White House Pushed Ashcroft on Wiretappings
Former Deputy Says Program Implemented Despite Objections

By William Branigin
Washington Post Staff Writer
Tuesday, May 15, 2007; 3:20 PM

The White House three years ago briefly implemented a classified program, parts of which the Justice Department found to be illegal, overriding the objections of top department officials after failing to get a seriously ill attorney general John D. Ashcroft to sign off on it from his hospital bed, Ashcroft's former deputy told a Senate panel today.

Former deputy attorney general James B. Comey testified under oath that Alberto R. Gonzales and Andrew H. Card Jr., at the time President Bush's White House counsel and chief of staff respectively, went to see Ashcroft in intensive care at George Washington University Hospital in March 2004 in an effort to "do an end run" around Comey, who was then acting attorney general, and obtain recertification of the highly sensitive program.

Comey declined to identify the program, but members of the Senate Judiciary Committee indicated at today's hearing that it was the National Security Agency's controversial warrantless eavesdropping effort that the White House called the "terrorist surveillance program." Under the presidential directive then in effect, the legality of the program was to be certified by the Justice Department every 45 days.

The secret program was authorized by Bush shortly after the Sept. 11, 2001, terrorist attacks to monitor communications between suspects abroad and persons in the United States without obtaining warrants from a special court under provisions of the Foreign Intelligence Surveillance Act. The program came to light in late 2005. A federal judge ruled it unconstitutional in August 2006, but it was allowed to continue pending an administration appeal.

Comey refused to comment publicly on what caused the Justice Department to balk at recertification or what changes were made to the program to overcome the department's objections.

In January, Gonzales, who succeeded Ashcroft as attorney general in February 2005, informed the Senate that Bush would not reauthorize the program but would submit electronic surveillance requests for approval by the Foreign Intelligence Surveillance Court.

In his testimony today, Comey described publicly for the first time the tense confrontation between the White House and the Justice Department over the program in 2004, a dispute that he said was settled when Bush was confronted with the imminent prospect of mass resignations, including those of Ashcroft and Comey.
He said he had been angered by the visit of Gonzales and Card to Ashcroft's hospital room after the Justice Department had refused to recertify the program for reasons that he declined to explain publicly. Ashcroft at the time was seriously ill with pancreatitis, and Comey had temporarily taken over his duties.

"I was very upset," Comey told the committee. "I was angry. I thought I just witnessed an effort to take advantage of a very sick man, who did not have the powers of the attorney general because they had been transferred to me."

The testimony appeared to add more fuel to calls for the resignation of Gonzales, who is under fire for the controversial dismissals last year of nine U.S. attorneys. At today's hearing, Sen. Arlen Specter (R-Pa.), the only Republican present, joined Democrats in saying he was troubled by the testimony.

"It is the decision of Mr. Gonzales as to whether he stays or goes," Specter told the committee today. "But it is hard to see how the Department of Justice can function and perform its important duties with Mr. Gonzales remaining where he is. And beyond Mr. Gonzales's decision, it's a matter for the president as to whether the president will retain the attorney general or not."

Comey testified that the day after the March 10, 2004, hospital room confrontation, the White House went ahead with the program as it ran up against a deadline for reauthorizing it.

"The program was reauthorized without us and without a signature from the Department of Justice attesting as to its legality," Comey said. As a result, he said, he prepared a letter of resignation, intending to resign the next day, March 12.

But after Comey and FBI Director Robert S. Mueller gave Bush a scheduled counterterrorism briefing in the Oval Office that day, Bush held separate private talks with each of them and decided to follow the Justice Department's advice, Comey said.

"We had his direction to do the right thing," he told the committee. "We had the president's direction to do what we believed, what the Justice Department believed was necessary to put this matter on a footing where we could certify to its legality."

He said that over the next two to three weeks, Justice Department officials made changes to the program so that it would operate "consistently with the Office of Legal Counsel's judgment as to what was lawful." He did not specify what triggered the officials' refusal to recertify the program or what changes were made to it to overcome their objections.

Comey told the committee that he understood a number of other officials intended to resign with him if the program went ahead without Justice Department certification, including Mueller, Ashcroft, the attorney general's chief of staff and Comey's own chief of staff.

The former deputy attorney general, who ultimately left the Justice Department in August 2005, said that in addition to Gonzales and Card, White House officials who opposed the Justice Department's position included Vice President Cheney and his chief of staff, David S. Addington.

Comey said he initially felt compelled to resign in March 2004 "because I didn't believe that as the chief law enforcement officer in the country I could stay when they had gone ahead and done something that I had said I could find no legal basis for."
Under questioning from Specter, Comey declined to say that the White House had acted illegally in going ahead with the program.

He would say only that the program "went forward without certification from the Department of Justice as to its legality."

He said there was no statute requiring Justice Department certification of the program, but he declined to provide details of laws that might have been broken by implementing the parts of the program that the department's lawyers found objectionable.

Comey said he was not targeted for retaliation as a result of his stand while he remained at the Justice Department. But he said a senior staffer -- Patrick Philbin, then the associate deputy attorney general -- was "blocked from promotion" because of his involvement in the matter. Philbin had been at the hospital with him when he was confronted by Gonzales and Card, Comey said.

Testifying in detail about the encounter, Comey said it was set in motion by a call from the White House, possibly from Bush himself, to Ashcroft's hospital room, informing the attorney general's wife that Gonzales and Card were on their way to see him. Comey said that upon learning of the call around 8 p.m., he called Mueller and his chief of staff to ask that they meet him at the hospital immediately.

"I was concerned that, given how ill I knew the attorney general was, that there might be an effort to ask him to overrule me when he was in no condition to do that," Comey said. He added later, "I was concerned that this was an effort to do an end run around the acting attorney general and to get a very sick man to approve something that the Department of Justice had already concluded . . . was unable to be certified as to its legality."

Comey said Mueller instructed FBI agents at the hospital by phone "not to allow me to be removed from the room under any circumstances."

Soon afterward, Gonzales walked in carrying an envelope and accompanied by Card and explained that he wanted Ashcroft to sign a presidential order, Comey said.

"And Attorney General Ashcroft then stunned me," he said. "He lifted his head off the pillow and in very strong terms expressed his view of the matter . . . and then laid his head back down on the pillow [and] seemed spent. . . . And as he laid back down, he said, 'But that doesn't matter, because I'm not the attorney general. There is the attorney general,' and he pointed to me."

Gonzales and Card "did not acknowledge me," but simply "turned and walked from the room," Comey said.

Shortly afterward, he received a call from Card summoning him to the White House, he said.

"I responded that, after the conduct I had just witnessed, I would not meet with him without a witness present," Comey said. "He replied, 'What conduct? We were just there to wish him well.' " Comey said he insisted that the solicitor general attend the meeting with Card, which eventually took place around 11 p.m.

That meeting was "more civil" than their phone conversation, and Card "was concerned that he had heard reports that there were to be a large number of resignations at the Department of Justice," Comey said.
Sen. Patrick J. Leahy (D-Vt.), chairman of the Senate Judiciary Committee, said the testimony confirmed his view that under Gonzales, the Justice Department is "dysfunctional" and is being run "as a political arm of the White House." He said the committee would hold a closed-door hearing on the matter.

Sen. Charles E. Schumer (D-N.Y.) told Comey at the end of the hearing that he represented "a profile in courage." He said Comey's account of the hospital room encounter "crystallized Mr. Gonzales's view about the rule of law: that he holds it in minimum low regard."

Schumer added: "It's hard to understand after hearing this story how Attorney General Gonzales could remain as attorney general, how any president, Democrat, Republican, liberal, conservative, could allow him to continue."