



## CAN YOU LOOK AT A WEB BROWSING HISTORY WITHOUT A WARRANT

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Perhaps some of you saw one of the many sensational news articles this week declaring that the United States Senate voted to, “Allow the FBI to Look at Your Web Browsing History Without a Warrant.” But that’s not exactly what happened. Then again, does it really surprise us anymore when the press doesn’t get the story quite correct? Here’s what actually occurred, and what it means for you.

It all has to do with the PATRIOT Act. The PATRIOT Act has been in place since the 9/11 terroristic attacks in 2001. Section 215 of PATRIOT Act, known as the “Tangible Things” or “Business Records” provision, permits the collection of “...tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information...”. The collection of such “tangible” things, however, is permitted only if the investigation “seeks to obtain foreign intelligence information that does not concern U.S. persons.” Section 215 has been interpreted to permit the bulk collection of “telephony metadata” and the mass collection of basic call-log information from telecommunications companies. This includes the date, time, and duration of calls to and from all phone numbers, but excludes specific personally identifying information such as the names or addresses connected to the phone numbers. Critics argue Section 215 violates the Fourth Amendment’s warrant requirement by authorizing the indiscriminate collection of data of U.S. citizens without probable cause. (It should be noted the Supreme Court has held that phone records are not considered private or privileged information for Fourth Amendment purposes because they are voluntarily provided to telecommunications carriers for billing purposes.) Critics also object to the long list of things that fall under the umbrella of “tangible things”, such as browser history and Internet search terms.

Section 215, however, contains a “sunset” provision, meaning it was designed to automatically expire unless periodically, and specifically, renewed by Congress. Indeed, since 2006, Congress has twice renewed the PATRIOT Act, including Section 215. More recently, the PATRIOT Act and Section 215 were set to expire in March 2020. Prior to the expiration, the House of Representatives voted to extend Section 215 for three more years. Of course, for a Bill to become a law the House and Senate must pass identical bills, which then must be signed by the President. The Senate was not able to vote on the House bill before recessing due to the COVID-19 pandemic, so on March 15, Section 215 lapsed. But that doesn’t mean it was gone forever. And this is where it gets interesting.

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On May 13, 2020, the Senate finally met to renew the already expired Section 215. As part of the renewal, three amendments were proposed. The amendment that's causing all the hype was proposed by Senators Ron Wyden (D-Ore.) and Steve Daines (R-Mont.). It would have allowed the continued collection of data, but would have limited Section 215's "tangible things" by eliminating the FBI's ability to access your web browsing history unless they had probable cause and a search warrant. As argued by Senator Wyden, *"When you talk about web browsing and searches, you're talking about some of the most sensitive, most personal, and most private details of Americans' lives. Every thought that can come into people's heads can be revealed in an internet search or a visit to a website."* The Amendment needed 60 votes to pass. Despite Senator Wyden's compelling argument, the Amendment received only 59 votes. That's why many headlines read something like, *"Senate votes to allow FBI to access your browsing history without a warrant."* In actuality, the Senate vote simply failed to restrict the FBI's current ability to access your browser history without a search warrant because "browser history" is a "tangible thing" under Section 215. Interestingly, four Senators who would have almost certainly voted in favor of the Amendment were absent – one of whom was actually flying back to Washington at the time the vote was taken.

Another Amendment, however, did pass. The Amendment provided for additional oversight in some domestic surveillance cases. If that Amendment survives and is incorporated into the Senate's final version of the legislation, then the Senate version of the bill would be different from the House version. The Senate bill, therefore, would have to go back to the House for approval, rather than to the President's desk. It does remain remotely possible for the failed bipartisan amendment to be considered at a later time, but there's no indication when that might be.

But what does that mean for you? It means that Section 215 has not yet been renewed. Until that happens, the FBI no longer has the authority to rely on Section 215 to access people's "tangible things" or "business records", including our telephone metadata and browser histories. It means they would need to show probable cause to believe you committed a crime before requiring your ISP (Internet Service Provider) to turn over your information. But more to the point, Section 215 was designed for national security reasons. For the local or state or federal officer who needs call records, telephone metadata, or browsing history in a criminal investigation, they must still comply with the requirements of ECPA (Electronic Communications Privacy Act), SCA (Stored Communications Act), and the Fourth Amendment. Whether the information you need falls within these provisions, and the process necessary to obtain it, is for another day.

Make no mistake, Section 215 will be renewed. It's simply a matter of time. But at least now, to paraphrase the late, great Paul Harvey, "You know the rest of the story."