To require the Attorney General to disclose each decision, order, or opinion of a Foreign Intelligence Surveillance Court that includes significant legal interpretation of section 501 or 702 of the Foreign Intelligence Surveillance Act of 1978 unless such disclosure is not in the national security interest of the United States and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 11, 2013

Mr. Merkley (for himself, Mr. Lee, Mr. Heller, Mr. Leahy, Mr. Begich, Mr. Franken, Mr. Tester, Mr. Wyden, Mr. Blumenthal, and Mr. Paul) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To require the Attorney General to disclose each decision, order, or opinion of a Foreign Intelligence Surveillance Court that includes significant legal interpretation of section 501 or 702 of the Foreign Intelligence Surveillance Act of 1978 unless such disclosure is not in the national security interest of the United States and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
SECTION 1. SHORT TITLE.

This Act may be cited as the “Ending Secret Law Act”.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Secret law is inconsistent with democratic governance. In order for the rule of law to prevail, the requirements of the law must be publicly discoverable.

(2) The United States Court of Appeals for the Seventh Circuit stated in 1998 that the “idea of secret laws is repugnant”.

(3) The open publication of laws and directives is a defining characteristic of government of the United States. The first Congress of the United States mandated that every “law, order, resolution, and vote [shall] be published in at least three of the public newspapers printed within the United States”.

(4) The practice of withholding decisions of the Foreign Intelligence Surveillance Court is at odds with the United States tradition of open publication of law.

(5) The Foreign Intelligence Surveillance Court acknowledges that such Court has issued legally significant interpretations of the Foreign Intelligence
Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) that are not accessible to the public.

(6) The exercise of surveillance authorities under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), as interpreted by secret court opinions, potentially implicates the communications of United States persons who are necessarily unaware of such surveillance.

(7) Section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861), as amended by section 215 of the USA PATRIOT Act (Public Law 107–56; 115 Stat. 287), authorizes the Federal Bureau of Investigation to require the production of “any tangible things” and the extent of such authority, as interpreted by secret court opinions, has been concealed from the knowledge and awareness of the people of the United States.

(8) In 2010, the Department of Justice and the Office of the Director of National Intelligence established a process to review and declassify opinions of the Foreign Intelligence Surveillance Court, but more than two years later no declassifications have been made.
SEC. 3. SENSE OF CONGRESS.

It is the sense of Congress that each decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review that includes significant construction or interpretation of section 501 or section 702 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 and 1881a) should be declassified in a manner consistent with the protection of national security, intelligence sources and methods, and other properly classified and sensitive information.

SEC. 4. REQUIREMENT FOR DISCLOSURE OF DECISIONS, ORDERS, AND OPINIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT.

(a) Section 501.—

(1) In general.—Section 501 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861) is amended by adding at the end the following:

“(i) Disclosure of Decisions.—

“(1) Decision defined.—In this subsection, the term ‘decision’ means any decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review that includes significant construction or interpretation of this section.
“(2) Requirement for disclosure.—Subject to paragraphs (3) and (4), the Attorney General shall declassify and make available to the public—

“(A) each decision that is required to be submitted to committees of Congress under section 601(c), not later than 45 days after such opinion is issued; and

“(B) each decision issued prior to the date of the enactment of the Ending Secret Law Act that was required to be submitted to committees of Congress under section 601(c), not later than 180 days after such date of enactment.

“(3) Unclassified summaries.—Notwithstanding paragraph (2) and subject to paragraph (4), if the Attorney General makes a determination that a decision may not be declassified and made available in a manner that protects the national security of the United States, including methods or sources related to national security, the Attorney General shall release an unclassified summary of such decision.

“(4) Unclassified report.—Notwithstanding paragraphs (2) and (3), if the Attorney General makes a determination that any decision may not be declassified under paragraph (2) and an unclassified
summary of such decision may not be made available under paragraph (3), the Attorney General shall make available to the public an unclassified report on the status of the internal deliberations and process regarding the declassification by personnel of Executive branch of such decisions. Such report shall include—

“(A) an estimate of the number of decisions that will be declassified at the end of such deliberations; and

“(B) an estimate of the number of decisions that, through a determination by the Attorney General, shall remain classified to protect the national security of the United States.”.

(2) Section 702.—Section 702(1) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1881a(l)) is amended by adding at the end the following:

“(4) Disclosure of decisions.—

“(A) Decision defined.—In this paragraph, the term ‘decision’ means any decision, order, or opinion issued by the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review that in-

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cludes significant construction or interpretation of this section.

“(B) **Requirement for Disclosure.**—Subject to subparagraphs (C) and (D), the Attorney General shall declassify and make available to the public—

“(i) each decision that is required to be submitted to committees of Congress under section 601(c), not later than 45 days after such opinion is issued; and

“(ii) each decision issued prior to the date of the enactment of the Ending Secret Law Act that was required to be submitted to committees of Congress under section 601(c), not later than 180 days after such date of enactment.

“(C) **Unclassified Summaries.**—Notwithstanding subparagraph (B) and subject to subparagraph (D), if the Attorney General makes a determination that a decision may not be declassified and made available in a manner that protects the national security of the United States, including methods or sources related to national security, the Attorney General shall release an unclassified summary of such decision.
“(D) UNCLASSIFIED REPORT.—Notwithstanding subparagraphs (B) and (C), if the Attorney General makes a determination that any decision may not be declassified under subparagraph (B) and an unclassified summary of such decision may not be made available under subparagraph (C), the Attorney General shall make available to the public an unclassified report on the status of the internal deliberations and process regarding the declassification by personnel of Executive branch of such decisions. Such report shall include—

“(i) an estimate of the number of decisions that will be declassified at the end of such deliberations; and

“(ii) an estimate of the number of decisions that, through a determination by the Attorney General, shall remain classified to protect the national security of the United States.”.

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