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*“Eavesdropping on Americans: Implausible Deniability”*

Professors David Cole of Georgetown and Curtis Bradley of Duke agree on little in the law. Cole, an ardent defender of immigrants and civil liberties, is a darling of the left. Bradley, a skeptic about international law and champion of national sovereignty, is a darling of the right.

Yet last month they both joined a bipartisan group of 16 eminent law professors and former government officials to denounce the Bush Administration’s national security wiretapping of Americans. In the view of this ideologically disparate group, the Justice Department’s defense of the eavesdropping lacks even a “plausible” legal basis.

In other words, in their opinion, the legal arguments put forward by Attorney General Alberto Gonzales have the persuasive force of a cow flop.

And they are right. In 1972 the Supreme Court ruled that the Fourth Amendment requires judicial warrants for domestic security wiretapping in the United States. However, it left open whether a warrant is required for wiretaps in the US designed to gather intelligence about a foreign power.

In 1978 Congress plugged the gap. The Foreign Intelligence Surveillance Act (“FISA”) creates two separate legal schemes. Where a target in the US is exclusively foreign, such as an embassy, and there is no “substantial likelihood” of overhearing Americans, the President may authorize wiretaps for up to a year based on a certification by the Attorney General.

But where Americans in the US are targeted or likely to be overheard, a judicial warrant for a foreign intelligence wiretap in the US must be obtained from a special, eleven-judge FISA court. Operating in total secrecy, the FISA court may authorize electronic surveillance, so long as the government shows probable cause that the target is a foreign power or an agent of a foreign power.

International terrorist groups qualify as foreign powers. Americans who work for, or knowingly conspire with or aid and abet groups like Al Qaeda, are agents of a foreign power.

FISA is fast and flexible. In emergencies the government can get a warrant up to 3 days after surveillance begins. In wartime no warrant is required for the first 15 days – long enough for the government to ask Congress for any necessary changes in the law.

A limited proviso protects free speech. Americans cannot be deemed agents of a foreign power based solely on First Amendment activities. If a reporter emails a member of Al Qaeda to ask a journalistic question, she may not be targeted by a FISA wiretap (although the Al Qaeda member may be a target). But if there is probable cause to believe she is conspiring with Al Qaeda, she may be targeted.

To engage in electronic surveillance of Americans in the US without either a FISA warrant or an ordinary warrant from a criminal court is a federal crime. Nonetheless, soon after 9/11, the National Security Agency, initially on its own and later with the President's blessing, began listening in on conversations between Americans in the US and foreigners – with no judicial warrant.

The Justice Department offers two legal defenses. First, it claims that the congressional authorization for the President to use force against terrorists after 9/11 implicitly authorized him to wiretap Americans. As the legal scholars point out, that claim violates elementary rules of statutory construction. Repeals of laws by implication are disfavored; if Congress had meant to repeal FISA, it would have said so.

In addition, specific laws prevail over general laws. FISA specifically governs electronic surveillance; a general law on use of force does not take its place.

The second government argument is that the President as commander in chief has implied authority under the Constitution to wiretap our enemies in a war. Of course he does. But that does not mean he has authority to wiretap Americans in the US, who have rights under the Fourth Amendment, even in wartime. And even less can the President secretly violate a law passed by Congress, acting within its constitutional powers.

Perhaps FISA should be amended. The National Security Agency may well wish to listen in on all conversations between Americans and Al Qaeda, even if the Americans are not agents of Al Qaeda, and even if there is no tap on the Al Qaeda end of the phone, because their identities are unknown.

But if that change needs to be made – one must weigh the security gains against the loss in freedom – the way to make it is by open debate and, if Congress is persuaded, by changing the law. The answer is not to break the law in secret, and then to cover up the crime in cow flops. This controversy is about much more than privacy or security; it is about the rule of law.

**Doug Cassel's commentaries are broadcast Wednesdays during the noon hour of the Worldview program on Chicago Public Radio, 91.5 FM. Views expressed are personal views of the author and not necessarily those of Notre Dame Law School, the Center for Civil and Human Rights or Chicago Public Radio.**