

S.448: Concessions to Address National Security Concerns

The Free Flow of Information Act has changed significantly to address national security concerns raised by members of Congress and by the White House. As explained by DNI Dennis Blair and Attorney General Eric Holder, in their November 4, 2009 letter to Chairman Leahy, “[t]here are a number of changes from previous versions of this legislation that address concerns that the Administration has expressed” — such that the Act “enabl[es] the Government to take measures necessary to protect national security.”

1. Concern that evidentiary standard in national-security exception was too demanding for the government.

- Original (Lugar/Dodd): Limited exception if “*clear and convincing evidence*” that disclosure is “*necessary*” to “prevent *imminent and actual* harm” to national security.
- S.448 (Schumer/Specter Managers’ Amendment): Broader exception for information that the government demonstrates by a “*preponderance*” of evidence “would *materially assist* the Federal Government in *preventing, mitigating, or identifying perpetrator of*—(i) an act of terrorism; or (ii) other acts that *have caused or are reasonably likely to cause* significant and articulable harm to national security.”

2. Concern that courts would second-guess Executive branch assessments of national security threats.

- Original (Lugar/Dodd): No deference to agency assessments of national security harm.
- S.448 (Schumer/Specter Managers’ Amendment): The court “shall give appropriate deference to a specific factual showing submitted to the court by the head of any executive branch agency or department concerned.”

3. Concern that the Act would make it too difficult for the government to investigate and prosecute leaks of classified information.

- Original (Lugar/Dodd): No provision enabling the government to identify sources of leaks of classified information; no deference to government officials about the significance of the information leaked; government would need to demonstrate that the leaker had “authorized access” to the information.
- S.448 (Schumer/Specter Managers’ Amendment):
 - *Provision for compelled disclosure in leak cases*: Government can compel disclosure when the information at issue “would materially assist the Federal Government in preventing or mitigating—(i) an act of terrorism; or (ii) other acts that are reasonably likely to cause significant and articulable harm to national security.”
 - *Deference to government assessments of importance of the classified information*: The court “shall give appropriate deference to a specific factual showing

submitted to the court by the head of any executive branch agency or department concerned.”

- *No showing of “authorized access”*: The government need not demonstrate that the source of the leak had “authorized access” to the classified information at issue.

4. Concern that media wings of terrorist organizations could claim protection as “covered person.”

- Original (Lugar/Dodd): No exceptions to “covered person” definition
- S.448 (Schumer/Specter Managers’ Amendment): Definition of a “covered person” excludes any entity that:
 - (1) is a foreign power or agent of a foreign power, as defined in 50 U.S.C. § 1801;
 - (2) has been designated a foreign terrorist organization, by the State Department, pursuant to 8 U.S.C. § 1189(a);
 - (3) has been designated as a Specially Designated Global Terrorist, by the Department of the Treasury, pursuant to Executive Order Number 13224;
 - (4) is a specially designated terrorist, as defined by 31 C.F.R. § 595.311;
 - (5) a terrorist organization, as defined in 8 U.S.C. § 1182(a)(3)(B)(vi)(II);
 - (6) is committing or attempting the crime of terrorism, as defined in 18 U.S.C. §§ 2331(5) or § 2332b(g)(5);
 - (7) is committing or attempting the crime of providing material support to a terrorist organization, as defined in 18 U.S.C. § 2339A(b)(1); or
 - (8) is aiding, abetting, or conspiring in illegal activity with any person or organization defined in exceptions (1)–(7).

5. Concern that exhaustion/narrow tailoring requirements would impose unnecessary delay in preventing urgent threats to national security.

- Original (Lugar/Dodd): National security exception required exhaustion of alternative sources before disclosure and narrow tailoring.
- S.448 (Schumer/Specter Managers’ Amendment): National security exception requires neither exhaustion of alternative sources nor narrow tailoring.

6. Concern about interference with National Security Letters (NSLs).

- Original (Lugar/Dodd): Provisions applied fully to national-security letters.

- S.448 (Schumer/Specter Managers' Amendment): The provision governing subpoenas to communications service providers contains relaxed requirements for National Security Letters, to take into account the unique posture of national-security investigations.

7. Concern that public-interest balancing test would lead to ad hoc judicial determinations in national security context.

- Previous versions: National-security exception contained balancing test, even in situations in which the government had established harm to national security.
- S.448 (Schumer/Specter Managers' Amendment): National-security exception contains no balancing test.

8. Concern that the Act would interfere with FISA.

- Original (Lugar/Dodd): No provision preserving status quo in FISA cases.
- S.448 (Schumer/Specter Managers' Amendment): Rule of construction provides that Act does not “affect or modify the authorities or obligations of a Federal entity with respect to the acquisition or dissemination of information pursuant to [FISA].”

9. Concern that the government would be forced to reveal additional classified information to make the showing required by the national security exception.

- Original (Lugar/Dodd): No provision for review in camera/ex parte of information related to national security.
- S.448 (Schumer/Specter Managers' Amendment): Submissions to the court, including national security-related submissions by the Government, can be submitted under seal and ex parte when appropriate.