February 4, 2008

Dear Senator:

As you debate S. 2248, legislation to amend the Foreign Intelligence Surveillance Act (“FISA”), I urge you to support a bipartisan amendment introduced by Senator Dianne Feinstein (D-CA) to reiterate that FISA is the exclusive means for conducting electronic surveillance for foreign intelligence purposes.

The ABA believes that any future foreign intelligence surveillance must be conducted within the framework of FISA. The Feinstein Amendment (S.A. 3910) accomplishes this by reiterating that FISA and Title III of the Crime Control and Safe Streets Act are the exclusive means for conducting electronic surveillance.

Furthermore, the Feinstein Amendment codifies the requirement that affirmative and explicit action by Congress is necessary to take exception to the requirement to abide by FISA when conducting foreign intelligence surveillance. When the ABA studied the NSA warrantless surveillance activities in 2006, we found that the argument that Congress implicitly authorized the NSA program when it enacted the 2001 Authorization for Use of Military Force (AUMF) was unpersuasive. There is nothing in the text or the history of the AUMF to suggest that Congress intended to permit the Executive to engage in warrantless electronic surveillance in the United States without judicial approval or a showing of probable cause as required by FISA. Adoption of the Feinstein Amendment would ensure that it is absolutely clear that Congress must specifically authorize any exception to the exclusivity requirements of FISA.

As originally enacted, FISA achieved the necessary balance of providing tools to protect our country while preserving the privacy of American citizens. In amending FISA, we urge you to adopt appropriate safeguards, including the Feinstein Amendment, to ensure that national security objectives are being accomplished within the bounds of our constitutional system of government.

Sincerely,

Denise A. Cardman
Acting Director