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Memo Linked to Warrantless Surveillance

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WASHINGTON (AP) -- For at least 16 months after the Sept. 11 terror attacks in 2001, the Bush administration believed that the Constitution's protection against unreasonable searches and seizures on U.S. soil didn't apply to its efforts to protect against terrorism.

That view was expressed in a Justice Department legal memo dated Oct. 23, 2001. The administration on Wednesday stressed that it now disavows that view.

The October 2001 memo was written at the request of the White House by [John Yoo](#), then the deputy assistant attorney general, and addressed to [Alberto Gonzales](#), the White House counsel at the time. The administration had asked the department for an opinion on the legality of potential responses to terrorist activity.

The 37-page memo has not been released. Its existence was disclosed Tuesday in a footnote of a separate secret memo, dated March 14, 2003, released by the Pentagon in response to a Freedom of Information Act lawsuit by the [American Civil Liberties Union](#).

"Our office recently concluded that the Fourth Amendment had no application to domestic military operations," the footnote states, referring to a document titled "Authority for Use of Military Force to Combat Terrorist Activities Within the United States."

Exactly what domestic military action was covered by the October memo is unclear. But federal documents indicate that the memo relates to the [National Security Agency's](#) Terrorist Surveillance Program, or TSP.

That program intercepted phone calls and e-mails on U.S. soil, bypassing the normal legal requirement that such eavesdropping be authorized by a secret federal court. The program began after the Sept. 11 terrorist attacks and continued until Jan. 17, 2007, when the White House resumed seeking surveillance warrants from the Foreign Intelligence Surveillance Court.

White House spokesman Tony Fratto said Wednesday that the Fourth Amendment finding in the October memo was not the legal underpinning for the Terrorist Surveillance Program.

"TSP relied on a separate set of legal memoranda," Fratto told The Associated Press. The Justice Department outlined that legal framework in a January 2006 white paper issued by the Justice Department a month after the TSP was revealed by The New York Times.

The October memo was written just days before Bush administration officials, including Vice President [Dick Cheney](#), briefed four House and Senate leaders on the NSA's secret wiretapping program for the first time.

The government itself related the October memo to the TSP program when it included it on a list of documents that were responsive to the ACLU's request for records from the program. It refused to hand them over.

Late Wednesday, Justice Department spokesman Brian Roehrkasse said department officials believe the

October 2001 memo was not about the eavesdropping program, but he did not explain why it was included on requests for documents linked to the TSP.

Earlier, Roehrkasse said the statement in the footnote does not reflect the current view of the department's Office of Legal Counsel.

"We disagree with the proposition that the Fourth Amendment has no application to domestic military operations," he said. "Whether a particular search or seizure is reasonable under the Fourth Amendment requires consideration of the particular context and circumstances of the search."

Roehrkasse would not say exactly when that legal opinion was overturned internally. But he pointed to the January 2006 white paper.

"The white paper does not suggest in any way that the Fourth Amendment does not apply to domestic military activities, and that is not the position of the Office of Legal Counsel," he said.

Suzanne Spaulding, a national security law expert and former assistant general counsel at the CIA, said she found the Fourth Amendment reference in the footnote troubling, but added: "To know (the Justice Department) no longer thinks this is a legitimate statement is reassuring."

"The recent disclosures underscore the Bush administration's extraordinarily sweeping conception of executive power," said Jameel Jaffer, director of the ACLU's National Security Project. "The administration's lawyers believe the president should be permitted to violate statutory law, to violate international treaties and even to violate the Fourth Amendment inside the U.S. They believe that the president should be above the law."

"Each time one of these memos comes out you have to come up with a more extreme way to characterize it," Jaffer said.

The ACLU is challenging in court the government's withholding of the October 2001 memo.

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