Mr. President, before the Senator from Wisconsin leaves

the floor, I request that he be available to discuss some of the

provisions of the PATRIOT Act. I see him remaining on the floor, so

permit me at this time to take up a couple of the issues which the

Senator from Wisconsin has raised, appropriately putting my question to

the Chair as our rules require, and then asking for responses.

The Senator from Wisconsin has raised an issue on the

national security letters with respect to the presumption which arises

when a high-ranking governmental official, such as the Attorney

General, Deputy Attorney General, Assistant Attorney General, head of

the FBI, or head of the departments making the request, certifies that

there is a national security interest or an issue of diplomatic

relations.

This is an issue which, as I understand it, the ranking member, the

Senator from Vermont, Mr. Leahy, raised earlier. The question I have

for the Senator from Wisconsin is whether he is aware of the fact that

the conclusive presumption, which is present in the conference report,

is not as tight as the conclusive presumption which was present in the

Senate bill which passed unanimously from the Judiciary Committee, of

which the Senator from Wisconsin is a member, and by unanimous consent

on the floor of the Senate, without objection by the Senator from

Wisconsin.

I refer specifically to the provision in the Senate bill which says:

In reviewing a nondisclosure requirement, the certification by the

Government that the disclosure may endanger the national security of

the United States or interfere with diplomatic relations shall be

treated as conclusive unless the court finds that the certification was

made in bad faith.

That language is substantially repeated in the conference report,

except that the conference report makes it tougher on the governmental

certification by requiring the high-level official to make the

certification.

Quoting from the conference report, it says: If at the time of the

petition

the Attorney General, the Deputy Attorney General and Assistant

Attorney General or the Director of the Federal Bureau of Investigation

or, in the case of a request by a department, agency, or

instrumentality of the Federal Government other than the Department of

Justice, the head or deputy head of such department, agency, or

instrumentality--and now we come to the crucial language, continuing--

certifies that disclosure may endanger the national security of the

United States or interfere with diplomatic relations, such

certification shall be treated as conclusive unless the court finds

that the certification was made in bad faith.

My questions to the Senator from Wisconsin are the obvious ones: No.

1, was he aware that the conference report has the identical provision,

except more restrictive, and if so, why does he now object to this

provision in the conference report when he approved it in committee and

raised no objection on the floor?

Mr. President, with all due respect, the Senator from

Wisconsin has not answered my question. When he takes up the SAFE Act,

which he cosponsored, so did this Senator. I was not satisfied with the

provisions of the PATRIOT Act in effect at the present time, and I was

a cosponsor of the same bill as the Senator from Wisconsin, Senator

Durbin, and others, in order to protect civil liberties, which I sought

to do in the Senate bill and I sought to do, and I think successfully,

in the conference report.

When the Senator from Wisconsin talks about Section 215, I am coming

to that and I wish to engage him in a discussion on that specifically,

but let me put it aside for a minute so as not to confuse that issue.

With respect to sneak and peak, the delayed notice, I am coming to that

as well because there are major, vast improvements in the conference

report over existing law. With respect to the roving wiretaps, I am

coming to that, too. But focusing for just a minute one at a time so

there can be some understanding--this is a very complicated bill. I

spoke on it at some length yesterday afternoon in order to acquaint my

colleagues with it. I have made quite a number of calls to my

colleagues, as far as I can go, to acquaint people with what is in this

bill so we can understand it and vote on it with an understanding.

Coming back to the conclusive presumption in the national security

letter, the question I posed to the Senator from Wisconsin was

whether--well, maybe three questions. Does not he agree that the

conference report is even more protective of civil liberties than the

Senate bill? The second question: Did he know about it? And if on this

provision alone, putting aside the others he referred to, 215, sneak

and peak, and wiretap, and we want to come to sunset, too, which is a

gigantic improvement--it was not mentioned by the Senator from

Wisconsin. I think when we get to that he will concede that was a big

improvement and maybe he overlooked it in commenting or at least any

comment that I heard him make. But coming back to the national

security letter, what about my three questions, if I may pose them

through the Chair to the Senator from Wisconsin?

Mr. President, the Senator from Wisconsin does not know

what I did in conference because he was not a conferee. There is no

reason why he should know. But I can tell him that I fought very hard

for a lot of these provisions, and I can tell him further that I was

not persuasive enough to get 100 percent of what I wanted.

Wait just a minute. I have the floor. I want to finish

this, and I will come back to the Senator from Wisconsin and give him

ample time to comment on what he wants to comment on.

We have a bicameral system. If the Senate could act alone, we would

have had the Senate bill. When the Senator from Wisconsin says he was

not satisfied with this provision in the Senate bill contrasted with

the SAFE Act, I would not disagree with him about that. I will not

disagree with him about that at all. In the Senate bill, I did not have

everything that I would like. There are 17 other members of the

Judiciary Committee and there are many members who thought the Senate

bill went too far on civil rights. It was necessary to balance very

delicately to get 18 Senators to agree, sort of unheard of, and I will

not go over the composition of the committee, but we have people from

opposite ends of the political spectrum on that committee.

One moment, and then I will yield for the Senator's

reply.

The point is, the Senate came to this conclusive presumption and the

Senator from Wisconsin voted for it. The full Senate came to this

conclusion. The Senator from Wisconsin did not object to it. So I think

it is rather late in the day--frankly, too late in the day--for the

Senator from Wisconsin to say that a provision which he has approved is

the basis for rejecting the conference report because the conference

report did not do something he would have liked better.

Now, without yielding the floor, I ask unanimous consent that the

Senator

from Wisconsin be allowed to make whatever comments he chooses on this

point.

Mr. President, I do not disagree with everything the

Senator from Wisconsin has said. In fact, I like part of it where he

said I was brilliant, I like the part where he said I was a tremendous

chairman, but there were other parts with which I disagree as to what

he said.

A little levity will not hurt this debate any.

I focus only on national security letters at the outset, to establish

the point that the conference report is more protective of civil

liberties on that point than the Senate bill. I want to go on to the

other points. I have only faint hopes of persuading the Senator from

Wisconsin to support the conference report, but I do think it is very

useful to have this discussion because he is, appropriately, very

deeply involved in this bill and there is no better way to acquaint our

colleagues and the staffs--perhaps two or three people watching on C-

SPAN2--to acquaint America, to the extent we can, with what we are

doing here.

On to section 215: Section 215 involves business records and the

highly controversial point on library records. The Senator from

Wisconsin is correct that the existing law is deeply flawed. Bear in

mind, we are living under that law until we pass a new law. That is the

law we are operating under today. Existing law enables a law

enforcement official unilaterally to go to get records on his

determination that they are relevant, and there is no judicial review.

What the Senate bill did, and what the conference report perpetuates,

is to put in judicial review. The traditional safeguard of liberty has

been to interpose a disinterested, impartial magistrate between law

enforcement and the citizen. That is what happens when you get a

search-and-seizure warrant to establish probable cause. That is what

happens when you get an arrest warrant to take somebody into custody.

We have moved substantially toward that cause, although not quite

probable cause for a search warrant or an arrest warrant, but a very

substantial portion of the way by the Senate bill, which is perpetuated

in the conference report, that a court may issue an order for records

only on ``a statement of facts showing that there are reasonable

grounds to believe that the tangible things sought are relevant to an

authorized investigation to protect against international terrorism.''

The Senate bill established three criteria for the relevant standard.

First, activities of a suspected agent of a foreign power; second, a

foreign power or agent of a foreign power; third, an individual in

contact with or known to a suspected agent of a foreign power. In

conference we did add an additional provision, which the Senator from

Wisconsin has objected to. The additional provision is that the judge

may order the production of records of an individual where the judge

concludes those records are important--crucial to the investigation, to

a terrorism investigation.

If I had my druthers, I wouldn't have put the provision in, but we

had a closed-door briefing where the Department of Justice came in and

showed us what they consider to be needed. I thought it was within the

realm of reason, but I knew it would be an obstacle to getting the law

put into effect and getting support for that provision, and I opposed

it. But when I recognized that there are other points of view besides

mine and besides the Senate's, and without a lot of other major

concessions on the national security letter, which I have already

described and will come back to--there were more concessions we got

there--it seemed to me that provision was acceptable.

The question which I have for the Senator from Wisconsin is whether

he has had an opportunity to get that briefing? Last Thursday, I asked

my Chief Counsel, who has done such an extraordinary job, Michael

O'Neill--who was here a moment or two ago; he's probably too busy to

stay and listen to his speeches--to make a briefing available to the

Senator or his staff. My question to the Senator from Wisconsin is, No.

1, if he has had an opportunity to get that briefing; No. 2, if so,

what he thought of it with respect to the weightiness of what the

Department of Justice had to say; and, No. 3, if this modest addition

is so significant as to sink--or in conjunction with other similarly

unweighty matters--sink the bill?

Mr. President, I did not acquiesce in this matter simply

as a matter of druthers or nondruthers. I acquiesced in this matter

because it was, as a total scheme of things, acceptable. There was

adequate protection. It is not, as the Senator from Wisconsin defines

it, broad-ranging authority of a judge. The impartial judicial official

has to agree that it is a terrorism investigation, and that these

records are crucial and important to the investigation, that they are

relevant to the investigation, and it is not something that is

extraneous but it is a terrorism investigation.

I focus on this matter again not with any expectation of persuading

the Senator from Wisconsin but to tell my colleagues why he is

objecting to this provision, and to invite my colleagues, the other 98

Senators, if they want the briefing, to see why there were sensible

reasons for the Department of Justice and the details of this provision

not going too far, not impinging on civil liberties because I wouldn't

support a bill which impinged on civil liberties. I simply wouldn't do

it. But there are others who have contentions, and we had a great many

concessions from the House of Representatives.

I have taken up the two principal considerations which the Senator

from Wisconsin was arguing, the conclusive presumption in the national

security letter and this additional provision under section 215.

But I want to come back for a moment to the national security letter

on important concessions which the Senate obtained in the conference

report, first, to point out that the national security letter was not

established by the PATRIOT Act which we enacted shortly after 9/11. The

national security letters have been in existence for decades. But the

Senate utilized the revisions to the PATRIOT Act to put limitations on

the national security letters because they fit within the overall

parameters. We have some very important concessions on national

security letters in the conference report. The standard has always been

that if you had a national security letter, you kept quiet about it,

the recipient did. There was no explicit opportunity for the recipient

of a national security letter to challenge it. But the conference

report fixing up the Senate provision explicitly gives the recipient of

a national security letter the right to contact an attorney, to go to

court, and to have a national security letter quashed, if it is

unreasonable, oppressive, or otherwise contrary to law. The recipient

also has the power to get a court order to tell the target. That is

subject to a certification by these high-ranking governmental officials

that it would endanger national security or diplomatic relations.

But again, the provision in the conference report is more protective

of civil liberties than what was in the Senate report. On this

provision on national security letters, the conference report goes much

further than existing law. Again, the national security letters were

not covered in the PATRIOT Act.

I don't have a question for the Senator from Wisconsin. I will come

to some later, but I ask unanimous consent that I might yield to the

Senator, if he cares to reply at this point to what I have said,

without losing my right to the floor.

Mr. President, the national security letters are

stronger in the conference report than they were in the Senate bill.

The conclusive presumption in the conference report is more protective

than the language in the Senate bill on conclusive presumption. The

conference report picking up the Senate bill provisions improves the

civil liberties protection from existing law by the explicit right of

the recipient to go to court to quash or to make the disclosure to the

target.

Mr. President, I suggest that the Senator from Wisconsin

get a classified briefing and not accept what he reads in the

Washington Post. The Washington Post is wrong. I hope the Senator from

Wisconsin will not leave the floor. If I can have the attention of the

Senator from Wisconsin, I hope he will not leave the floor while I make

a couple of other comments. I will try to be brief, although I don't

think it has been extensive so far.

Let me be brief with one comment about 30,000. I urge

the Senator from Wisconsin to get a classified briefing and not to take

the facts of the Washington Post, because the Washington Post is

totally wrong. I am not at liberty to tell the Senator what the facts

are, although I asked the Department of Justice to put those facts

before the public. Too much is classified, and I think this is

inappropriately classified. I would like to be able to detail it.

Let me talk about the delayed notice provisions.

Existing law provides for notification of the target in a reasonable

period of time, which could mean anything. The Senate bill called for 7

days, the House

bill wanted 180 days, and we got 30 days.

I suggest in the totality of the legislation that we are in the 85 to

15-percent range, 85-percent Senate provisions, 15-percent House

provisions, and the 15 percent which the House has does not impinge on

civil liberties. I wouldn't take 1 percent if this were an

inappropriate impingement on civil liberties. The 30 days can be

extended by a court on cause shown for specific reasons.

With respect to the wiretap provision, I joined the Senator from

Wisconsin in opposing the roving wiretaps. I have never liked wiretaps.

When I was district attorney for Philadelphia, this issue came up for

consideration of our body, and I was the only one of 67 county district

attorneys to object to wiretapping.

Since I can only be brief here, I would invite my colleagues again--I

know I am not going to persuade the Senator from Wisconsin. In talking

about the late notice and talking about the wiretap provisions, I want

my colleagues to look at the details as to how we have protected

against random selection on the specification, a description of the

person who is to be wiretapped, and showing that the person subject to

the wiretap is likely to try to avoid the wiretap.

The final comment I have to make is about sunsetting. The House put

in a provision for a 10-year sunset. The Senate put in a provision for

a 4-year sunset. The House wanted the compromise of 7 years, halfway

between 4 and 10. The Senate conferees insisted on a compromise at 4

years. The House said it was not much of a compromise, not when they

were at 10 and the Senate was at 4 years. I thank the White House for

assistance in working this detail out. We did so on the expectation

that by working the sunset to 4 years, we would have a number of

Senators' signatures on the conference report and a number of House

signatures on the conference report.

I am not going to wash that linen in public as to what happened but

only to say that our ability to review this bill at 4 years is a mighty

potent weapon to keep law enforcement on its toes, knowing it is going

to be subject to review in that period of time.

I have pledged privately and publicly and again in the Senate

yesterday to have extensive and piercing oversight as to what law

enforcement does. I think the Senator from Wisconsin will agree on the

point that in the year I have been chairman, there has been real

oversight. We have called for it and done a job here.

The debate has been very useful. I don't have any questions to pose

to the Senator from Wisconsin. I am glad he is here to respond so the

other side can be articulated and so my colleagues can make their own

evaluation as to the weight of the objection of the Senator from

Wisconsin to section 215, which is very limited to that one additional

provision, which is justified, so they can evaluate his objection to

the national security letters where the conclusive presumption is

tighter in the conference report than in the Senate version and other

protections, and the protections on delayed notice, so-called sneak and

peek, and wiretaps, and then especially on sunset.

The debate is very illuminating and does more than the speech I gave

yesterday. There is nothing as dull as a speech on the Senate floor and

nothing as lively as a little debate. This Senate has very little

debate, very little exchange of ideas where Senators come and in a

respectful way pose questions and in a respectful way give answers to

illuminate rather than obfuscate; no table-pounding.

I thank the Senator from Wisconsin for what he has done this year on

the committee and for his thoughtful approach here, albeit wrong,

albeit not persuasive and should not carry the day. I thank him for his

contribution.

Without yielding the floor, I ask unanimous consent I may yield to

the Senator from Wisconsin without losing the floor.

I thank the Senator from Wisconsin.

The last comments made the argument better than I have during the

course of the last hour when he chastises me for agreeing to 30 days

when I voted for 7 days but the House bill has 180 days. That is a

reason to vote against the bill. He has made my case.

When you take up an issue about what is fair and appropriate and

adequately protective of civil rights as to when the target should be

notified as to a surreptitious or secret search of his apartment, and

you have an existing bill which says a reasonable period of time--which

could be anything--and the Senate comes in at 7 days and the House

comes in at 180 days, there is no real concession on civil liberties.

The House made a concession of 150 days, from 180 to 30. The Senate

made a concession of 23 days, from 7 to 30.

I ask the other 98 Senators whether this is a meritorious argument, a

weighty argument, or more of scintilla. That is an expression we use in

the law when the item has virtually no weight. In the common law, they

talk about a peppercorn being adequate for consideration. But this is a

scintilla. Maybe this is not even a scintilla, to say a concession from

7 to 30 days is meaningful.

I am glad the Senator from Wisconsin made that as his final,

persuasive, overwhelming argument because that illustrates the

flimsiness of the considerations.

I have the floor, but I will yield to the Senator from

Wisconsin on unanimous consent. I saw Senator Byrd one day perfect

this, and I will not make a mistake of yielding without reserving the

right to the floor.

Mr. President, the problem with the renewed argument by

the Senator from Wisconsin is not on 7 days or 30 days, it is on 1 day.

It is on any sneak and peek. It is on any delayed notification. Law

enforcement has that latitude because they need to continue the

investigation. If a disclosure is made, it will impede an

investigation. A short period of time enables them to continue the

investigation without alerting the target.

One day would be too long for the argument which is made by the

Senator from Wisconsin. We are conducting this debate as if we have a

law enforcement community in this country made up totally of rogues who

have no regard for the rights of the individual. And when they get a

delayed notice warrant, bear in mind, my colleagues and the Senator

from Wisconsin, they have gotten judicial review on this sneak-and-peek

warrant. On this delayed notification warrant, they have gone to a

judge and have gotten leeway on standards which are set forth and

articulated in the PATRIOT Act.

Mr. President, the Senate is not in order.

Back to the substance of the argument: this period of

time, the less, the closer to the Senate position the better. But this

is not some random act of a rogue law enforcement officer. This is a

delayed notice warrant which has been obtained by going to an impartial

magistrate and by showing cause and by showing reason to have this

delayed notice.

Mr. President, the Senator from New Hampshire was on the floor

earlier today and has raised a number of arguments. I see other of my

colleagues on the floor seeking recognition so I will not take these up

at this time. But I would invite my colleagues to examine what the

Senator from New Hampshire has had to say in the context of the debate

which I have had with the Senator from Wisconsin because I think they

are covered. But I will want to deal with them specifically.

I would point out--I am looking through the transcript for a moment

on some of the things which he has had to say. There are also some

comments made by the Senator from Vermont, the distinguished ranking

member, which I will comment about later. We will have a debate.