The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. FRIST. Mr. President, tomorrow, we will be in session at 8:45 in the morning, and we expect to proceed to a vote on the Kavanaugh nomination, to be followed by a vote on the Hayden nomination, and a cloture vote on the Kempthorne nomination. Thus, Senators can expect three votes very early tomorrow morning. Those votes should begin shortly after we convene at 8:45 a.m. I thank my colleagues for their work on the immigration bill that we passed earlier today.

ORDER FOR ADJOURNMENT

Mr. FRIST. Mr. President, if there is no further business to come before the Senate, I ask unanimous consent that the Senate stand in adjournment under the previous order, following the remarks of Senator OBAMA for 10 minutes, Senator LEVIN for 30 minutes, and then Senator SCHUMER.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Illinois.

NOMINATION OF GENERAL MICHAEL HAYDEN

Mr. OBAMA. Mr. President, let me start by saying that the nomination of General Hayden is a difficult one for me. I generally, as a rule, believe the President should be able to appoint members of his Cabinet, of his staff, to positions such as the one General Hayden is nominated for without undue obstruction from Congress.

General Hayden is extremely well qualified for this position. Having previously served as head of the National Security Agency and as Deputy Director of National Intelligence under John Negroponte, he has 30 years of experience in intelligence and national security matters. And he was nearly universally praised during his confirmation to Deputy DNI.

There are several members of the Intelligence Committee, including Senator LEVIN, who I hold in great esteem, who believe General Hayden has consistently displayed the sort of independence that would make him a fine CIA Director.

Unfortunately, General Hayden is being nominated under troubling circumstances, as the architect and chief defender of a program of wiretapping and collection of phone records outside of FISA oversight. This is a program that is still accountable to no one and no law.

Now, there is no one in Congress who does not want President Bush to have every tool at his disposal to prevent terrorist attacks—including the use of a surveillance program. Every single American—Democrat and Republican and Independent—who remembers the images of falling towers and needless death would gladly support increased surveillance in order to prevent another attack.

But over the last 6 months, Americans have learned that the National Security Agency has been spying on Americans without judicial approval. We learned about this not from the administration, not from the regular workings of the Senate Intelligence Committee, but from the New York Times and USA Today. Every time a revelation came out, President Bush refused to answer questions from Congress.

This is part of a general stance by this administration that it can operate without restraint. President Bush is interpreting article II of the Constitution as giving him authority with no bounds. The Attorney General and a handful of scholars agree with this view, and I do not doubt the sincerity with which the President and his lawyers believe in their constitutional interpretation. However, the overwhelming weight of legal authority is against the President on this one. This is not how our Constitution is designed, to give the President unbounded authority without any checks or balances.

We do not expect the President to give the American people every detail about a classified surveillance program, but we do expect him to place such a program within the rule of law and to allow members of the other two coequal branches of Government—Congress and the judiciary—to have the ability to monitor and oversee such a program. Our Constitution and our right to privacy as Americans require as much.

Unfortunately, we were never given the chance to make that examination. Time and again, President Bush has refused to come clean to Congress. Why is it that 14 of 16 members of the Intelligence Committee were kept in the dark for 4½ years? The only reason that some Senators are now being briefed is because the story was made public in the newspapers. Without that information, it is impossible to make the decisions that allow us to balance the need to fight terrorism while still upholding the rule of law and privacy protections that make this country great.

Every democracy is tested when it is faced with a serious threat. As a nation, we have had to find the right balance between privacy and security, between executive authority to face threats and uncontrolled power. What protects us, and what distinguishes us, are the procedures we put in place to protect that balance; namely, judicial warrants and congressional review. These are not arbitrary ideas. They are not new ideas. These are the safeguards that make sure surveillance has not gone too far, that somebody is watching the watchers.

The exact details of these safeguards are not etched in stone. They can be reevaluated, and should be reevaluated, from time to time. The last time we had a major overhaul of the intelligence apparatus was 30 years ago in the aftermath of Watergate. After those dark days, the White House worked in a collaborative way with Congress through the Church Committee to study the issue, revise intelligence laws, and set up a system of checks and balances. It worked then, and it could work now. But, unfortunately, thus far, this administration has made no effort to reach out to Congress and tailor FISA to fit the program that has been put in place.

I have no doubt that General Hayden will be confirmed. But I am going to reluctantly vote against him to send a signal to this administration that even in these circumstances, even in these trying times, President Bush is not above the law. No President is above the law. I am voting against Mr. Hayden in the hope that he will be more humble before the great weight of responsibility that he has not only to protect our lives but to protect our democracy.

Americans fought a Revolution in part over the right to be free from unreasonable searches—to ensure that our Government could not come knocking in the middle of the night for no reason. We need to find a way forward to make sure we can stop terrorists while protecting the privacy and liberty of innocent Americans. We have to find a way to give the President the power he needs to protect us, while making sure he does not abuse that power. It is possible to do that. We have done it before. We could do it again.

Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, I ask unanimous consent that I be allowed to speak for 5 minutes before the Senator from Michigan speaks—he has graciously agreed to allow me to do that—and then he be given as much time as he needs.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SCHUMER. Thank you, Mr. President. I want to first, again, thank Senator CARL LEVIN, who I know has been graciously acceding all night. So he will be the last person to speak here, but I very much appreciate it. And I know all of my colleagues do.

NOMINATION OF BRETT KAVANAUGH

Mr. SCHUMER. Mr. President, I rise in opposition to the confirmation of Brett Kavanaugh to the DC Circuit Court of Appeals.

This court is too important, its jurisdiction too broad, and its decisions too final, for a lifetime seat to be entrusted to someone with such limited nonpartisan experience—even someone as bright as Mr. Kavanaugh clearly is.

First, let me say that I am continually frustrated by the nature of the debate that takes place in the Senate and in the public about the so-called politicization of the judicial nomination and confirmation process. We are often told—with a straight face—that politics and ideology play no part in the President's thinking when it comes to judicial nominations.

But, as anyone who is paying attention knows full well: It is the President who too often picks judicial nominees with politics and ideology squarely in mind.

It is the President who too often picks judicial nominees with an eye towards shoring up his conservative political base. It is the President who too often selects judicial nominees with an eye towards picking a political fight. And, of course, on at least one occasion—in the case of Harriet Miers—it was the President who withdrew a nominee with an eye towards mitigating political damage.

So, those who complain that the process has become politicized and that ideology shouldn't matter should take their quarrel to the other end of Pennsylvania Avenue.

In this case—especially after Mr. Kavanaugh's second hearing—I continue to believe that his nomination is too infused with politics and that Mr. Kavanaugh himself is neither seasoned enough nor independent enough at this early stage of his career to merit a lifetime appointment to the second highest court in the land.

Let me say a word about how deeply important the DC Circuit Court of Appeals is.

But there are serious questions as to why, at barely 40, having never tried a case, and with a record of service almost exclusively to highly partisan political matters, he is being nominated to a seat on the second most important court in America.

Why is the DC Circuit so important?

The Supreme Court currently takes fewer than 100 cases a year. That means that the lower courts resolve the tens of thousands a cases a year brought by Americans seeking to vindicate their rights. All the other Federal appellate courts handle just those cases arising from within its boundaries. So, for example, the Second Circuit, where I am from, takes cases coming out of New York, Connecticut, and Vermont.

But the DC Circuit doesn't just take cases brought by residents of Washington, DC. Congress has decided there is value in vesting one court with the power to review certain decisions of administrative agencies.

We have given plaintiffs the power to choose the DC Circuit—and in come cases we have forced them to go to the DC Circuit—because we have decided for better or worse, that when it comes to these administrative decisions one court should decide what the law is for the whole Nation.

When it comes to regulations adopted under the Clean Air Act by the EPA, labor decisions made by the NLRB and rules propounded by OSHA, gas prices regulated by the Federal Energy Regulatory Commission, and many other administrative matters, the decisions are usually made by the judges on the DC Circuit, to which Mr. Kavanaugh aspires.

To most, it seems like this is the ''Alphabet Soup Court,'' since virtually every case involves an agency with an unintelligible acronym—EPA, NLRA, FCC, SEC, FTC, FERC, and so on, and so on.

But the letters that make up this ''Alphabet Soup'' are what make our Government tick. They are the agencies that write and enforce the rules that determine how much ''reform'' there will be in campaign finance reform. They determine how clean the water has to be for it to be safe for our families to drink. They establish the rights workers have when negotiating with corporate powers.

The DC Circuit is important because its decisions determine how these Federal agencies go about doing their jobs. And, in so doing, it directly impacts the daily lives of all Americans more than any other court in the country, with the exception of the Supreme Court.

Mr. President, there is so much at stake when considering nominees to the DC Circuit—how their ideological predilections will impact the decisions coming out of the court—and why it is vital for Senators to consider how nominees will impact the delicate ideological balance on the court when deciding how to vote.

Given the importance of that court, I cannot vote to confirm Mr. Kavanaugh. Although Mr. Kavanaugh has held several important and influential positions in Government, they have been almost exclusively political. While his academic credentials are undeniably top-notch, he has largely devoted his legal talents to helping notch political victories for his party. While his resume is laden with high-profile political assignments, it is light on the kinds of professional and nonpartisan accomplishments typical of recent nominees to this important court.

Mr. Kavanaugh has been one of the point people among young Republican lawyers, appearing at the epicenter of so many high-profile controversial issues in a relatively short career. That is not in itself dispositive, but that is all there is. There is not much more we can rely on to offset this experience.

Notwithstanding his legal credentials, he is younger than, and has less relevant experience than, almost everyone else who has joined the DC Circuit in modern times.

If this were a nominee for the district court, where it belongs, there would not be opposition. But it seems as if Mr. Kavanaugh's nomination is repayment for services rendered to the political operation of the White House and the Republican Party. He does not have a long list of articles. He does not have a long list of judicial experience, or even of legal experience outside of the political realm. And it shows you the brazenness of this administration, frankly, that he would be nominated to the second highest court in the land. It shows you that they value ideology and political service above judicial experience and depth.

The bottom line is this, that Mr. Kavanaugh does not belong on this court. If my colleagues on the other side of the aisle were not so apt to just rubberstamp every single nominee that this administration puts forward, he would not get to this court. But the reason we are unable to block this nomination is not because of the merits—I wish we could because America will regret, I believe, having Mr. Kavanaugh on the court for decades to come—but it is because, again, we have seen fewer than a handful of times any Republican Member vote against any nominee who this White House nominates.

Mr. Kavanaugh is intelligent; no question. Intelligence alone is hardly a criteria for the second most important court in the land.

Mr. Kavanaugh, when I met him, told me one way to make a judgment about him would be to talk to the people who know him, to talk to colleagues and judges and others familiar with his work. That is what the American Bar Association actually did in preparing his evaluation. And I have rarely seen an evaluation that has comments such as these: One lawyer said that Mr. Kavanaugh was ''sanctimonious'' and inexperienced. A lawyer in a different proceeding said: Mr. Kavanaugh did not handle the case well as an advocate and dissembled. Another said he was ''inexperienced in the practice of law.'' Others characterized him as ''insulated.'' One lawyer who worked with him questioned his ability ''to be balanced and fair should he assume a federal judgeship.''

Unfortunately, I think that is the reason he was chosen. The administration on this DC Court of Appeals wants people who will not be balanced and fair. They want people who have an ideological ax to grind, to undo the work of Government which this court oversees.

It is true that this is the second most important court in the land. It is also true to say that there cannot be a single person in this body, if they were being honest, who does not recognize that there are many more qualified people in Washington to be on this bench.

So, Mr. President, I must vote against this nomination, with the full conviction that we could do a lot better.

Mr. Kavanaugh, if confirmed, would be the youngest person on the D.C. Circuit since his mentor, Ken Starr.

By a quick review of the preconfirmation accomplishments of the active judges who currently sit on the D.C. Circuit, the nominee's

achievements—though impressive—are simply not on a par.

Every active judge had significant professional and nonpartisan experience to help persuade us that they merited confirmation.

I remind my colleagues that in recent months, I voted for two Republican nominees who were deeply involved in the impeachment of President Clinton—Tom Griffith for the very court to which Mr. Kavanaugh has been nominated and Paul McNulty to the second highest position in the Justice Department.

Now let me come to the ABA report released recently. Some of my friends across the aisle have fallen over themselves to dismiss, dilute, and denigrate that report. This, of course, despite the fact that last time around, Mr. Kavanaugh and several Senators frequently repeatedly boasted about his original, higher ABA rating.

Here is why the observations noted in that report are important. When he and I met recently, I asked Mr. Kavanaugh how we are to judge someone with his scant record. He has very few writings. He is younger than almost everyone who has been nominated to the D.C. Circuit. He has never been a judge.

Mr. Kavanaugh told me that one way to make a judgment about him would be to talk to the people who know him, to talk to colleagues and judges and others who are familiar with him and his work.

Well, that is one of the things the American Bar Association actually did in preparing its evaluation. They talked—as Mr. Kavanaugh himself suggested—with people who are familiar with his work.

What is more, they do it under a promise of confidentiality, so that they will be likely to obtain the most honest and candid appraisals—rather than the expected plaudits from peers and previous employers.

Many of those interviewed echoed precisely the concerns that I and others have raised—his lack of relevant experience and the effect the insularity of his political experience might have on his ability to be a neutral judge.

Now, I understand that none of the 14 committee members found Mr. Kavanaugh flatly ''not qualified.''

But I ask my colleagues, shouldn't we give substantial weight to these statements from people who are familiar with his work—not isolated remarks, but a multitude of them, from different quarters, commenting about different court appearances and interactions with him?

Given the importance of the D.C. Circuit, we have a duty to closely scrutinize the nominees who come before us seeking lifetime appointment to this court.

And it is no insult to Mr. Kavanaugh, to say that there can't be a single person in this room, if they were being honest, who doesn't recognize that there are scores of lawyers in Washington and around the country who are of equally high intellectual ability, but who have much more significant judicial, legal, and academic experience to recommend them for this post.

So I would say that many of my colleagues and I have a sincere and good-faith concern that this nominee is not apolitical enough, not seasoned enough, not independent enough, and has not been forthcoming enough. The hearing did not alleviate those concerns.

Indeed, Mr. Kavanaugh was evasive when he should have been forthright; he sidestepped questions when he should have met them head on.

During an extended exchange with me, he repeatedly refused to answer a simple question—whether he had ever expressed opposition to a potential judicial nominee within the White House, even though there is no conceivable earthly privilege that should have prevented him from answering.

On another occasion, it took Senator LEAHY four tries before Mr. Kavanaugh would answer the simple question: Why did you take 7 months to respond to the Judiciary Committee's written questions in 2004?

On yet another occasion, he continued to refuse to tell us whether he is in the mold of Scalia and Thomas, even though he has spent several years selecting and vetting highly ideological judges for the President who has repeatedly promised to nominate judges in ''the mold of Scalia and Thomas.''

If the President can say repeatedly at campaign stops and speeches that he wants judges in the mold of Scalia and Thomas, and if those statements are not just meaningless, empty rhetoric, why can't we Senators find out in some meaningful way whether there is any truth in advertising?

In short, if the nominee had spent the last several years on a lower court or in a nonpolitical position proving his independence from politics, I could view his nomination in a different light.

But he has not. Instead, his résumé is almost unambiguously political. Perhaps with more time, and different experience, we would have greater comfort imagining Mr. Kavanaugh on this court. But that day is not yet here.

Therefore, I vote nay on the nomination and urge my colleagues to do the same.

With that, I yield the floor and, once again, thank my colleague from Michigan.

The PRESIDING OFFICER. The Senator from Michigan.

NOMINATION OF GENERAL MICHAEL V. HAYDEN

Mr. LEVIN. Mr. President, General Hayden's nomination for Director of the Central Intelligence Agency comes at a critical time. The Agency is in disarray. Its current Director has apparently been forced out, and the previous Director, George Tenet, departed under a cloud after having compromised his own objectivity and independence and that of his Agency by misusing Iraq intelligence to support the administration's policy agenda. The next Director must right this ship and restore the CIA to its critically important mission.

I will vote to confirm General Hayden because his actions have demonstrated on a number of important occasions the independence and strength of character needed to fulfill the most important role of the CIA Director—independence and a willingness to speak truth to power about the intelligence assessments of professionals in the intelligence community.

This nomination has been considered by me on two key issues: One, whether or not General Hayden will be independent—and I believe he will—and two, what judgment should be rendered about him based on what is known about the National Security Agency's surveillance program which he administered during his tenure as Director of the NSA. Again, the highest priority of the new Director must be to ensure that intelligence provided to the President and the Congress is objective and independent of political considerations. It was only a few years ago that then-CIA Director George Tenet shaped intelligence to support the policy position of the administration. There are many examples.

On February 11, 2003, just before the war, Director Tenet publicly stated, as though it were fact, that Iraq has ''provided training in poison and gases to two Al-Qaeda associates.'' However, we now know that the DIA, the Defense Intelligence Agency, had assessed a year earlier that the primary source of that report was more likely intentionally misleading his debriefers, and the CIA itself had concluded in January 2003, before the Tenet public declaration that I have quoted, that the source of the claim that Iraq had provided training in poisons was not in a position to know if any training had in fact taken place.

On September 28, 2002, President Bush said that ''each passing day could be the one on which the Iraqi regime gives anthrax or VX nerve gas or someday a nuclear weapon to a terrorist group.'' A week later, on October 7, 2002, a letter declassifying CIA intelligence indicated that Iraq was unlikely to provide WMD to terrorists or al-Qaida and called such a move an ''extreme step,'' a very different perspective from that which had been stated by the President. But the very next day after that declassification was obtained, Director Tenet told the press that there was ''no inconsistency'' between the views in the letter and the President's views on the subject.

His statement was flatly wrong. His effort to minimize the inconsistency or eliminate it not only revealed his lack of independence, but it damaged the credibility of the Central Intelligence Agency.