters in a US district court and court may set aside if “unreasonable” or “oppressive.”</p> <p>The secrecy order is no longer automatic but is based on a certification that disclosure would harm national security, interfere with diplomatic relations, harm an investigation or endanger life or physical safety. If challenged, certification is to be treated as “conclusive” by the court unless issued in “bad faith.” If a year has elapsed since issuance of the order (or previous challenge), issuing official must re-certify but certification is still conclusive.</p> <p>All challenges can be heard in secret session, with secret evidence.</p> <p>Government may enforce order by going to court; violation will be 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).</p> <p>Reports to intelligence committees must also go to judiciary committees.</p>	<p><i>Section 8</i></p> <p>Recipient of national security letter may consult with an attorney and may challenge national security letter in a US district court. Court may set aside if “unreasonable” or “oppressive” or would violate a constitutional or legal right.</p> <p>Secrecy order can be set aside if challenged in court. However, standard is whether order would harm national security, interfere with an investigation, interfere with diplomatic relations, or endanger life or physical safety. If the government certifies this would result, certification must be treated as “conclusive.”</p> <p>Government may enforce NSL by going to court.</p> <p>Classified Information Procedures Act standards apply to ensure against disclosure of classified information.</p>

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<b>Patriot Act Section</b>	<b>HR. 3199</b>	<b>S. 1389</b>
<b>Section 505</b> <i>National Security Letters</i>	<p><b><u>POSITIVE:</u></b> provides right to challenge on same basis as subpoena; secrecy order not automatic and can be challenged annually.</p> <p><b><u>NEGATIVE:</u></b> no standard of individual suspicion (or even statement of facts) required for NSLs; challenges can be resisted with secret evidence; secrecy order must be upheld if government provides certification; new criminal penalties for violating secrecy order</p>	<p><b><u>POSITIVE:</u></b> provides right to challenge on same basis as subpoena; secrecy order not automatic and can be challenged; standards for handling classified information based on CIPA; no new penalties for violating gag order;</p> <p><b><u>NEGATIVE:</u></b> no standard of individual suspicion (or even statement of facts) required for NSLs; secrecy order must be upheld if government provides certification</p>
<b>Section 802</b> <i>Definition of Domestic Terrorism</i>	<p>Changes the reference in the forfeiture statute from 2331 (domestic terrorism) to 2332(b) and 2332(g)(5)(B) (the Federal crime of terrorism definition)</p> <p>Adds offenses to criminal definition by inserting 2339D (relating to military-type training from a foreign terrorist organization) and 832 (relating to nuclear and weapons of mass destruction threats)</p>	<p>No amendment (meaning existing sunset expiring at the end of 2007 is left in place).</p>
<b>Title VIII</b> <i>Terrorism crimes and death penalties</i>	<p>Creates a host of new federal terrorism crimes and death penalties, including a new “catch all” death penalty for all “federal crimes of terrorism” that creates more than 30 new death penalties in one stroke; new criminal provisions deal with a host of areas, from maritime law, to smokeless tobacco smuggling, all without any committee consideration</p>	<p>No similar provisions.</p>

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<b>Patriot Act Section</b>	<b>HR. 3199</b>	<b>S. 1389</b>
<b>Section 1001</b>	Enhanced oversight of review of detentions under the material witness statute (18 U.S.C. 3144), including length, conditions of access to counsel, frequency of access to counsel, offense at issue, and frequency of appearance before a grand jury.	No similar provisions.
<b>Intelligence Reform Act of 2004 Section</b>	<b>HR. 3199</b>	<b>S. 1389</b>
<b>Section 6001</b> <i>“lone wolf” surveillance</i>	Allows surveillance without criminal probable cause using secret foreign intelligence court even where no evidence connects target to a foreign government or international terrorist organization, if target is suspected of terrorism  <i>Section 104</i>  Repeals sunset provision	<i>Section 10</i>  Extends power for another four years (until 2009).
<b>Section 6603</b> <i>Provision relating to 2332B and material support sections in title 18</i>	Extends crime of “material support” to include providing oneself as a member and “receiving” military training; also requires “knowledge” of organization’s involvement in terrorism  <i>Section 105</i>  Repeals sunset provision	Extends crime of “material support” to include providing oneself as a member and “receiving” military training; also requires “knowledge” of organization’s involvement in terrorism  <i>Section 9</i>  Repeals sunset provision

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Other issues	HR. 3199	S. 1389
<i>FISA Courts; procedures and enhanced reporting</i>	No similar amendment	<p><i>Section 10</i></p> <p>Allows FISA courts to establish rules and procedures and take actions that are <b>reasonably necessary</b> to administer their responsibilities, must be transmitted to all FISA judges, Chief Justice, and House and Senate intelligence and judiciary committees. Requires enhanced reporting to Congress on the total number of emergency orders (by Attorney General without court approval) for FISA wiretaps, secret physical searches, and pen/trap orders</p>
<i>Data mining</i>	<p>(1) Requires a report to Congress on the development and use of data mining technology by departments and agencies of the Federal government (Berman Amendment)</p> <p>(2) Report must include description of data-mining technology and data that will be used, plans for use of technology and target dates for use of technology, assessment of efficacy of data mining technology, assessment of <b>likely impact</b> of data mining on civil liberties, list and analysis of regulations and description of modifications of such laws that will be requires for the safe use of the program, discussion of policies, procedures, guidelines that are developed</p>	