

CATEGORIES OF FISA

The Foreign Intelligence Surveillance Act

The Foreign Intelligence Surveillance Act (FISA) was first passed by Congress in 1978 and has been modified many times to ensure that the United States has the legal tools it needs to collect foreign intelligence information while protecting privacy and civil liberties. FISA regulates a number of the most sensitive types of intelligence collection activities that occur within the United States. When discussing FISA collection, it is important to understand which type, or category, of FISA is being discussed:

- Before conducting **electronic surveillance** against a person in the United States, the Government must obtain an order from the Foreign Intelligence Surveillance Court (FISC) showing that there is probable cause to believe that the target of the electronic surveillance is an “agent of a foreign power” (like a spy or international terrorist). In many ways, this is similar to the requirements to get a court order before conducting a wiretap in a criminal case.
- Just like electronic surveillance, **physical searches**, including searching a home to look for foreign intelligence, require the Government to go to the FISC and demonstrate that there is probable cause to justify the search.
- **Pen register/trap and trace** refers to the ongoing collection of *metadata only* (for example, the telephone numbers called or received, but not the content of the calls). Since 2015, collection under this provision must be strictly targeted and bulk collection of metadata is no longer permitted.
- Similar to a criminal subpoena, FISA used to broadly allow for the collection of **business records**. Much of this authority partially lapsed in 2020, and for new investigations only certain narrow categories of business records can be obtained. The broader, subpoena-like authority is still available for older investigations, but bulk collection under this provision was barred in 2015. An NSA program involving call detail records used to be authorized under this part of the law, but the authority to do that collection also lapsed in 2020 and NSA deleted all the data related to that program.
- FISA Section 702 permits the Government to compel U.S. companies to assist in **the targeting of non-U.S. persons located outside the United States to collect foreign intelligence information**. Unlike electronic surveillance, no individual FISC order is required for each target, but the FISC must approve special procedures that ensure that the 702 collection is targeted at non-U.S. persons abroad, that any U.S. person information picked up in the course of this foreign-focused collection is “minimized,” and that there are limits on the government looking for Americans’ information in this foreign collection.
- FISA Sections 703, 704, and 705(b) apply when the government wants to collect information about **a United States person outside the United States in circumstances where a court order would be required** if the same collection happened in the United States. Like electronic surveillance and physical searches, these sections require the Government prove to the FISC that there is probable cause that the United States person is an agent of a foreign power.

