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Court Ruling on Wiretap Is a Challenge for Obama

By **JAMES RISEN** and **CHARLIE SAVAGE**

WASHINGTON — As a presidential candidate, Senator **Barack Obama** declared that it was “unconstitutional and illegal” for the Bush administration to conduct warrantless surveillance of Americans. Many of his supporters said likewise.

But since Mr. Obama won the election, administration officials have avoided repeating that position. They have sidestepped questions about the legality of the program in Congressional testimony. And in lawsuits over the program, they followed a strategy intended to avoid ever answering the question by asking courts to dismiss the lawsuits because the litigation could reveal national security secrets.

But the ruling on Wednesday by a federal judge that one instance of such spying had been “unlawful electronic surveillance” may force onto the table a discussion of how aggressively the Obama administration should continue to defend from judicial review the contentious Bush-era counterterrorism policy.

David Golove, a **New York University** law professor who specializes in executive power issues, said the ruling had highlighted the “awkwardness” of the Obama administration’s ambivalent stance toward its predecessor’s surveillance program.

“They have a lot of discomfort with the legal arguments the Bush administration made, but they’ve tried to avoid having to acknowledge too publicly those differences or to air them in court,” he said.

Representative **Rush Holt**, a New Jersey Democrat who is the chairman of the House Select Intelligence Oversight Panel and a critic of the warrantless-wiretapping program, said: “Where does this leave the Obama administration? That’s a good question.”

The administration does not yet have to make any decision about what to do about the case because the judge, Vaughn Walker, has not yet entered a final order. He has given the plaintiffs until April 16 to decide whether to drop other claims and to submit a proposal for damages the government owes them.

But if the ruling stands, the Obama administration will have to decide whether to appeal it — thereby trying to wipe the decision off the books.

Decisions about appeals are usually made by Solicitor General **Elena Kagan**, but current and former officials said the deliberations were virtually certain to reach Attorney General **Eric H. Holder Jr.** and the White House.

There are some reasons that the administration might appeal, legal specialists said. Among them, it may not want Judge

Walker's narrow interpretation of the [state secrets privilege](#) to stand because it might influence other cases, and appealing on those narrow grounds would allow the administration to still avoid engaging on whether the program was legal.

In addition, the administration may fear political attacks from the right if it agrees to pay damages to the plaintiffs, which include an Islamic charity in Oregon, Al Haramain, which the government has said had links to [Al Qaeda](#). (The charity is defunct and its assets are frozen, however.)

But several legal specialists said that the administration may instead want to let the ruling stand. That would terminate a case that has been a political headache for the administration since the month after Mr. Obama took office, when the Justice Department's decision to keep pressing forward with the Bush administration's assertion of the state secrets privilege in the matter created an uproar among liberals.

A decision not to appeal would also ensure that the ruling against the government went no higher than a district court judge's decision, which — unlike one by an appeals court — would not set a binding precedent.

"This is a very hard decision for them," said John P. Elwood, a Justice Department lawyer in the Bush administration. "The thing that makes it hard to appeal is that they apparently are of two minds about it and don't want to be pinned down on what they think of it now, but also the fact that they might end up with just as bad a precedent from the court one rung up."

Still, if the administration lets the judgment stand, Mr. Holder — who in 2008 said Mr. Bush had authorized the [National Security Agency's](#) wiretapping program in "direct defiance of federal law" — would be left with a ruling from a federal judge that such warrantless wiretapping by government officials was illegal. That could prompt calls to begin a criminal investigation. It is a felony to violate the surveillance law requiring warrants.

"Despite the government trying to throw up every procedural roadblock imaginable in this case, the judge has ruled that the Bush administration broke the law," Senator [Russ Feingold](#), a Wisconsin Democrat who is on both the Senate Judiciary and Intelligence Committees, said Thursday.

Most of the lawsuits brought against the government over the program in the past have faltered because the plaintiffs could not prove that they were spied upon.

But Jon Eisenberg, a lawyer for Al Haramain, observed Thursday that if Mr. Holder chose to open a criminal investigation, he could easily obtain all the evidence of wrongdoing he needed.

"If Holder wanted to be really aggressive, he could go into the Justice Department's files and pick out some of the people who were wiretapped and prosecute those cases," Mr. Eisenberg said. "But do they want to do that? No. The Obama administration made a decision a long time ago that they are not going to prosecute Bush's warrantless wiretapping

program.”

Mr. Holder already faced a similar decision over whether to investigate [Central Intelligence Agency](#) interrogators who conducted harsh [interrogations](#) of detainees during the Bush years despite antitorture laws.

But Mr. Holder decided not to investigate any interrogators for conduct that at the time had been blessed as lawful by the Justice Department’s Office of Legal Counsel. That office wrote similar memorandums declaring that warrantless surveillance was lawful, and Mr. Golove, the New York University law professor, said that precedent was likely to be repeated.

“I assume Holder would say there is the same rationale — if they were acting under Office of Legal Counsel authority, we’re not going to investigate them,” he said. “Does he have to announce that? I don’t know — it depends on how much political pressure is brought to bear.”