STATEMENT OF BRUCE FEIN

REGARDING H.R. 3189: NATIONAL SECURITY LETTERS REFORM ACT OF 2007

BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

APRIL 15, 2008

Mr. Chairman and Members of the Subcommittee:

I welcome the opportunity to share my views on H.R. 3189, the National Security Letters Reform Act of 2007. I support the bill. It strikes a balance between privacy and law enforcement vastly superior to existing law in honoring the charter principles of the American Revolution and the Constitution.

The Declaration of Independence sets forth the purpose of the United States government: to secure the unalienable rights to life, liberty, and the pursuit of happiness enjoyed by every American citizen. The signature creed of the United States has been that individual freedom is the rule. Government intrusions are the exception that can be justified only by clear and substantial community interests. Justice Louis D. Brandeis lectured in Olmstead v. United States (1928) that the right to be left alone is the most cherished freedom among civilized people. Privacy is not only a good in itself; it also nurtures a sense of assertiveness, robust independence, and even rebelliousness which are the lifeblood of democracy. The greatest danger to freedom is an inert or docile people fearful that the government has access to every detail of their private lives.

In the typical federal criminal investigation, a grand jury composed of ordinary citizens, supervised by an independent and neutral federal judge, issues subpoenas for records relevant to determining whether an indictment should be voted. The prosecutor cannot act as a surrogate for the collective view of the grand jury because of the temptation to overreach in a quest for fame, vindictiveness or otherwise. Supreme Court Justice Robert Jackson captured the idea in Johnson v. United States (1948) in addressing the Fourth Amendment's protection against unreasonable

searches and seizures and the customary requirement of a judicial warrant based on probable cause: "Its protection consists in requiring inferences [of crime] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

The recipient of a grand jury demand may move to quash the subpoena as unconstitutional or otherwise in violation of law. The target may also publicize the subpoena to expose possible abuse or overreaching or the need for remedial legislation. Sunshine is frequently the best disinfectant.

Of course, there are exceptions to every rule. The Constitution is not a suicide pact. It seems worth noting, however, that the United States Supreme Court has refused to carve out a Fourth Amendment exception for murder investigations despite the alarming annual number of murders. (The FBI estimated the murder toll in 2006 at more than 17,000, or approximately six times 9/11 fatalities). National security letters (NSLs), which deviate sharply from customary law enforcement methods, might be justified in principle if there were a substantial showing that espionage or international terrorism crimes were eluding detection because available investigatory tools were insufficiently muscular; and, that NSLs would provide the necessary muscle to thwart national security crimes. (The Patriot Act's elimination of the wall between intelligence collection and law enforcement makes NSL requests indistinguishable from grand jury subpoenas for documents), NSLs should are presumptively disfavored because they may be issued by the government without any citizen or judicial supervision and lack the transparency that is a cornerstone deterrent to abuses.

I do not believe either benchmark for NSLs has ever been satisfied to overcome the presumption. Before their enshrinement in the Patriot Act, Congress was not presented with a roster of international terrorist incidents that probably would have been foiled if NSLs had been available. The 9/11 Commission did not find that the terrorist abominations might have been forestalled with NSLs. After years of intensive use, this Committee has not been presented with a list of espionage or international terrorism crimes that were prevented or solved because of NSLs and could not have been prevented or solved otherwise. NSLs are the twin of the quest to emasculate the individual warrant protection of the Foreign Intelligence Surveillance Act with general warrants rubber stamped after the fact by a FISA judge.

H.R. 3189 should be supported because it diminishes (although it does not eliminate) the gratuitous encroachments on citizen privacy under the existing laws governing NSLs. There is not a crumb of hard evidence that enactment of the bill would cause a single act of planned espionage or international terrorism to go undetected.

The bill would confine NSLs to investigations where there are specific and articulable facts indicating the target is a foreign agent or foreign power. The former standard was simple relevancy to an espionage or international terrorism investigation. The bill also saddles NSLs with the same standards of reasonableness as would obtain if a grand jury subpoena had been issued in conjunction with an espionage or international terrorism investigation. It also places reasonable limits on the secrecy of NSLs. The democratic values advanced by transparency cannot be overstated. Secret government wars with self-government and deterring misconduct. The Constitution

does not permit secret detentions and trials of suspected international terrorists even if public knowledge might clue Al Qaeda where its network might be vulnerable. Of course, a disclosure of an NSL to assist obstruction or evasion of justice is itself a crime.

The bill would require minimization procedures to diminish the volume of private information unrelated to foreign intelligence or crime in government files. The standards for retention, however, are inescapably nebulous, and will easily blunt the purpose of minimization as they have regarding FISA. Deterrence of government wrongdoing is buttressed by creating a criminal justice suppression remedy for violations and a civil cause of action for the target. Regarding the latter, I would bring the suit within the universe of civil rights claims subject to the Civil Rights Attorneys' Fees Award Act of 1988. The recipients of NSLs have little or no incentive to challenge their legality because compliance with an administrative subpoena ordinarily shields the recipient from liability to the target. See e.g., 18 U.S.C. 2703(e).

Freedom requires a certain level of risk that tyrannies might find unacceptable. The risk of international terrorism in China may be less than in the United States, but who among us would prefer the former to the latter? We should never forget that the revolutionary idea of America was that government exists to secure the unalienable individual rights of every citizen period, with no commas, semi-colons or question marks. There can be no doubt that NSLs have been fueled by post-9/11 fears. But we should be steeled against capitulation by James Madison's admonition: "If Tyranny and Oppression come to this land, it will be in the guise of fighting a foreign enemy."