

112TH CONGRESS
2D SESSION

S. 3515

To amend the Foreign Intelligence Surveillance Act of 1978 to provide additional protections for privacy and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 2, 2012

Mr. MERKLEY (for himself, Mr. WYDEN, and Mr. TESTER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Foreign Intelligence Surveillance Act of 1978 to provide additional protections for privacy and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protect America’s Pri-
5 vacy Act of 2012”.

6 **SEC. 2. PROHIBITION ON REVERSE TARGETING UNDER**
7 **FISA.**

8 Section 702 of the Foreign Intelligence Surveillance
9 Act of 1978 (50 U.S.C. 1881a) is amended—

1 (1) in subsection (b)(2), by striking “the pur-
 2 pose” and all that follows and inserting the fol-
 3 lowing: “a significant purpose of the acquisition is to
 4 acquire the communications of a particular, known
 5 person reasonably believed to be located in the
 6 United States, except in accordance with title I;”;

7 (2) in subsection (d)(1)(A)—

8 (A) by striking “ensure that” and insert
 9 the following: “ensure—

10 “(i) that”; and

11 (B) by adding at the end the following:

12 “(ii) that an application is filed under
 13 title I, if otherwise required, when a sig-
 14 nificant purpose of an acquisition author-
 15 ized under subsection (a) is to acquire the
 16 communications of a particular, known
 17 person reasonably believed to be located in
 18 the United States; and”;

19 (3) in subsection (g)(2)(A)(i)(I)—

20 (A) by striking “ensure that” and insert
 21 the following: “ensure—

22 “(aa) that”; and

23 (B) by adding at the end the following:

24 “(bb) that an application is
 25 filed under title I, if otherwise re-

quired, when a significant purpose of an acquisition authorized under subsection (a) is to acquire the communications of a particular, known person reasonably believed to be located in the United States; and”; and

(4) in subsection (i)(2)(B)(i)—

(A) by striking “ensure that” and insert the following: “ensure—

“(I) that”; and

(B) by adding at the end the following:

“(II) that an application is filed under title I, if otherwise required, when a significant purpose of an acquisition authorized under subsection (a) is to acquire the communications of a particular, known person reasonably believed to be located in the United States; and”.

SEC. 3. LIMITS ON USE OF UNLAWFULLY OBTAINED INFORMATION UNDER FISA.

Section 702(i)(3) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1881a(i)(3)) is amended by striking subparagraph (B) and inserting the following:

1 “(B) CORRECTION OF DEFICIENCIES.—

2 “(i) IN GENERAL.—If the Court finds
3 that a certification required by subsection
4 (g) does not contain all of the required ele-
5 ments, or that the procedures required by
6 subsections (d) and (e) are not consistent
7 with the requirements of those subsections
8 or the Fourth Amendment to the Constitu-
9 tion of the United States, the Court shall
10 issue an order directing the Government
11 to, at the Government’s election and to the
12 extent required by the order of the
13 Court—

14 “(I) correct any deficiency identi-
15 fied by the order of the Court not
16 later than 30 days after the date on
17 which the Court issues the order; or

18 “(II) cease the acquisition au-
19 thorized under subsection (a).

20 “(ii) LIMITATION ON USE OF INFOR-
21 MATION.—

22 “(I) IN GENERAL.—Except as
23 provided in subclause (II), no infor-
24 mation obtained or evidence derived
25 from an acquisition determined to be

1 deficient under clause (i) concerning
2 any person located in the United
3 States or United States person shall
4 be received in evidence or otherwise
5 disclosed in any trial, hearing, or
6 other proceeding in or before any
7 court, grand jury, department, office,
8 agency, regulatory body, legislative
9 committee, or other authority of the
10 United States, a State, or political
11 subdivision thereof, and no informa-
12 tion concerning any United States
13 person acquired from the acquisition
14 shall subsequently be used or dis-
15 closed in any other manner by Fed-
16 eral officers or employees without the
17 consent of the United States person,
18 except with the approval of the Attor-
19 ney General if the information indi-
20 cates a threat of death or serious bod-
21 ily harm to any person.

22 “(II) EXCEPTION.—If the Gov-
23 ernment corrects any deficiency iden-
24 tified by the order of the Court under
25 clause (i), the Court may permit the

1 use or disclosure of information ac-
 2 quired before the date of the correc-
 3 tion under such minimization proce-
 4 dures as the Court shall establish for
 5 purposes of this clause.”.

6 **SEC. 4. PRIVACY PROTECTIONS FOR INTERNATIONAL COM-**
 7 **MUNICATIONS OF AMERICANS COLLECTED**
 8 **UNDER FISA.**

9 (a) IN GENERAL.—Title VII of the Foreign Intel-
 10 ligence Surveillance Act of 1978 (50 U.S.C. 1881) is
 11 amended by adding at the end the following:

12 **“SEC. 709. ADDITIONAL SAFEGUARDS FOR COMMUNICA-**
 13 **TIONS OF PERSONS IN THE UNITED STATES.**

14 “(a) LIMITATIONS ON ACQUISITION OF COMMUNICA-
 15 TIONS.—

16 “(1) LIMITATION.—Except as authorized under
 17 title I or paragraph (2), no communication shall be
 18 acquired under this title if the Government knows
 19 before or at the time of acquisition that the commu-
 20 nication is to or from a person reasonably believed
 21 to be located in the United States.

22 “(2) EXCEPTION.—

23 “(A) IN GENERAL.—In addition to any au-
 24 thority under title I to acquire communications

described in paragraph (1), the communications
may be acquired if—

“(i) there is reason to believe that the
communication concerns international ter-
rorist activities directed against the United
States, or activities in preparation there-
for;

“(ii) there is probable cause to believe
that the target reasonably believed to be
located outside the United States is an
agent of a foreign power and the foreign
power is a group engaged in international
terrorism or activities in preparation there-
for; or

“(iii) there is reason to believe that
the acquisition is necessary to prevent
death or serious bodily harm.

“(B) ACCESS TO COMMUNICATIONS.—

Communications acquired under this paragraph
shall be treated in accordance with subsection
(b).

“(3) PROCEDURES FOR DETERMINATIONS BE-
FORE OR AT THE TIME OF ACQUISITION.—

“(A) SUBMISSION.—Not later than 120
days after the date of the enactment of the Pro-

1 tect America’s Privacy Act of 2012, the Attor-
2 ney General, in consultation with the Director
3 of National Intelligence, shall submit to the
4 Foreign Intelligence Surveillance Court for ap-
5 proval procedures for determining before or at
6 the time of acquisition, if reasonably prac-
7 ticable, whether a communication is to or from
8 a person reasonably believed to be located in
9 the United States and whether the exception
10 under paragraph (2) applies to that commu-
11 nication.

12 “(B) REVIEW.—The Foreign Intelligence
13 Surveillance Court shall approve the procedures
14 submitted under subparagraph (A) if the proce-
15 dures are reasonably designed to determine be-
16 fore or at the time of acquisition, if reasonably
17 practicable, whether a communication is to or
18 from a person reasonably believed to be located
19 in the United States and whether the exception
20 under paragraph (2) applies to that commu-
21 nication.

22 “(C) PROCEDURES DO NOT MEET RE-
23 QUIREMENTS.—If the Foreign Intelligence Sur-
24 veillance Court concludes that the procedures
25 submitted under subparagraph (A) do not meet

1 the requirements of subparagraph (B), this sec-
2 tion, and the 4th Amendment, the Court shall
3 enter an order so stating and provide a written
4 statement for the record of the reasons for the
5 determination. The Government may appeal an
6 order under this subparagraph to the Foreign
7 Intelligence Surveillance Court of Review.

8 “(D) USE OF PROCEDURES.—If the For-
9 eign Intelligence Surveillance Court approves
10 procedures under this paragraph, the Govern-
11 ment shall use the procedures in any acquisition
12 of communications under this title.

13 “(E) REVISIONS.—The Attorney General,
14 in consultation with the Director of National
15 Intelligence, may submit new or amended proce-
16 dures to the Foreign Intelligence Surveillance
17 Court for review under this paragraph.

18 “(F) RELIABILITY.—If the Government
19 obtains new information relating to the reli-
20 ability of procedures approved under this para-
21 graph or the availability of more reliable proce-
22 dures, the Attorney General shall submit to the
23 Foreign Intelligence Surveillance Court the in-
24 formation.

1 “(b) LIMITATIONS ON ACCESS TO COMMUNICA-
2 TIONS.—

3 “(1) IN GENERAL.—At such time as the Gov-
4 ernment can reasonably determine that a commu-
5 nication acquired under this title (including a com-
6 munication acquired under subsection (a)(2)) is to
7 or from a person reasonably believed to be located
8 in the United States or a United States person the
9 communication shall be specifically designated and
10 handled or otherwise managed such that no person
11 may access or search for the communication, except
12 in accordance with title I, this section, or chapter
13 119 of title 18, United States Code.

14 “(2) EXCEPTIONS.—In addition to any author-
15 ity under title I, including the emergency provision
16 in section 105(f), a communication described in
17 paragraph (1) may be accessed and disseminated for
18 a period of not longer than 7 days if—

19 “(A)(i) there is reason to believe that the
20 communication concerns international terrorist
21 activities directed against the United States, or
22 activities in preparation therefor;

23 “(ii) there is probable cause to believe that
24 the target reasonably believed to be located out-
25 side the United States is an agent of a foreign

1 power and the foreign power is a group engaged
2 in international terrorism or activities in prepa-
3 ration therefor; or

4 “(iii) there is reason to believe that the ac-
5 cess is necessary to prevent death or serious
6 bodily harm;

7 “(B) the Attorney General notifies the
8 Foreign Intelligence Surveillance Court imme-
9 diately of the access; and

10 “(C) not later than 7 days after the date
11 the access is initiated, the Attorney General—

12 “(i) makes an application for an order
13 under title I or pursuant to chapter 119 of
14 title 18, United States Code; or

15 “(ii) submits to the Foreign Intel-
16 ligence Surveillance Court a document
17 that—

18 “(I) certifies that—

19 “(aa) there is reason to be-
20 lieve that the communication con-
21 cerns international terrorist ac-
22 tivities directed against the
23 United States, or activities in
24 preparation therefor;

1 “(bb) there is probable
2 cause to believe that the target
3 reasonably believed to be located
4 outside the United States is an
5 agent of a foreign power and the
6 foreign power is a group engaged
7 in international terrorism or ac-
8 tivities in preparation therefor; or

9 “(cc) there is reason to be-
10 lieve that the access is necessary
11 to prevent death or serious bodily
12 harm; and

13 “(II) identifies the target of the
14 collection, the party to the commu-
15 nication who is in the United States if
16 known, and the extent to which infor-
17 mation relating to the communication
18 has been disseminated.

19 “(3) DENIAL OF COURT ORDER.—If an applica-
20 tion for a court order described in paragraph
21 (2)(C)(i) is made and is not approved, the Attorney
22 General shall submit to the Foreign Intelligence Sur-
23 veillance Court, not later than 7 days after the date
24 of the denial of the application, the document de-
25 scribed in paragraph (2)(C)(ii).

1 “(4) ADDITIONAL COURT AUTHORITIES.—

2 “(A) IN GENERAL.—The Foreign Intel-
3 ligence Surveillance Court may—

4 “(i) limit access to communications
5 described in paragraph (1) relating to a
6 particular target if the Court determines
7 that any certification submitted under
8 paragraph (2)(C)(ii)(I) with respect to that
9 target is clearly erroneous; and

10 “(ii) require the Attorney General to
11 provide the factual basis for a certification
12 submitted under paragraph (2)(C)(ii)(I), if
13 the Court determines it would aid the
14 Court in conducting review under this sub-
15 section.

16 “(B) FISC ACCESS.—The Foreign Intel-
17 ligence Surveillance Court shall have access to
18 any communications that have been specifically
19 designated under paragraph (1) and any infor-
20 mation the use of which has been limited under
21 paragraph (5).

22 “(5) FAILURE TO NOTIFY.—

23 “(A) IN GENERAL.—In the circumstances
24 described in subparagraph (B), access to a com-
25 munication shall terminate, and no information

1 obtained or evidence derived from the access
2 concerning any United States person shall be
3 received in evidence or otherwise disclosed in
4 any trial, hearing, or other proceeding in or be-
5 fore any court, grand jury, department, office,
6 agency, regulatory body, legislative committee,
7 or other authority of the United States, a State,
8 or political subdivision thereof, and no informa-
9 tion concerning any United States person ac-
10 quired from the access shall subsequently be
11 used or disclosed in any manner by Federal of-
12 ficers or employees without the consent of the
13 person, except with the approval of the Attor-
14 ney General if the information indicates a
15 threat of death or serious bodily harm to any
16 person, or if a court order is obtained under
17 title I or pursuant to chapter 119 of title 18,
18 United States Code.

19 “(B) CIRCUMSTANCES.—The cir-
20 cumstances described in this subparagraph are
21 circumstances in which—

22 “(i) as of the date that is 7 days after
23 the date on which access to a communica-
24 tion is initiated under paragraph (2), a
25 court order described in paragraph

1 (2)(C)(i) has not been sought and the doc-
2 ument described in paragraph (2)(C)(ii)
3 has not been submitted; or

4 “(ii) as of the date that is 7 days
5 after an application for a court order de-
6 scribed in paragraph (2)(C)(i) is denied,
7 the document described in paragraph
8 (2)(C)(ii) is not submitted in accordance
9 with paragraph (3).

10 “(6) EVIDENCE OF A CRIME.—Information or
11 communications subject to this subsection may be
12 disseminated for law enforcement purposes if it is
13 evidence that a crime has been, is being, or is about
14 to be committed, if dissemination is made in accord-
15 ance with section 106(b).

16 “(7) PROCEDURES FOR DETERMINATIONS
17 AFTER ACQUISITION.—

18 “(A) IN GENERAL.—Not later than 120
19 days after the date of enactment of the Protect
20 America’s Privacy Act of 2012, the Attorney
21 General, in consultation with the Director of
22 National Intelligence, shall submit to the For-
23 eign Intelligence Surveillance Court for ap-
24 proval procedures—

1 “(i) for determining, if reasonably
2 practicable, whether a communication ac-
3 quired under this title is to or from a per-
4 son reasonably believed to be in the United
5 States or is a United States person; and

6 “(ii) for ensuring that no person may
7 access such a communication, except as de-
8 scribed in subsection (b)(1).

9 “(B) REVIEW.—The Foreign Intelligence
10 Surveillance Court shall approve the procedures
11 submitted under subparagraph (A) if the proce-
12 dures are reasonably designed to determine, if
13 reasonably practicable, whether a communica-
14 tion acquired under this title is a communica-
15 tion to or from a person reasonably believed to
16 be located in the United States.

17 “(C) PROCEDURES DO NOT MEET RE-
18 QUIREMENTS.—If the Foreign Intelligence Sur-
19 veillance Court concludes that the procedures
20 submitted under subparagraph (A) do not meet
21 the requirements of subparagraph (B), this sec-
22 tion, or the Fourth Amendment to the Con-
23 stitution of the United States, the Court shall
24 enter an order so stating and provide a written
25 statement for the record of the reasons for the

1 determination. The Government may appeal an
2 order under this subparagraph to the Foreign
3 Intelligence Surveillance Court of Review.

4 “(D) USE OF PROCEDURES.—If the For-
5 eign Intelligence Surveillance Court approves
6 under this paragraph the procedures submitted
7 under subparagraph (A), the Government shall
8 use such procedures for any communication ac-
9 quired under this title.

10 “(E) REVISIONS.—If the Attorney General
11 seeks to replace or modify procedures approved
12 under this paragraph, the Attorney General, in
13 consultation with the Director of National Intel-
14 ligence, shall submit the replacement or modi-
15 fied procedures to the Foreign Intelligence Sur-
16 veillance Court. The Court shall review such re-
17 placement or modified procedures as provided
18 in this paragraph.

19 “(F) RELIABILITY.—If the Government
20 obtains new information relating to the reli-
21 ability of procedures approved under this para-
22 graph or the availability of more reliable proce-
23 dures, the Attorney General shall submit to the
24 Foreign Intelligence Surveillance Court such in-
25 formation.

1 “(c) TITLE I COURT ORDER.—If the Government ob-
2 tains a court order under title I relating to a target of
3 an acquisition under this title, the Government may access
4 and disseminate, under the terms of that court order and
5 any applicable minimization requirements, any commu-
6 nications of that target that have been acquired or specifi-
7 cally designated under subsection (b)(1).

8 “(d) INSPECTOR GENERAL AUDIT.—

9 “(1) AUDIT.—Not less than once each year, the
10 Inspector General of the Department of Defense and
11 the Inspector General of the Department of Justice
12 shall complete an audit of the implementation of and
13 compliance with this section. For purposes of an
14 audit under this paragraph, the Inspectors General
15 shall have access to any communications that have
16 been specifically designated under subsection (b)(1)
17 and any information the use of which has been lim-
18 ited under subsection (b)(5). An audit under this
19 paragraph shall include an accounting of any specifi-
20 cally designated communications that have been dis-
21 seminated.

22 “(2) REPORT.—Not later than 30 days after
23 the completion of each audit under paragraph (1),
24 the Inspectors General shall jointly submit to the
25 Permanent Select Committee on Intelligence and the

1 Committee on the Judiciary of the House of Rep-
2 resentatives and the Select Committee on Intel-
3 ligence and the Committee on the Judiciary of the
4 Senate a report containing the results of the audit.

5 “(3) EXPEDITED SECURITY CLEARANCE.—The
6 Director of National Intelligence shall ensure that
7 the process for the investigation and adjudication of
8 an application by an Inspector General or any ap-
9 propriate staff of an Inspector General for a security
10 clearance necessary for the conduct of the audits
11 under this subsection is conducted as expeditiously
12 as possible.

13 “(e) APPLICABILITY.—Subsections (a) and (b) shall
14 apply to any communication acquired under this title on
15 or after the earlier of—

16 “(1) the date that the Foreign Intelligence Sur-
17 veillance Court approves the procedures described in
18 subsection (a)(3) and the procedures described in
19 subsection (b)(7); and

20 “(2) 1 year after the date of enactment of the
21 Protect America’s Privacy Act of 2012.”.

22 (b) TECHNICAL AND CONFORMING AMENDMENT.—
23 The table of contents in the first section of the Foreign
24 Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et

- 1 seq.) is amended by inserting after the item relating to
- 2 section 708 the following:

“Sec. 709. Additional safeguards for communications of persons in the United States.”.

