

higher number of Americans throughout the year.

This is an emergency. These people have worked. They are in a job market where typically there are more than two applicants for every job, and we are seeing a job market that is moving sometimes forward and sometimes sideways. The numbers last Friday were quite disappointing. It could have been the weather or it could be other factors, but it does underscore the need to move very aggressively to address the issue of these unemployed Americans. The average benefit is about \$300 to \$350 a week. The only reason they qualify for the benefit is they did work and they are still looking for work.

One of the ironies of last week's numbers is even though we had very mediocre job creation, the unemployment rate fell. Why? Because people are leaving the workforce. They are giving up. We can't let that happen. One way we keep people looking for work and we keep them able to look for work is to provide this modest benefit each week.

So we are looking very hard and we have had a great deal of collaboration and cooperation. I thank Senators HELLER, COLLINS, PORTMAN, AYOTTE, MURKOWSKI, and COATS. They voted to keep this process going forward, and I respect and thank them for that. I know, over this last weekend, particularly Senators HELLER, COLLINS, and PORTMAN have been working to try to find a way to move forward. Let me say, though, we on our side have moved very far.

Typically these benefits are not paid for. Last year's 12 month extension of unemployment insurance was unpaid for. It was an emergency. It probably created on the order of 100-plus thousand jobs, which would not have taken place without that kind of increase in demand in the economy generated by these payments to individuals looking for work.

We heard what our colleagues said, that this has to be paid for. So we went ahead and proposed a pay-for. Again, many of my colleagues in the Democratic caucus in both the House and the Senate would prefer to see these benefits as emergency unpaid for. We have repeatedly done that.

We have also changed the duration of the benefits. We eliminated some weeks in the first two tiers so we would be able to afford this benefit and still give people the opportunity to move forward.

So we have moved from what we have typically done.

Again, if we look back over the years, the exception is paying for these benefits. Many times during the Bush administration, we provided unemployment benefits unpaid for. Now some of my colleagues are asking to pay for them. We have tried to pay for them. We tried to change the duration so we could afford them but still provide help for people. We have done this because we have heard from the other side: One, they have to be paid for; but, two, we can't use revenues.

A balanced approach to any public policy solution has to at least consider revenues. But our colleagues have been staunch about saying: We will not entertain at all any revenues to offset this payment.

There is a long list of egregious tax provisions which have been highlighted by many of my colleagues—particularly Senator LEVIN in his work—with respect to corporate tax loopholes which not only should be corrected but could be applied to allow these Americans the opportunity to have some support as they go forward looking for work. But because our colleagues said no revenue, OK, we have looked for ways to pay for this without engaging in rhetoric. So I think we have made a significant step forward.

In turn, my colleagues have come back and proposed variations on some of the things we have talked about. They have done it in good faith. They have done it with great ingenuity. Again, I thank them. We haven't yet come to a sort of meeting of the minds, but we are working.

Again, let me go back to the original proposal Senator HELLER and I made. We said: Let's do this for 3 months without a pay-for. That will give us time to do a lot of the work my colleagues have suggested. They have talked about how training programs have to be changed, how skills have to be matched up with jobs, very intricate programmatic changes. That is not going to be done here on the floor within 24, 48, or 72 hours.

I would conclude by again saying: There are now approaching 1.5 million Americans who were abandoned on the 28th of December. Their benefits were cut off. They are in some cases desperate, trying to pay their mortgages, trying to keep their homes, trying to put food on their table. They are trying to put gas in their car, natural gas to heat their homes in the cold weather, and I think we have to respond.

Again, I thank my colleagues who have helped. Tomorrow we are going to get closer to a sort of point of reckoning, and I hope we can come together and move forward.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

#### WILKINS NOMINATION

Mr. LEE. Mr. President, I thank my colleagues from Rhode Island and Iowa for their cooperation in establishing the speaking order this evening. I would like to speak for a moment about the vote we just cast. We just confirmed Judge Wilkins to the U.S. Court of Appeals for the DC Circuit. I voted against this judge. In doing that, I joined my Republican colleagues for one simple reason. Several years ago, when President George W. Bush was in the White House, he nominated an eminently qualified lawyer named Peter Keisler who had bipartisan support.

He was not a partisan hack; he was a true craftsman in the law. He was

someone whom no one had any ideological opposition to, but he was blocked by the Senate Democrats at that time for the simple fact, based on the simple reason, that according to the Senate Democrats the DC Circuit's caseload was not sufficiently robust to justify the filling of this position.

Since that time, not very many things have changed. Since that time, if anything, the DC Circuit's caseload per judge has remained about the same or some would argue has gone down a little, depending on which metric you use. One change is that we have now a Democratic President in the White House instead of a Republican President in the White House. Suddenly my friends across the aisle have forgotten about the caseload-based arguments they used a few years ago to keep Peter Keisler off the U.S. Court of Appeals for the DC Circuit.

We have now confirmed, just in the last few weeks, three additional judges to the U.S. Court of Appeals for the DC Circuit. This has happened against substantial Republican opposition that has been based on the very analysis I have just outlined. This has been facilitated by virtue of the fact that my distinguished colleague, the senior Senator from Nevada, joined by his Democratic colleagues, chose a few weeks ago to exercise what has been referred to as the nuclear option. They broke the rules of the Senate in order to change the rules of the Senate, and they did that so they could put more people on the bench, so they could put more people into top-level positions in this administration while more or less squelching the view of the minority party within the Senate.

This is unfortunate. The most unfortunate aspect of it is that it is part of a broader strategy that is not limited to the DC Circuit; in fact, it is not even limited to the Senate's confirmation process with respect to these judges or other judges. It extends much more broadly than that. It is part of the same effort that convinced the President of the United States, on January 4, 2012, to make four appointments, three to the National Labor Relations Board and one to the Consumer Financial Protection Bureau, pursuant to the President's recess appointment power.

Citing Article II, Section 2, Clause 3 of the Constitution, the President claimed he had the power to appoint these individuals without going through the Senate advice-and-consent process because, as he asserted, the Senate was in recess. There was only one problem with this. The Senate was not in fact in recess. Under Article I, Section 5, Clause 2 of the Constitution, each Chamber of Congress, including the Senate, has the right to determine its own rules, its own procedures. According to the Senate's own rules and according to the Senate's own Journal, the Senate was in fact in session as of January 4, 2012, the moment these supposed recess appointments were made. This was a problem.

Fortunately, the U.S. Court of Appeals for the DC Circuit—prior, I would add, to the confirmation of the three recent judges we have confirmed just in the last few weeks—concluded that this was a lawless act; that it was unconstitutional; that the President did not have the right to deem the Senate in recess when, according to the Senate's own rules, the Senate was in session. The Senate was not in recess.

That case today was reviewed by the Supreme Court of the United States. I had the privilege of sitting in the courtroom just across the street and watching those proceedings. I was pleased to see the checks and balances within our system were functioning—at least to the extent that we have our court system reviewing this act by the President of the United States. I think it is fortunate we have this kind of judicial system that can review it. Based on what I saw today and the quality of the arguments presented to the Court, I am hopeful the Court will reach the same conclusion. I am hopeful the Supreme Court will affirm the judgment entered by the DC Circuit.

In a broader sense it is sad, it is disappointing that it even had to get that far, and it is disappointing that the President of the United States was willing to engage in such a lawless act; that the President of the United States was willing openly to flout the plain text, history, tradition of the U.S. Constitution.

Ours is not a government of one. It was with good reason that the Founding Fathers split up the power, including the power to appoint people to high Federal office such that the President could nominate but the Senate got to confirm. By the President's approach, pursuant to which the President of the United States could himself deem the Senate in recess if he did not think the Senate was doing enough when it went into brief sessions, the President himself could substantially circumvent the advice-and-consent role the Founding Fathers and the Constitution wisely placed in the hands of the Senate.

The reason I said it is unfortunate it had to get to that level, it is unfortunate, first of all, the President felt it was OK, it was acceptable do this. He, of course, took an oath, not once but twice, to uphold, protect, and defend the Constitution of the United States.

It is unfortunate, secondarily, that there was not more of an outcry from this body. Sure, there were a lot of Republicans who joined me in calling this action lawless, because it was. It was sad that none of our colleagues from the other side of the aisle—at least not publicly—were willing to acknowledge the lawlessness of this act. Some acknowledged to me in private that it was problematic. Some acknowledged to me that there were some implications behind this that threatened the Senate as an institution. But I think we need to be more open, more faithful, more forceful, and less partisan about the way we defend the Constitution of the United States.

To me it would not matter—if this were a Republican President I would be arguing with equal strength on this issue. In the future when we have a Republican President, if any Republican President is lawless enough to try this, I will oppose it with everything within me. We ourselves take an oath to uphold the Constitution of the United States. I think that involves doing more than simply leaving it to the courts to iron out the details.

I yield the floor.

The PRESIDING OFFICER. The Senator from Iowa.

#### UNEMPLOYMENT COMPENSATION

Mr. HARKIN. Mr. President, first, I thank the Senator from Rhode Island and the Senator from Utah for agreeing to the way we worked this out so we could all have our time to speak on the Senate floor. I appreciate it very much.

Extending unemployment compensation benefits is one of the most important things, vital things we should be doing right now in Congress, both for the people who are unemployed but also for our economy. Our economy is improving—slowly. There are still 20 million Americans either out of work or marginally employed who want to work. Almost 4 million of those have been out of work for over 6 months. So, faced with this, it is reprehensible that Congress failed to extend Federal unemployment benefits at the end of last year, 3 days after Christmas.

To correct this failure, last week the Senate began considering a bill that was intended to extend those benefits, and I wholeheartedly support this effort. As our economy makes steady improvements on the long road of recovery from the great recession, we continue to support our fellow Americans who are out of work through no fault of their own. The way to do that is to restore Federal unemployment insurance programs for the long-term unemployed. But to garner the votes needed to pass the unemployment insurance extension, my colleagues on the other side of the aisle insisted we find a way to pay for it, through cuts to existing programs, cuts that one columnist for the Los Angeles Times said were Swiftian in their absurdity and cruelty.

I refer to the January 10 issue of the Los Angeles Times by Michael Hiltzik. It is titled "An awful idea: hammer the disabled to pay for unemployment benefits."

The first paragraph says:

It would take the pen of Jonathan Swift to fully describe Congress's willingness to beat up on the least fortunate members of society to protect the richest. The latest example is a plan to pay for a one-year extension of unemployment insurance by cutting Social Security benefits for the disabled.

First of all, I wish to say I do not believe that an extension of Federal unemployment insurance benefits needs to be offset. We have done it before. We did it under the Bush administration

and we have done it before and it has always been an emergency. It is just as if a hurricane hits or terrible storm; this is a terrible storm for people who are unemployed for long periods of time. Frankly, the recent budget deal we just passed reduced the deficit by \$25 billion. I disagree with having to find extra money. But the other side—the Republicans—says we have to find offsets. I guess I am reluctantly willing to do so.

However, the proposal before us would do so in one of the most pernicious ways possible. I guess the most positive comment I can make about it is it is comparatively less damaging than some of the amendments that have been filed by some of my Republican colleagues. But understand this. The proposal before us to extend unemployment benefits and to "pay for it," what it would do is it would deny individuals who have a disability and who are receiving Social Security disability insurance—it would say that if someone gets unemployment compensation, their disability payments will be reduced, dollar for dollar, for every dollar they get in unemployment compensation. That is bad enough. I will get into that in a second. Amendments filed on the Republican side would go further, and they would say if someone gets \$1 in unemployment compensation payments, they would lose all their disability rights, all their disability payments, and all their Medicare support that comes along with being approved for SSDI—Social Security disability insurance.

The proponents of these policies say that people with disabilities who receive disability insurance payments and unemployment compensation payments are double dipping. They claim this is a loophole; that somehow people who receive both are scamming the system. This is not true. This is simply not true. SSDI, Social Security disability insurance, is designed to address the needs of people with disabilities. Unemployment insurance is designed as a partial, temporary replacement of income for people who lost jobs through no fault of their own. They are two separate programs with two separate designed benefits. It is possible for an individual to be eligible for both.

How can this be? First of all, we have to disabuse ourselves of what we keep hearing on the Senate floor from my friends on the Republican side. They keep talking about disability insurance as though, if someone gets Social Security disability insurance, then they are unable to work. That is not true. That is simply not true. SSDI is set up as a system to give some support while looking for work—or get a job and supplement that.

Under the law, people who qualify for SSDI, Social Security disability—I will just say disability. People who qualify for disability insurance can work and are encouraged to work, and they can make up to \$1,070 a month without losing their SSDI. Why is it? Because we