Senators Say White House Cut Deal With Panel on FISA
Documents Said to Be Traded for Telecom Immunity

By Ellen Nakashima
Washington Post Staff Writer
Tuesday, October 23, 2007; Page A09

Senate Judiciary Committee members yesterday angrily accused the White House of allowing the Senate Intelligence Committee to review documents on its warrantless surveillance program in return for agreeing that telecommunications companies should get immunity from lawsuits.

Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) and Sen. Arlen Specter (Pa.), the ranking Republican, said any such agreement would be "unacceptable," signaling that legislation granting immunity to certain telecom carriers could run into trouble. Leahy and Specter demanded that the documents, which were provided only to the Intelligence Committee, be turned over to the Judiciary Committee as well.

At issue is a White House-endorsed measure that would give immunity to telecom carriers being sued for allegedly helping the National Security Agency spy on Americans after September 11, 2001. It is part of a larger bill to rework the Foreign Intelligence Surveillance Act (FISA). The Intelligence Committee has approved the bill and sent it to the Judiciary
Committee for deliberation.

Tony Fratto, a White House spokesman, said yesterday that what the White House did was "not exactly" a quid pro quo but that the intelligence panel "expected to legislate on the liability" and so "we've been accommodative on sharing information."

Fratto said that the White House could not make documents containing presidential authorizations and the Justice Department's legal opinions underpinning the surveillance program available to members not already briefed on the NSA program, as members of the Intelligence Committee were. He said talks are ongoing on that point.

On Friday, White House press secretary Dana Perino said that Intelligence Committee Chairman John D. Rockefeller IV (D-W.Va.) and ranking member Christopher S. Bond (R-Mo.)*s staff "showed a willingness" to include immunity in their legislation. "Because they were willing to do that, we were willing to show them some of the documents that they asked to see."

But an Intelligence Committee aide, speaking on condition of anonymity, said there was "no quid pro quo," and that the immunity decision was based not on a determination of the program's legality but on the members' having previously reviewed written requests sent by the government to the carriers. "The documents we'd already received and carefully reviewed certainly led Rockefeller to the opinion that immunity was justified in this case," said the aide. "But we felt it was an important principle to not allow the administration to deprive the committee of the full panoply of documents before they proceeded to markup."

Sen. Russell Feingold (D-Wis.), a member of both the Intelligence and Judiciary panels, said in an interview yesterday that the documents revealed that the NSA program was illegal. He said the presidential authorizations and the Justice Department opinions do not make it legal. "That makes it an executive power grab that is not justified by the statute or by the Constitution," he said.
Feingold had not seen the documents, however, saying he based his assertion on briefings from his Intelligence Committee aide, who reviewed the documents for several hours last Tuesday.

"Everything he saw and reported to me would indicate that the terrorist surveillance program involved was illegal and not something permissible given the clear exclusivity language in the statute," said Feingold, referring to current law, which specifies that FISA, along with Title III of the 1968 Wiretap Act, shall be the "exclusive" means to authorize domestic wiretaps.

Feingold voted against the bill, which would allow the government to begin wiretaps of foreign targets and then seek FISA court approval of the targeting procedures. It also would allow a court to dismiss lawsuits against phone carriers if the attorney general certified that the aid was part of a counter-terrorism program authorized by the president between September 11, 2001, and January 17, 2007, congressional aides said.

Feingold said that the documents revealed "the absence of a legitimate justification under the law" for the program.

As such, he said, he could not vote to grant immunity to telecom carriers. "I don't think we should be in the business of granting immunity in situations where a company has every opportunity to determine whether something is legal or not," he said. "Otherwise, that sets a precedent encouraging any company, especially those that have great access to our private information, to just do what they want and rely on immunity."

Sen. Bill Nelson (D-Fla.), a member of the Intelligence Committee, said it wasn't given enough time to review the White House's documents and that he tried to strip the immunity provision from the bill. "I want to know if there was any complicity of the telephone companies in this," he said. Nelson, whose amendment failed, said he was "favorably disposed" toward carriers but did not want to halt lawsuits aimed at finding "the truth as to the legality of the program."

Sen. Orrin Hatch (R-Utah), also on the Judiciary and Intelligence panels, said the documents did not change his position that the surveillance activities "were and are" lawful.