

hears none, and it is so ordered. The Senator from Oklahoma is recognized to speak as if in morning business for 10 minutes.

#### LEGISLATING BY EXECUTIVE ORDER

Mr. NICKLES. I would like to follow up on some of the statements that have been made by our colleagues concerning the executive branch's current willingness to legislate by Executive order. I have talked to the White House two or three times now. I have let it be known that I want to use whatever tools are available to get their attention and make sure they quit attempting to legislate by Executive order.

Some of our colleagues may not be aware of what we are talking about, but we have had two or three disputes—maybe we should have had more—with the administration over the last few years about executive actions that clearly should be implemented through legislation by Congress, the body elected by the people for legislative purposes. This administration, the Clinton administration, has tried to bypass Congress and legislate by Executive order. I think they have done so knowing full well in many cases they could not get their desired objective through Congress so they just decided to do it by fiat.

I am here to say all of us, Democrats and Republicans, should reject that approach. We should uphold this institution, the legislative branch, the branch of the people, and say this is why our forefathers had separation of powers. The Constitution is very clear. If you read the Constitution, it states in article I, "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of the Senate and the House of Representatives." "All legislative powers." It does not say some. It does not say that if the administration cannot accomplish its objectives through the Congress it can go ahead and pass them by Executive order.

In the 10th amendment it says all other powers are reserved to the States and to the people. So the executive branch has the power to enforce the law but not to write it. That is the responsibility of the legislative branch. And then if people do not like the laws we pass, they can vote for someone else. They have a chance to do that through the election process.

There are a couple of cases where the administration has overstepped its bounds, and I think where Congress has spoken up, or should have spoken up. One example was a case where the administration tried to give organized labor a gift and issued an Executive order to prohibit hiring replacement workers during a strike. They tried to get Congress to pass a bill that would do that in 1993 and 1994—and actually passed legislation through the House but could not get it passed through the Senate. So after the 1994 elections, the

administration tried to change the law by Executive order in March 1995. That was contested in the courts.

I might make note that in the November elections of 1994, Republicans took control of the Senate and it was obvious that this legislation could not pass Congress. So President Clinton, in my opinion, overstepped his bounds and issued an Executive order in 1995 barring management from hiring replacement workers during a strike—a perfectly legal practice under the National Labor Relations Act. He issued this order knowing that Congress had twice rejected legislation that would have done the same thing. The courts didn't let him get away with it.

On February 2, 1996, the U.S. court of appeals threw out President Clinton's Executive order ruling that the President's action was clearly unlawful and was preempted by the National Labor Relations Act. Clearly, the court's message was a reminder that the President does not have a blank check to adopt policies in direct conflict with Federal laws established by Congress.

The President does not have legislative authority. I think that is what we are finding in a couple of his other Executive actions. Another example deals with the Grand Staircase-Escalante National Monument where the President in September 1996 unilaterally took a 2 million acre coal-rich block of land in Utah and made it a national monument. He did it without talking to Congress. He did it without consulting the Utah delegation. He did it without consulting the people who live and work in that area. He did it without consulting the Governor of Utah. He basically said we are going to take that 2 million acres and declare it a national monument.

Maybe I would support such a thing, but again we have a committee, the Energy And Natural Resources Committee, that considers such bills. We should have had a hearing on that legislation. There has never been a hearing. There has never been a chance for the Utah delegation to speak out on that legislation. Is it good or not? I am not sure how I would vote. Maybe I would vote with the President.

My point is he usurped congressional responsibility and basically said we are going to declare this a national monument by Federal fiat.

I might mention that when he did this—it was in September 1996, during a campaign—he had a press conference around the Grand Canyon in Arizona. He did not do it at a press conference in Utah because his decision was quite unpopular.

My point is not whether his decision is popular or not. He did it clearly for political purposes. But he did not allow the people to speak. The President is not king. He cannot do that. And maybe this will be contested. Probably we did not speak out enough on it.

Another example where I seriously think he has exceeded his Executive authority and I think legislation is re-

quired, is the President's Executive action requiring that if you are under age 27, if you buy cigarettes, you are required to show an ID wherever you are buying them. And if retailers are found selling to minors or anybody under the age of 27, they face civil penalties of \$250 or more and could be subject to other sanctions. Retailers reported to have sold cigarettes or smokeless tobacco to someone under 27, without checking their photo ID, risk compliance checks being conducted in the future.

Maybe we should do that. I will tell my colleagues, I do not want kids smoking. I have four kids. I absolutely do not want them to smoke. This is hazardous to their health. I have a mother who has emphysema, lung cancer, which is very serious. I absolutely do not want anybody to smoke. But if the President wants to have ID checks for anybody under age 27, or age 40 for that matter, he can introduce it in Congress and maybe we can pass it. I think that is a proper prerogative of the States. But at least it should go through the legislative route. He did not do that.

He has advocated other Executive rules dealing with advertising. I supported banning smoking on airplanes. I may support banning various types of advertising. But we should go through the legislative process. We should have hearings. We should let elected people make a decision. I think the President's Executive action goes so far as to ban outdoor billboards or baseball caps that say Marlboro, and so on. I think the President's actions and the FDA's rules have exceeded the constitutional authority of the executive branch. I think that is wrong.

Finally, Mr. President, let me bring up the latest proposed Executive order, and I say proposed because it has been announced by the President that he is going to issue an Executive order that deals with Federal construction projects which will in practice screen out nonunion businesses from participating in Federal construction projects or force their employees to join a union, the so-called project labor agreements.

Mr. President, this is an egregious power grab by organized labor. If they want to try to do this they should do it through the legislative branch. They should see if they have the votes. We have \$239 billion of Federal construction spending available between now and 2002, and to come up with an Executive order and say you need not apply unless you have a union is totally wrong. Totally wrong. More than 80 percent of the workers that are doing Federal work on construction projects now, according to this proposal, need not apply; or if you are going to apply you need to join a union. What about free competition? What about competitive bidding? What about the taxpayers?

For the administration to try to make this kind of behind-the-scenes

deal with organized labor—and we have reports that organized labor was writing this regulation, that they were involved in formulating this regulation—to come up with this type of a power grab I think is absolutely wrong. If they want to do it, they should do it through the legislative branch. Have somebody who supports this legislation introduce it. Let us debate it. Let us find out where the votes are. Let us go the legislative route. Let us go the constitutional route.

And so I have contacted the White House and tried to let them know that I am very sincere about trying to protect the constitutional prerogatives of Congress. This is the legislative body and I am very sincere about making sure that the White House does not become the legislative body by Executive action.

And so, Mr. President, I have told the White House we are willing to use what actions we have at our disposal to try to get their attention. We have the confirmation process. We also have the appropriations process. We have the judicial process. We have other tools available to try to convince the administration they cannot legislate by Executive order. That's very much my intention.

I just noticed an article in the Thursday, April 17th Roll Call where Mr. Reed Hunt, the Federal Communications Commission Chairman, is talking about drafting a notice of proposed rulemaking to examine the idea of free broadcast time for Federal candidates and predicted that free time for candidates could be implemented in time for the 1998 elections.

Mr. President, we have campaign reform before this body, and there is certainly legitimate debate and we have talked about having free time for political candidates. Some people call it food stamps for politicians. That is a legitimate legislative item we should discuss. But the FCC Chairman does not have the authority to say by fiat, by direction from the administration, that we are going to give candidates free time and mandate that or dictate it or bribe the broadcasting authorities to enforce it.

That is a serious mistake. If we are going to say politicians are entitled to free time, let us have that as part of a bill. Let us debate it. But Mr. Hunt cannot do it.

We as a legislative body, Democrats and Republicans, need to reassert our legislative authority, our legislative responsibility, and we need to object. If we find the administration, the executive branch, trying to legislate, we need to object. At a different time I will speak about the need to object when the Supreme Court or courts are legislating as well, because we find that branch of Government is involved in the legislative process. Right now they are considering two cases legalizing assisted suicide. The Supreme Court does not have the authority to legalize anything. That is the respon-

sibility of this body. That is called legislation. And that is a subject for a speech at another time. I am strongly opposed to the executive branch legislating as well as the judicial branch legislating. Both are wrong. This is the legislative branch. I as one Senator, whether I agree with the direction of the Executive order or the judicial decision, I am going to speak out loudly and strongly and use tools available to make sure the Congress remains the legislative branch of Government.

Mr. President, I yield the floor and I thank my colleague from Connecticut for his patience.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, are we in morning business?

The PRESIDING OFFICER. We are, with Senators allowed to speak for up to 5 minutes.

Mr. DODD. I ask unanimous consent that I may be able to proceed for 10 minutes as in morning business, and I may need a couple minutes beyond that, but I will try to move through the material fairly quickly.

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

Mr. DODD. I thank the Chair.

#### ALEXIS HERMAN NOMINATION

Mr. DODD. Mr. President, first of all, let me address if I can—and there are a couple matters I want to speak on—the issue of Alexis Herman. I have listened here to my colleagues address their concern about the Executive order regarding project labor agreements. My hope is that we would not be holding Alexis Herman hostage over a particular matter that Members have some concern about. And I respect that. I note my good friend and colleague from Oklahoma is still on the floor. It was back in I think 1991 when President Bush issued an Executive order to prohibit project labor agreements. I do not recall a similar outcry that this was acting without legislative authority.

I do not disagree, I say to my colleague, by the way, with his concern where executive branches, regardless of party, try to exceed their authority here. But nonetheless, I hope that despite the legitimacy or illegitimacy, whatever one's point of view is, on project labor agreements, Alexis Herman's nomination can go forward. She was proposed in December. The election was in November. This is almost May. We are missing a Secretary of Labor. And whether it is organized labor, unions, management, it is important there be someone at that table to represent the interests of management and labor. And the Secretary of Labor needs to be there.

My colleague from Pennsylvania, Senator SPECTER, I think addressed this issue appropriately back, as the Presiding Officer will recall, when there was some question of whether or not the nomination was going to move

through the committee which the Presiding Officer and I sit on together, the Labor and Human Resources Committee. There, the Senator from Pennsylvania noted we ought to vote on these people up or down, but we ought to at least vote.

The committee voted unanimously to send Alexis Herman's name to the full Senate for consideration. As I said a moment ago, now it is getting to be late April. I am told her nomination will not be considered until something is worked out on these project labor agreements. I think that is regrettable. Again, I will discuss in a moment the project labor agreement issue. Six months after an election, to be missing yet a meaningful and important member of the President's Cabinet, I think is an unfortunate use of our power here, to deny the Senate even a vote on this nomination. So I hope we would have that nomination come sooner rather than later, so we could have that individual sitting at the Cabinet table.

#### PROJECT LABOR AGREEMENTS

Mr. DODD. Mr. President, let me briefly address these project labor agreements. Again, this is maybe confusing to some people because it sounds rather esoteric: Project labor agreement. There is nothing new about project labor agreements. They go back to the 1930's. They have been a very effective means by which governing bodies, States, cities and the Federal Government, where there have been major public works projects, have been able to bring people together to try to work out arrangements, in terms of wages, benefits, hours and so forth, in return for which there would be no work stoppages, strikes and the like.

I note Governor Pataki of New York has very effectively used project labor agreements on projects in the State of New York. Christine Todd Whitman, the Governor of New Jersey, has used project labor agreements on major public works projects in the State of New Jersey. There are numerous projects around the country, Federal projects—the Boston Harbor is the one I am most familiar with in New England—where there is a project labor agreement there.

I might point out it was noted by our colleague from Texas that these project labor agreements result in tremendous cost overruns. It is estimated right now, and the project is not complete—the estimated cost of the Boston Harbor project was \$6.1 or \$6.3 billion. It is estimated now, in no small measure because of the project labor agreement, that project may be completed for about \$3.4 billion, substantially under the original estimates. So there is nothing inherent in this that says it is going to increase costs. In fact, it has worked very, very well.

The suggestion was also that non-union businesses would be prohibited from bidding. Nothing could be further