

## DOJ Memo Justifies Warrantless Surveillance As "Self-Defense"

by [Greg Nojeim](#) [1]

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A September 25, 2001 [memorandum](#) [2] released March 2, 2009 by the Justice Department asserts in sweeping language that the attacks of September 11, 2001 justified warrantless surveillance in the U.S. as an act of collective self-defense. "If the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches," the memo says. The memo, authored by John Yoo, then the Deputy Assistant Attorney General, argues that warrantless national security searches that were unreasonable under the Fourth Amendment prior to the September 11 attacks may well be reasonable after those attacks because the government's interest in conducting the search had strengthened. Thus, though the text of the Fourth Amendment hadn't changed, broader warrantless search authority resulted from the attacks, the memo argues. However, the memo also suggests that some intelligence surveillance authorized by the USA PATRIOT Act may be unconstitutional. Prior to the PATRIOT Act, intelligence surveillance could be conducted under the Foreign Intelligence Surveillance Act only if the "primary purpose" of the surveillance was to gather foreign intelligence. Relaxed probable cause standards applied. The government had to prove probable cause that the target of surveillance was an agent of a foreign power - such as a foreign terrorist organization or foreign government - instead of full probable cause of crime. However, the memo also suggests that some intelligence surveillance authorized by the USA PATRIOT Act may be unconstitutional. Prior to the PATRIOT Act, intelligence surveillance could be conducted under the Foreign Intelligence Surveillance Act only if the "primary purpose" of the surveillance was to gather foreign intelligence. Relaxed probable cause standards applied. The government had to prove probable cause that the target of surveillance was an agent of a foreign power - such as a foreign terrorist organization or foreign government - instead of full probable cause of a crime. In the PATRIOT Act, Congress, acknowledging that there isn't always a clear line between intelligence and crime fighting surveillance, blurred the line between the two. It permitted FISA surveillance if intelligence gathering was only a "significant purpose" of the surveillance, regardless of whether it was the "primary purpose." What if, however, the "primary purpose" of the surveillance is crime fighting? Which probable cause requirement applies? The PATRIOT Act doesn't say. But the DOJ memo seems to indicate that if crime fighting is the primary purpose of electronic surveillance, then full probable cause of crime must be proven to support the search:

"Once the primary purpose of the search is to further criminal prosecution of one or more individuals, then absent exigent circumstances it would seem that the core principles of the Fourth Amendment are triggered, requiring the reasonableness determination of a neutral magistrate based on the full probable cause standard of the Fourth Amendment."

This is important because the memo was written to justify changes to the FISA "primary purpose" test then sought by the Justice Department. It reflects the Department's contemporaneous understanding of the change it sought. It may also have implications for Brandon Mayfield, the Portland, Oregon attorney whose home was searched under the PATRIOT Act. Mayfield, a suspect in the Madrid train bombings who was later exonerated, challenged the constitutionality of the "significant purpose" test, won at the district court level, and is awaiting a decision from an appellate court. CDT's brief in favor of Mayfield can be found here by [clicking this link](#) [3].

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