Testimony of The Honorable Thomas B. Evans, Jr.
Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties
of the House Judiciary Committee

September 22, 2009

Thank you for the opportunity to testify today regarding the need to reform the Patriot Act. I am grateful to the leadership of this Subcommittee for holding this hearing on a subject of great importance to both our national security and our individual liberties. I am especially heartened to see this Subcommittee exercising its oversight responsibility, such a critically important element in our system of checks and balances.

I thought seriously about joining the FBI in the late 1950s. My experience serving as a Member of Congress (R – DE) only enhanced my appreciation that we must provide the FBI with the means it needs to protect the American people. This was further strengthened, of course, by the attacks of September 11, 2001. In the wake of that terrible tragedy, our nation clearly needed to mobilize to respond with a new and powerful counter-terrorism strategy. But we must not allow our fears to lead us to overreaction, and whenever we grant powers to the executive branch, we must incorporate proper safeguards to protect individual rights and ensure oversight.

Unfortunately, the Patriot Act was initially put together in haste in the wake of the September 11th attacks, and the Congress, pressed hard by the Administration, failed to consider all the negative implications. We missed our first chance to correct these deficiencies when various provisions of the Act came up for renewal four years ago. Now that several provisions of the Patriot Act are set to expire this year, I hope that Congress will take the opportunity to reform this Act and incorporate strong protections for constitutional rights and civil liberties. We should work to preserve the proper balance between the need to protect our national security and the need to safeguard the liberties of individual Americans. These two goals are not mutually exclusive.

I feel very strongly that we must work to preserve our system of checks and balances. This includes ensuring against abuse by an overreaching government. Proper oversight reduces substantially the potential for error. These convictions led me last year to become a member of the Liberty and Security Committee of the Constitution Project, and I have now joined with that broad bipartisan group in issuing a Statement on Reforming the Patriot Act. Many of the committee members are strong conservatives, and some are constitutional scholars. A copy of that statement is attached to my prepared remarks, and it outlines the minimum reforms that Congress should adopt in reconsidering the Patriot Act this year.

I am disappointed that the Obama administration has recommended that all three provisions of the Patriot Act set to expire this year be reauthorized without modification. Nevertheless, I am encouraged by the administration's expressed willingness to discuss reforms that provide additional safeguards for privacy rights while still protecting national security and the rule of law. These are exactly the types of reforms I will outline for you today; reforms that safeguard vital civil liberties while ensuring that law enforcement is able to effectively combat the threat of terrorism. I am cautiously optimistic that both Congress and the administration can reach a consensus and enact these much needed reforms.

Since the initial passage of the Patriot Act, we have learned how many of its provisions intrude upon Americans' privacy rights and civil liberties. Although much of the legislation was developed to

remedy gaps in the United States' intelligence gathering powers, the Patriot Act went well beyond those needs, and the Act authorizes overly broad executive powers to track, monitor, and search individuals without including the safeguards needed to prevent abuse. Such overbroad surveillance chills First Amendment freedoms and intrudes upon Fourth Amendment rights. History teaches us that the potential for abuse all too often results in actual abuse. We ignore history at our peril.

The Constitution Project's Liberty and Security Committee's specific recommendations include the following:

1. Business Records Provision: Section 215 of the Patriot Act

Section 215 of the Patriot Act, also known as the "business records" or "library records" provision, provides the FBI with broad and largely unchecked powers to obtain material from businesses in connection with counter-terrorism or counter-espionage investigations. This provision eliminated the prior requirement that the information sought must be connected to an agent of a foreign power, and it expanded the types of material that may be sought and the entities that can be required to provide information. Under Section 215, the FBI does not even need to show that the items it seeks are related to a person the FBI is investigating. It only needs to show that the information or object sought is relevant to a terrorism or espionage investigation. In addition, Section 215 includes a non-disclosure or "gag order" requirement, which allows the government to prevent recipients from disclosing that they have received such orders.

Although a judicial order is required before the government can seek records under Section 215, the minimal showing that must be made combined with the broad scope of records that can be obtained makes this power dangerously ripe for abuse. This provision is scheduled to sunset at the end of this year. Congress should only reauthorize Section 215 if it amends the provision to incorporate key safeguards. At a minimum, these should include:

- Tightening the standard for issuing an order under Section 215 to restore the requirement that the material sought must relate to a suspected agent of a foreign power or a person directly linked to such an agent, and requiring adoption of minimization procedures, to ensure that the scope of the order is no greater than necessary to accomplish the investigative purpose.

- Limiting to 30 days the period during which the recipient of a Section 215 order can be required not to disclose existence of the order, unless the government can demonstrate harm would result unless the "gag order" is extended.

2. National Security Letter Provision: Section 505 of the Patriot Act

The National Security Letter Provision of the Patriot Act, which is not scheduled to sunset, raises similar and even graver concerns. That provision does not even require a court order and creates even greater potential for serious abuse.

National Security Letters (NSLs) are demand letters signed by officials of the FBI and other agencies, which require disclosure of sensitive information held by banks, credit companies, telephone carriers and Internet Service Providers, among others. Companies that receive NSLs are usually prohibited from disclosing the fact or nature of a request.

As with the business records provision, Section 505 of the Patriot Act eliminated the requirement that the information sought through an NSL must "pertain to" a foreign power or the agent of a foreign power, and thus information about Americans is now at greater risk. The FBI is permitted merely to assert that the records are "relevant to" an investigation to protect against international terrorism or foreign espionage. Section 505 also enabled agents to seek information without any demonstrated factual basis, and it vastly expanded the types of "financial institutions" that can receive an NSL to include such businesses as travel agencies, real estate agents, insurance companies, and car dealers.

Sadly, these overly broad powers did not just create the *potential* for abuse. Audits by the Justice Department Inspector General (IG) released in 2007 and 2008 have revealed numerous *actual* abuses in the issuance of NSLs. The IG audits demonstrated that FBI agents had issued NSLs in many cases where they were not authorized, including using them against individuals who were not actually connected to any FBI investigation. The audits also demonstrated that the FBI had used unauthorized "exigent letters" to quickly obtain information without ever issuing the NSL that it promised to issue to cover the request.

As Congress considers renewal of the three Patriot Act provisions set to expire this year, it should, at a minimum, extend its examination to the NSL provision. Although the NSL provision is not scheduled to sunset, the lack of appropriate safeguards for this tool have been well-documented by the IG reports. Congress should enact reforms to limit the scope of NSLs and the potential for abuse, including:

- Re-establishing the prior requirement that there be specific facts showing that the records sought through an NSL relate to an agent of a foreign power; and requiring adoption of minimization to ensure that the scope of the order is no greater than necessary to accomplish the investigative purpose.

- Establishing reasonable limits on the "gag" that attaches to an NSL, requiring it to be narrowly tailored and limiting it to 30-days, extendable only by a court and based upon a showing of necessity.

- Establishing recipients' rights to seek judicial review of NSLs.

3. "Lone Wolf" Provision: Section 6001 of the Intelligence Reform and Terrorism Prevention Act

The "lone wolf" provision was originally created to permit surveillance of a hypothetical "lone wolf" terrorist – someone who operates without ties to any international terrorist organization. The provision eliminated the prior requirement in the Foreign Intelligence Surveillance Act (FISA) that only persons suspected of being agents of foreign powers or terrorist organizations can be subject to surveillance. So, the lone wolf provision allows the government to use FISA for surveillance of a non-US person who has no known ties to a group or entity.

FISA was adopted to provide special powers to conduct intelligence against foreign agents. FISA's authorization of secret wiretaps and secret home searches in the United States is an exception to traditional Fourth Amendment standards, which has been justified on the grounds that these extraordinary surveillance powers are limited to investigations of foreign powers and their agents. Under FISA, the government can obtain a warrant without a showing of probable cause that a crime is being committed or is about to be committed. But the "lone wolf" provision, by eliminating the

requirement to show a connection to any foreign group, undermines this justification for the lower FISA standards and raises serious constitutional concerns under the Fourth Amendment.

Amazingly, the administration acknowledged in the Justice Department's September 14, 2009 letter to Congress, that the government has never to date needed to rely on this lone wolf provision. Nonetheless, the administration has argued that these extraordinary powers, which raise serious Fourth Amendment concerns, are necessary because the "lone wolf" provision is an "essential tool" in the fight against terrorism. It is one thing to modify traditional legal standards in the face of a grave and known threat; it is another to authorize infringements on civil liberties when the facts show there is no need for such executive powers. There is no reason that Congress should reauthorize without modification a provision that drastically erodes civil liberties when the government cannot point to a single instance in which this provision was necessary to combat terrorism.

For these reasons, Congress should let the "lone wolf" provision sunset due to the serious constitutional issues it raises. Suspected terrorists would still be subject to surveillance and search under *traditional and established* criminal law standards.

If Congress does choose to reauthorize the "lone wolf" provision, it should include a new sunset period together with a rigorous public reporting requirement that would help Members of Congress and the public to assess whether there is any justification for this provision. Currently, the Attorney General is required to report to Congress semiannually on the use of the "lone wolf" provision; however such reports are not made public.

4. "Roving" Wiretap Provision: Section 206 of the Patriot Act

Section 206 of the Patriot Act allows the government to obtain "roving wiretap" orders that cover multiple phones or email addresses, without citing the particular location of the target. These wiretaps are conducted under FISA and based on orders received from the FISA Court.

This provision was designed to allow surveillance of a target who continually eludes government agents by constantly changing phones and email addresses. However, under Section 206, unlike those in traditional criminal investigations, the government is not required to identify *either* the particular communications device to be monitored or the individual who is the subject of the surveillance. The provision does require that the target be described "with particularity," but not that the target be named. Because there is no particularity of location requirement, as traditionally required by the Fourth Amendment, innocent civilians may become inadvertent targets of surveillance.

The roving wiretap provision is the last of the three Patriot Act provisions set to expire on December 31st. If Congress decides to reauthorize this provision, it should require that if the wiretap order does not specify the location of the surveillance, then it must identify the target. Conversely, if the order does not specify the target, then it should identify the location with particularity.

5. Ideological Exclusion Provision: Section 411 of the Patriot Act

Section 411 of the Patriot Act is not set to expire, but should also be reconsidered by Congress this year. This provision expanded the grounds for excluding and deporting foreign nationals based upon speech, raising serious First Amendment concerns. This provision permits the United States to deport foreign nationals for wholly innocent support of a "terrorist organization," even where there is no

connection between the foreign national's support and any act of violence, much less terrorism, by the recipient group. It also bars admission to the United States of foreign nationals who "endorse or espouse terrorist activity" or who "persuade others to support terrorist activity or a terrorist organization" in ways determined by the Secretary of State to undermine U.S. efforts to combat terrorism. It also excludes representatives of groups that "endorse acts of terrorist activity" in ways that undermine U.S. efforts to combat terrorism.

These provisions make individuals excludable and removable for speech and association that is constitutionally protected by the First Amendment, and are subject to the same sorts of ideologically biased application that the 1952 McCarran-Walter Act permitted before it was repealed over thirty years later. These provisions were initially cited by the State Department in denying admission to Tariq Ramadan, a Swiss scholar of Islam who had been hired to fill an endowed chair at Notre Dame University.

Congress should take this opportunity to amend Section 411 to eliminate deportation and exclusion based on speech and association that would be protected by the Constitution if engaged by a United States citizen. When it comes to core First Amendment freedoms, we should not tolerate a double standard.

Thank you again for the invitation to be a part of your review process. I hope you will seriously consider adopting reforms to the Patriot Act along the lines I have outlined.