approved to date, the morning hour be deemed expired, the time for the two leaders be reserved for their use later in the day; that following any leader remarks, the Senate proceed to a period of morning business for 1 hour, with Senators permitted to speak therein for up to 10 minutes each, with the time equally divided and controlled between the two leaders or their designees, with the Republicans controlling the first half and the majority controlling the final half; that following morning business, the Senate resume consideration of H.R. 5297, the small business jobs bill.

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

PROGRAM

Mrs. HAGAN. Mr. President, tonight cloture was filed on the small business jobs bill. As a result, the filing deadline for first-degree amendments is 1 p.m. tomorrow. Senators should expect rollcall votes to occur throughout the day in relation to amendments to the bill, if an agreement can be reached to consider amendments.

ORDER FOR ADJOURNMENT

Mrs. HAGAN. Mr. President, if there is no further business to come before the Senate, I ask unanimous consent that it adjourn under the previous order, following the remarks of Senator SPECTER.

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

Mrs. HAGAN. I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

SEPARATION OF POWERS

Mr. SPECTER. Mr. President, I have sought recognition to continue the discussion of the erosion of the very important principle of separation of powers.

Our Constitution was devised with three branches: article I, the Congress; article II, the Executive, the President; article III, the judiciary. A very important concept in the operation of our constitutional government has been the separation of powers to provide checks and balances.

During the course of the past two decades, we have seen a substantial erosion of the power of Congress. Congress's authority has been taken away in significant measure by the Supreme Court of the United States, which has, in effect, entered into the legislative process by disregarding the finding of fact that the Congress has undertaken and changed the standard for determining constitutionality of legislation.

There had been in effect the rational basis test which had been in existence for decades. But then in 1995, in a case captioned ''United States v. Lopez,'' involving the bringing of guns onto school property, the Supreme Court overturned 60 years of precedent.

In the case of United States v. Morrison, when the Congress had legislated to protect women against violence, the Supreme Court of the United States, in a 5-to-4 decision—as was the Lopez case, 5 to 4—decided that because of the ''method of reasoning'' of the Congress, the act was unconstitutional, notwithstanding a mountain of evidence, as noted by Justice Souter in his dissent.

Then in a third case, Kimel v. Florida Board of Regents, an age discrimination case, the Court again undertook to declare an act of Congress unconstitutional on a new standard, and the standard is ''proportionate and congruent,'' which is really a virtual impossibility to understand.

This evening, I propose to discuss two other cases: the case of Alabama v. Garrett, which interpreted the legislation to protect Americans with disabilities, and the case of Lane v. Tennessee, also to protect people with disabilities.

In the case of Alabama v. Garrett, the Court, in a 5-to-4 decision, decided that the legislation was unconstitutional because it did not fit this illusive congruent and proportionality test. That was an employment discrimination case.

In the case of Lane v. Tennessee, it involved a paraplegic who could not gain access to a courtroom. There was no elevator in the courtroom, and he could not walk up the steps. There, the same statute, the Americans with Disabilities Act—a voluminous record, hearings held all over the United States—by a 5-to-4 decision, the Supreme Court of the United States decided that application of the Americans with Disabilities Act was constitutional. The shifting vote was the vote of Justice Sandra Day O'Connor. But the standard which was applied was this test of congruence and proportionality. Justice Scalia, in his dissenting opinion in that case, said the test was a flabby test which, in effect, enabled the court to engage in legislation. This subject of the standard to be applied was a significant concern in the recently concluded hearings for Solicitor General Elena Kagan for the Supreme Court of the United States. We are faced in these confirmation hearings, regrettably, with the fact that we can't get answers on judicial philosophy or judicial ideology.

I am not talking about how the case is going to be decided; that is a matter for the Court and, as a matter of judicial independence, that is for the Court to decide. The questions directed to nominees—directed to Ms. Kagan and directed to others—have not been about how they would decide a specific case. But in the confirmation hearing with Ms. Kagan, if we really couldn't get answers from her, it is hard to see any nominee from whom we could get answers in light of the fact that she had written extensively on the nomination procedure in a now famous University of Chicago Law Review where she criticized specifically Justice Ginsburg and Justice Breyer for stonewalling the Senate and criticized the Senate for not doing its job in getting information. But her confirmation proceeding was, in effect, a repeat performance. So we are really searching for ways to make a determination as to ideology to have some accountability for what the Justices are doing.

In a later floor statement, I will address the separate issue as to what, if anything, is possible when the nominees do a 180-degree U-turn, as Chief Justice Roberts and Justice Alito did when they decided the case of Citizens United, upsetting 100 years of precedent and a 100,000-page record in allowing corporations to engage in political advertising.

One of the suggestions which has been made following the proceedings for confirmation of Justice Scalia in 1986 where he would answer virtually nothing, Senator DeConcini and I considered a resolution to establish Senate standards. Then, in the next year, Judge Bork answered a great many questions as he, in fact, had to because he had such an extensive paper trail and had such an unusual interpretation of the Constitution on original intent. So after the Bork hearings, Senator DeConcini and I decided we didn't need to proceed. Perhaps we were too precipitous because the following nominations since Judge Bork in 1986 produced the same result: failure to really answer questions.

Another possibility was suggested by later Justice Louis Brandeis in a famous article he wrote in 1913 talking about sunlight being the best disinfectant and that publicity was the way to deal with society's ills. That raises the possibility of finding accountability through informing the public as to what is going on. The Supreme Court flies under the radar. It is pretty hard to get an understanding as to what is going on.

A noted commentator on the Supreme Court, Stuart Taylor, has made a comment that the way to get accountability is to infuriate the public. That was his standard. He said until the public is infuriated, the Supreme Court will be able to continue to take power from the other branches of government and, most importantly, from my point of view, institutionally from the Senate of the United States and from the House of Representatives, in some cases where they leave the Executive with extensive authority. By refusing to decide a case, as they refused to decide the conflict between the Foreign Intelligence Surveillance Act, which is the congressional determination that the only way to get a warrantless wiretap is through a court order showing the probable cause and the President's assertion of article II power as Commander in Chief or the court's refusal to take up the issue of the Foreign Sovereign Immunities Act

when lawsuits were brought by survivors of 9/11. Those are subjects I will discuss at a later time. The hour grows late this evening.

But these are issues which we have to grapple with because the doctrine of separation of powers is so important and, institutionally, the Congress ought to be assertive of our authority, when the authority is taken to the Court, which, in effect, is legislation illustrated by the two cases, the Garrett case and the Lane case, which I have discussed—same standard, congruency and proportionality—we can't get an answer from Ms. Kagan as to what standard she would apply, whether it would be the rational basis test which had been in effect until the Boerne case in 1997; not asking her how she would decide a case but what standard she would apply.

So these are issues I think that have to be very carefully considered by the Congress.

I have been speaking on the issue of televising the Court for a couple of decades now, and I tend to continue to acquaint the public as best we can through C–SPAN, through this medium. But if the public knew what was happening, I think we might meet the standard of Stuart Taylor on an infuriated public. I think it will take public concern to provide some accountability to restore the important balance on separation of powers.

I thank the Chair, I thank the staff for staying extra, and I yield the floor. I believe that is the curtain for the day.

ADJOURNMENT UNTIL 9:30 A.M. TOMORROW

The PRESIDING OFFICER. Under the previous order, the Senate stands adjourned until 9:30 a.m. tomorrow.

There being no objection, the Senate, at 6:37 p.m., adjourned until Wednesday, July 28, 2010, at 9:30 a.m.

NOMINATIONS

Executive nominations received by the Senate:

NATIONAL BOARD FOR EDUCATION SCIENCES

ANTHONY BRYK, OF CALIFORNIA, TO BE A MEMBER OF THE BOARD OF DIRECTORS OF THE NATIONAL BOARD FOR EDUCATION SCIENCES FOR A TERM EXPIRING NOVEMBER 28, 2015. (REAPPOINTMENT)

LEGAL SERVICES CORPORATION

JULIE A. REISKIN, OF COLORADO, TO BE A MEMBER OF THE BOARD OF DIRECTORS OF THE LEGAL SERVICES CORPORATION FOR A TERM EXPIRING JULY 13, 2013. (REAPPOINTMENT)

IN THE ARMY

THE FOLLOWING ARMY NATIONAL GUARD OF THE UNITED STATES OFFICERS FOR APPOINTMENT IN THE RESERVE OF THE ARMY TO THE GRADES INDICATED UNDER TITLE 10, U.S.C., SECTIONS 12203 AND 12211:

To be major general

BRIGADIER GENERAL FRANK E. BATTS
BRIGADIER GENERAL MELVIN L. BURCH
BRIGADIER GENERAL JOHN E. DAVOREN
BRIGADIER GENERAL LESTER D. EISNER
BRIGADIER GENERAL ALLEN M. HARRELL
BRIGADIER GENERAL ROBERT A. HARRIS
BRIGADIER GENERAL ALBERTO J. JIMENEZ
BRIGADIER GENERAL THOMAS H. KATKUS
BRIGADIER GENERAL JAMES D. TYRE

To be brigadier general

COLONEL STEVEN W. ALTMAN
COLONEL DAVID B. ANDERSON
COLONEL DAVID N. AYCOCK
COLONEL DAVID S. BALDWIN
COLONEL JONATHAN T. BALL
COLONEL CRAIG E. BENNETT
COLONEL JULIE A. BENTZ
COLONEL VICTORIA A. BETTERTON
COLONEL VICTOR J. BRADEN
COLONEL DAVID R. BROWN
COLONEL FELIX T. CASTAGNOLA
COLONEL PETER L. COREY
COLONEL DONALD S. COTNEY
COLONEL STEPHANIE E. DAWSON
COLONEL CAROL A. EGGERT
COLONEL ALFRED C. FABER
COLONEL WILLIAM A. HALL
COLONEL RICHARD J. HAYES
COLONEL TIMOTHY E. HILL
COLONEL TIMOTHY J. HILTY
COLONEL JEFFREY H. HOLMES
COLONEL JANICE G. IGOU
COLONEL JAMES C. LETTKO
COLONEL TOM C. LOOMIS
COLONEL WESLEY L. MCCLELLAN
COLONEL JOHN K. MCGREW
COLONEL JOHNNY R. MILLER
COLONEL STEVEN R. MOUNT
COLONEL ERIC C. PECK
COLONEL CHARLES E. PETRARCA
COLONEL ANDREW P. SCHAFER
COLONEL RAYMOND F. SHIELDS
COLONEL LESTER SIMPSON
COLONEL PHILIP A. STEMPLE
COLONEL RANDY H. WARM
COLONEL CHARLES W. WHITTINGTON

IN THE NAVY

THE FOLLOWING NAMED OFFICER FOR APPOINTMENT IN THE UNITED STATES NAVY TO THE GRADE INDICATED WHILE ASSIGNED TO A POSITION OF IMPORTANCE AND RESPONSIBILITY UNDER TITLE 10, U.S.C., SECTION 601:

To be vice admiral

REAR ADM. DANIEL P. HOLLOWAY

THE FOLLOWING NAMED OFFICER FOR APPOINTMENT IN THE UNITED STATES NAVY TO THE GRADE INDICATED WHILE ASSIGNED TO A POSITION OF IMPORTANCE AND RESPONSIBILITY UNDER TITLE 10, U.S.C., SECTION 601:

To be vice admiral

REAR ADM. WALTER M. SKINNER

THE FOLLOWING NAMED OFFICER FOR APPOINTMENT IN THE UNITED STATES NAVY TO THE GRADE INDICATED WHILE ASSIGNED TO A POSITION OF IMPORTANCE AND RESPONSIBILITY UNDER TITLE 10, U.S.C., SECTION 601:

To be admiral

VICE ADM. SAMUEL J. LOCKLEAR III