



## Scope, Standards and Protections Compared: Section 702 vs. Traditional FISA vs. Criminal Wiretap Warrants

This chart compares the three primary authorities for collecting the contents of real-time communications where one of the communicants involved is a US person. When reviewing the chart, it's important to keep in mind that the various standards apply to two very different kinds of collection: large-scale collection under Section 702 and discreet targeted collection under FISA Title I and the Wiretap Act.

Where identical standards are applied across all three authorities, the impact on privacy that results from the large-scale collection under Section 702 is far more significant than that which results from targeted collection because of the significant increase in incidental collection.

	<b>FISA Section 702 (large-scale, foreign intelligence) 50 USC 1881a</b>	<b>FISA Title I (targeted, foreign intelligence) 50 USC 1801 et seq</b>	<b>Wiretap Act (targeted, criminal) 18 USC 2510 et seq</b>
<b>How surveillance happens</b>	<p><u>PRISM</u>: Tasking tech companies to send NSA communications that are to or from the target</p> <p><u>Upstream</u>: NSA wiretapping the internet backbone, scanning all communications that transit it, and collecting any that are to, from, or about<sup>1</sup> the target</p>	Wiretapping discreet communications to or from the target	Wiretapping discreet communications to or from the target

<sup>1</sup> The National Security Agency recently announced that it would halt “about” collection because of repeated compliance incidents that have harmed Americans’ privacy. Their announcement does not disavow the practice, so it is possible that it could be restarted at a later date. <https://www.nsa.gov/news-features/press-room/statements/2017-04-28-702-statement.shtml>

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<b>Who approves targeting decisions</b>	<p>Attorney General and Director of National Intelligence set targeting procedures but NSA analysts select who to target (i.e. task selectors) - no independence from investigation/ investigating agency (50 USC 1881a(a))</p> <p>FISA Court judge only reviews and annually approves certifications and targeting and minimization procedures for adequate compliance with the statute. It does not approve specific targets for surveillance (50 USC 1881a(i)(2))</p>	Approval of Attorney General as well as a FISA Court Judge who is independent of the investigation/ investigating agency (50 USC 1804(a))	Federal or state judge who is independent of the investigation/ investigating agency (18 USC 2518(3))
<b>Who gets targeted?</b>	Non-US persons who may be in contact with Americans and who are reasonably believed to be outside the US (50 USC 1881a(d)(1) and 50 USC 1881a(g)(2)(A)(i)(I))	Foreign powers or agents of a foreign power who are located inside the U.S. (50 USC 1804(a)(3))	US persons who are targets of a particular investigation. If known, the target's identity must be included in the application to the court, and in the court's order. (18 USC 2518(4))
<b>Legal standard</b>	Target <b>may have</b> foreign intelligence information (see scope for what that means) (50 USC 1881a(a))	<b>Probable cause</b> to believe the target is a foreign power or an agent of a foreign power AND that the facility or place to be surveilled is about to be used by the target (50 USC 1805(a)(a))	<b>Probable cause</b> to believe a particular crime has been, is being, or is about to be committed. (18 USC 2518(3)(a))

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<b>Nexus to investigation</b>	<b>Significant purpose</b> of collection is to obtain foreign intelligence information; collection of foreign intelligence needn't be the sole or the primary purpose of the surveillance (i.e. may be criminal, so long as "significant purpose" requirement is also met) (50 USC 1881a(g)(2)(A)(v))	Same as Section 702 (50 USC 1804(a)(6)(B))	<b>Probable cause</b> to believe that particular communications concerning the investigated offense will be intercepted, and that the facilities to be used for the interception are used by the target; and a finding that using less invasive means to obtain the evidence sought is not feasible. (18 USC 2518(3)(b-d))
<b>Scope of collection</b>	Foreign intelligence information, which includes national security, counter-terrorism, counter-espionage, proliferation of WMDs, and <b>anything that relates to the foreign affairs of the U.S.</b> (ex. Communications about international business, trade agreements, human rights or political activism, law, medicine or science, etc.) (50 USC 1801(e))	Same as Section 702, <b>but</b> DOJ must also designate in the application to the judge the type of foreign intelligence it seeks, and DOJ must identify target for judge and the place to be surveilled, and attest that normal investigative techniques would not have worked. (50 USC 1801(e) and 50 USC 1804(a)(2-3), (6)(d))	Evidence of the crime being investigated, which must be from a proscribed list of serious felonies. (18 USC 2516(1))
<b>Minimization requirements</b>	Limit acquisition and retention of non-targeted communications, and mask US person identity <b>unless there may be evidence of a crime</b> , or their identity is needed to understand the foreign intelligence value (50 USC 1881a(e) and 50 USC 1801(h))	Same as Section 702 (50 USC 1804(a)(4) and 50 USC 1801(h))	Surveillance must be conducted in a manner that minimizes interception of communications that are not covered by the court order. (18 USC 2518(5))

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<b>Limitations for uses in other investigations</b>	None (50 USC 1801(h)(3))	None (50 USC 1801(h)(3))	None (18 USC 2517(5))
<b>Time limits on surveillance</b>	None	Orders may not last any longer than is necessary, and may be authorized for up to 90 days if the target is a US person, 1 year if the target is a foreign power, or 120 days if the target is an agent of a foreign power who is not a US person. If surveillance is required for a longer period, the judge may grant an extension. (50 USC 1805(d))	Orders may not last any longer than is necessary, and they may be authorized for for up to thirty days. If surveillance is required for a longer period, the judge may grant an extension. (18 USC 2518(5))
<b>Notice that one's communications have been collected</b>	Companies are not permitted to provide notice to their users if they are targets or subjects of incidental collection. DOJ is statutorily required to give notice to defendants if evidence to be used against them is derived from Section 702. However, defendants rarely get notice. Nine have been prosecuted using 702-derived evidence, but only five have received notice. These numbers are exceedingly low considering there are nearly 100,000 yearly targets, and FBI agents routinely query the 702 database using US-person identifiers during the course of criminal investigations. (50 USC 1806(d))	Notice is to be provided to anyone subject to a government proceeding before a court or regulatory body if evidence derived from a FISA order is to be used against them. (50 USC 1806(c-d))	Notice must be provided to the target of the order within 90 days of the application if the order was denied, or of its termination if the order was granted. (18 USC 2518(8)(d))