We are about to borrow ourselves into oblivion. There is a theory out there, long held, that democracies are doomed to fail because democracies over time will lose the ability to say no to themselves; that we in the government will continue to grow the government based on the needs of the next election cycle and make promises that make sense for our political future but really over time are unsustainable. We have reached that point, and we are about to go over the edge.

The only way America can self-correct is to make sure our political leadership is rewarded when we ask for change we can believe in. This is not change we can believe in. This is the old way of doing business. This is buying off a constituency that is important for the here-and-now debate of health care and not giving a damn about the consequences to the country down the road. This is how we got in this mess.

If we pass this bill, not only have we destroyed this new hope from a new President of ''change we can believe in,'' we will have reinforced the worst instincts of politics, sold the country short, and made it impossible to say no to the next group we want to sacrifice who needs to help us solve this problem.

With that, I yield back.

I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

The ACTING PRESIDENT pro tempore. The Senator from Iowa is recognized.

Mr. GRASSLEY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

MEDICARE PHYSICIAN PAYMENT SYSTEM REFORM

Mr. GRASSLEY. Mr. President, reforming the Medicare physician payment system is one of the most difficult issues we face in Medicare today. The name of the formula is the sustainable growth rate. Generally around here we refer to that as the SGR. It is the formula for the reimbursement of doctors under Medicare. It was designed in the first instance to control physician spending and to determine annual physician payment updates by means of a targeted growth rate system. The SGR is not the only problem with the Medicare physician payment system. Everyone who knows anything about physician payments and Medicare knows that this SGR formula is not working. It is a fee-for-service system that rewards volume instead of quality or value. This means that Medicare simply pays more and more as more and more procedures and tests and services are provided to patients. Providers who offer higher quality care at a lower cost get paid less. Somehow, it is a backward system, a perverse system. It is one of the driving forces behind rising costs and overutilization of health care, particularly in some parts of the United States.

In addition, the sustainable growth rate formula itself is flawed. The SGR is designed to determine annual physician payment updates by comparing actual expenditures to expenditure targets.

The purpose of the SGR was to put a brake on runaway Medicare spending. The SGR was intended to reduce physician payment updates when spending exceeded growth targets. In recent years, Medicare physician spending has exceeded those SGR spending targets. That has resulted, naturally, in physician payments being cut. As the magnitude of these payment cuts has increased over time, Congress has stepped in to avert these scheduled cuts in reimbursement to doctors.

In a roundabout way, the SGR has been serving its purpose. Numerous improvements in Medicare payments in other areas have been implemented over the years to offset or to pay for the various so-called doc fixes we have had to do and generally do them on an annual basis. Presently they are done on an 18-month basis, expiring December 31 this year.

We should, in fact, be reforming physician payments. That is why I supported the SGR amendments offered by my colleague, the Senator from Texas, during the Senate Finance Committee markup that concluded 8 days ago. Those amendments would have provided a fully offset, positive physician update for the next 2 years. And if we erroneously take up a debate on this flawed Stabenow bill, I will have an alternative to offer with my good friend, the chairman of the Senate Budget Committee, Senator CONRAD. A Conrad-Grassley amendment would be a bipartisan approach to this.

Realigning incentives in the Medicare Program and paying for quality rather than quantity of services is, of course, an essential part of physician payment reform. But as fundamentally flawed as the physician payment system is, S. 1776, the bill before us, is just as fundamentally flawed. S. 1776 would add—can my colleagues believe this—a $¼ trillion cost to the national debt. A quarter of a trillion, obviously, is $250 billion. But worse yet, it does not fix the problems we have with the physician payment system. It simply gives a permanent freeze to those payments. The American Association of Neurological Surgeons and the Congress of Neurological Surgeons oppose the Stabenow bill for precisely that reason, and I applaud them for having the courage to say so.

My esteemed colleague, the majority leader, claims this bill has nothing to do with health reform. I think it has everything to do with health reform. He says the $247 billion cost of this bill is just correcting, in his words, ''payment discrepancy;'' merely, in his words, ''a budgetary problem,'' a problem that needs to be fixed. But I don't believe anybody is going to buy that argument, not even the Washington Post. I have here a recent editorial. They said:

> $247 billion . . . is one whopper of a discrepancy.

S. 1776 isn't being offered to fix a budget payment discrepancy, it is being offered as one whopper of a backroom deal to enlist the support of the American Medical Association for a massive health reform bill that is being written behind closed doors.

Nobody is being fooled about what is going on in this body, the most deliberative body in the world, the Senate.

When President Obama spoke to a joint session of Congress last month—the week after we came back from our summer break—he made a commitment to not add one dime to the deficit now or in the future. Those are his words, not mine. But as this Washington Post editorial notes, S. 1776 would add 2.47 trillion dimes to the deficit.

We go to chart 2 now. That would be 2.47 trillion dimes, enough to fill the Capitol Rotunda 23 times.

Now we have chart 3. I wholeheartedly agree with the editorial's conclusion. The Post editorial said:

> A president who says that he is serious about dealing with the dire fiscal picture cannot credibly begin by charging this one to the national credit card . . .

This quote is highlighted out of that same editorial.

The Office of Management and Budget and the Treasury Department announced that the fiscal year 2009 deficit hit a record of $1.4 trillion. According to the Government Accountability Office, public debt is projected by the year 2019 to surpass the record that was set in 1946, 1 year after the end of World War II. That debt was attributable to the war, which was the war to save the world for democracies because of the dictatorial governments of Italy, Germany, and Japan, as we recall from history.

There is no doubt that fixing the flawed physician payment system is something that must be addressed. But the problem—this problem—with the physician payments is one of the biggest problems in health care that needs fixing. But at a time when the budget deficit has reached an alltime high of $1.4 trillion, this situation demands fiscal discipline.

As the Washington Post has correctly pointed out, S. 1776 is, indeed, a test of the President's pledge to pay for health care reform.

Repealing the SGR without any offsets, as S. 1776 would do, is a flagrant attempt to try and hide the true cost of comprehensive health care reform.

Let me suggest to the American people that bill, comprehensive health care reform—at least the one that came out of the Senate Finance Committee—is thick, at 1,502 pages that we all are committed to reading before it goes to the floor. That bill, of course,

will not go to the floor because now it is being merged in secrecy with the Senate HELP Committee bill, and so it may come out thicker. Who knows. We are talking about a great deal of cost connected with that and the SGR fix being connected with that as well.

We have in the Senate Finance Committee bill, that was reported out, significant payment system reform. That bill takes savings of almost $½ trillion to fund a new entitlement program outside Medicare. The priority for Medicare savings should be fixing Medicare problems, and the physician payment issue and the SGR is the biggest payment system problem in Medicare today. It should get fixed in health care reform with those Medicare savings.

I must, therefore, object not to fixing the SGR and improving the system for physician payments—which clearly must be done—but to this very flawed bill. It is only a permanent payment freeze. It does not fix the problem. It is not paid for. It should be a part of health care reform. It adds $¼ trillion to the deficit. It is one whopper of a discrepancy. It is not credible.

I urge my colleagues to oppose cloture on this train wreck of a bill.

I yield the floor and, since I do not see any of my colleagues waiting to speak, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. BEGICH). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. LEAHY. Mr. President, today, the Senate will finally consider the nomination of Roberto A. Lange to the District of South Dakota. It has been 3 weeks since Mr. Lange's nomination was unanimously reported by the Judiciary Committee to the Senate. It should not take 3 weeks to confirm a consensus nominee. I will be interested to hear from Senate Republicans who have stalled this confirmation for the last 3 weeks why they did so.

There are 10 other judicial nominations reported favorably by the Judiciary Committee to the Senate that remain pending without consent from Senate Republicans to proceed to their consideration. These are 10 other judicial nominations on the Senate Executive Calendar awaiting action and being stalled by Republican holds. All 10 were reported favorably by the Senate Judiciary Committee. Two were reported in June and have been waiting for more than 4 months for Senate consideration. These are things that we have always done by voice vote when there is no controversy.

It is not only a dark mark on the Senate for holding us up from doing our work, but it means that the nominees have their lives on hold. They have been given this nomination, and everything has to come to a stop. They know they are going to be confirmed. They know that whenever the Republicans allow a vote, it will be virtually unanimous. It makes the Senate look foolish, and I wish my colleagues would allow these people to move quickly.

The American Bar Association's Standing Committee on the Federal Judiciary reported that its peer review of the President's nomination of Mr. Lange resulted in the highest rating possible, a unanimous rating of well qualified. His nomination has the support of both home State Senators, Senator JOHNSON, a Democrat, and Senator THUNE, a Republican, and was reported out of the Judiciary Committee by unanimous consent on October 1. I expect the vote on the President's nomination of Mr. Lange to be overwhelmingly in favor, as was the 99–0 vote for the only other district court confirmation so far this year, that of Judge Viken. I will be listening intently to hear why then Senate Republicans—despite the support of Senator THUNE, the head of the Republican Policy Committee and a member of the Senate Republican leadership—have stalled this confirmation needlessly for 3 weeks.

This is one of the 13 judicial nominations reported favorably by the committee to the Senate since June to fill circuit and district court vacancies on Federal courts around the country. Ten of those nominations were reported without a single dissenting voice. This is unfortunately only the third of those judicial nominations to be considered all year.

It is October 21. By this date in the administration of George W. Bush, we had confirmed eight lower court judges. By this juncture in the administration of Bill Clinton, we had likewise confirmed eight circuit and district court nominations. The Senate has confirmed just three circuit and district court nominees this year less than half of those considered by this date during President Bush's tumultuous first year in office and confirmed by this date during President Clinton's first year. This is despite the fact that President Obama sent nominees with bipartisan support to the Senate two months earlier than did President Bush. Moreover, President Clinton's term also began with the need to fill a Supreme Court vacancy.

The first of these circuit and district court confirmations this year did not take place until September 17, months after the nomination of Judge Gerard Lynch had been reported out of committee with no dissent. Finally, after months of needless delay, the Senate confirmed Judge Lynch to serve on the Second Circuit by an overwhelming vote of 94 to 3. That filled just one of the five vacancies this year on the Second Circuit. The Second Circuit bench remains nearly one-quarter empty with four vacancies on its 13-member bench.

Judge Viken, the first of just two district court judges the Senate has been allowed to vote on this year, was confirmed on September 29, by a unanimous 99–0 vote. Today, the Senate is finally being allowed by Republicans to vote to confirm Roberto Lange, who was reported by the committee on October 1. It took 3 weeks to proceed to Mr. Lange's nomination despite the fact that he, like Judge Viken, had the support of both his home State Senators, one a respected Democratic Senator and the other a Republican Senator who is a member of the Republican Senate leadership.

South Dakota has had its two vacancies filled this year but vacancies in 35 other States remain unfilled and the Senate's constitutional responsibilities are going unfulfilled. There was—there is—no reason for the Republican minority to impose these unnecessary and needless delays to judicial confirmations. When will Senate Republicans allow the Senate to consider the nominations of Judge Hamilton to the Seventh Circuit, Judge Davis to the Fourth Circuit, Judge Martin to the Eleventh Circuit, Judge Greenaway to the Third Circuit, Judge Berger to the Southern District of West Virginia, Judge Honeywell to the Middle District of Florida, Judge Nguyen to the Central District of California, Judge Chen to the Northern District of California, Ms. Gee to the Central District of California and Judge Seeborg to the Northern District of California?

In a recent column, Professor Carl Tobias wrote:

> President Obama has implemented several measures that should foster prompt appointments. First, he practiced bipartisanship to halt the detrimental cycle of accusations, countercharges and non-stop paybacks. Moreover, the White House has promoted consultation by seeking advice on designees from Democratic and GOP Senate members, especially home state senators, before official nominations. Obama has also submitted consensus nominees, who have even temperaments and are very smart, ethical, diligent and independent.

I ask unanimous consent that a copy of Professor Tobias's column be printed in the RECORD following my statement.

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

(See Exhibit 1.)

Mr. LEAHY. When I served as chairman of the Senate Judiciary Committee during President Bush's first term, I did my best to stop the downward spiral that had affected judicial confirmations. Throughout my chairmanship I made sure to treat President Bush's judicial nominees better than the Republicans had treated President Clinton's. During the 17 months I chaired the Judiciary Committee during President Bush's first term, we confirmed 100 of his judicial nominees. At the end of his Presidency, although Republicans had chaired the Judiciary Committee for more than half his tenure, more of his judicial nominees were confirmed when I was the chairman than in the more than 4 years when Republicans were in charge.

In spite of President Obama's efforts, however, Senate Republicans began

this year threatening to filibuster every judicial nominee of the new President. They have followed through by dragging out, delaying, obstructing and stalling the process. The result is that 10 months into President's Obama's first term, the Senate has confirmed only three of his nominations for circuit and district courts while judicial vacancies skyrocket around the country. The delays in considering judicial nominations pose a serious problem in light of the alarming spike in judicial vacancies on our Federal courts.

There are now 96 vacancies on Federal circuit and district courts and another 24 future vacancies already announced. These vacancies are at near record levels. Justice should not be delayed or denied to any American because of overburdened courts. We can do better. The American people deserve better.

Professor Tobias' observations about the Second Circuit hold true throughout the country and with respect to this President's efforts to work cooperatively with respect to judicial nominations. President Obama made his first judicial nomination, that of Judge David Hamilton to the Seventh Circuit, in March, but it has been stalled on the Executive calendar since early June, despite the support of the senior Republican in the Senate, Senator LUGAR. The nomination of Judge Andre Davis to the Fourth Circuit was reported by the committee on June 4 by a vote of 16 to 3, but has yet to be considered by the Senate. The nomination of Judge Beverly Baldwin Martin to the Eleventh Circuit has the support of both of Georgia's Senators, both Republicans, and was reported unanimously from the committee by voice vote on September 10 but has yet to be considered or scheduled for consideration by the Senate. The nomination of Joseph Greenaway to the Third Circuit has the support of both Pennsylvania Senators, and was reported unanimously from the committee by voice vote on October 1, but has yet to be considered or scheduled for consideration by the Senate. All of these nominees are well-respected judges. All will be confirmed, I believe, if only Republicans would consent to their consideration by the Senate. Instead, the President's good efforts are being snubbed and these nominees stalled for no good purpose.

President Obama has been criticized by some for being too solicitous of Senate Republicans. As Wade Henderson, the executive director of the Leadership Conference on Civil Rights, said to The Washington Post recently: ''I commend the President's effort to change the tone in Washington. I recognize that he is extending an olive branch to Republicans on the Judiciary Committee and in the Senate overall. But so far, his efforts at reconciliation have been met with partisan hostility.'' As usual, Wade has it right. The efforts the President has made have not been reciprocated.

The Senate can and must do a better job of restoring our tradition of regularly considering qualified, noncontroversial nominees to fill vacancies on the Federal bench without needless and harmful delays. This is a tradition followed with Republican Presidents and Democratic Presidents. We should not have to overcome filibusters and spend months seeking time agreements to consider consensus nominees.

In addition, four nominations to be Assistant Attorneys General at the Department of Justice remain on the Executive calendar, three of them for many months. Republican Senators have also prevented us from moving to consider the nomination of respected Federal Judge William Sessions of Vermont to be Chairman of the United States Sentencing Commission for over 5 months, even though he was twice confirmed as a member of that Commission. The majority leader has been forced to file a cloture motion in order to end the obstruction of that nomination.

Four out of a total of 11 divisions at the Department of Justice remain without Senate-confirmed Presidential nominees because of Republican holds and delays—the Office of Legal Counsel, the Tax Division, the Office of Legal Policy, and the Environment and Natural Resources Division. Earlier this month, with the hard work of Senator CARDIN, we were finally able to move forward to confirm Tom Perez to head the Civil Rights Division at the Justice Department. His nomination was stalled for 4 months, despite the fact that he was approved 17 to 2 by the Judiciary Committee. At the last minute, Senate Republicans abandoned an ill-fated effort to filibuster the nomination and asked that the cloture vote be vitiated. He was finally confirmed with more than 70 votes in the Senate.

During the 17 months I chaired the Judiciary Committee during President Bush's first term, we confirmed 100 of his judicial nominees and 185 of his executive nominees referred to the Judiciary Committee. And yet 10 months into President's Obama's first term, we have confirmed only 2 of his nominations for circuit and district courts and 40 of the executive nominees that have come through our committee.

I hope that, instead of withholding consents and filibustering President Obama's nominees, the other side of the aisle will join us in treating them fairly. We should not have to fight for months to schedule consideration of the President's judicial nominations and nomination for critical posts in the executive branch.

I look forward to congratulating Mr. Lange and his family on his confirmation today. I commend Senator JOHNSON for his steadfastness in making sure his State is well served.

EXHIBIT 1

COMMENTARY: SECOND CIRCUIT APPEALS COURT OPENINGS NEED TO BE FILLED

(By Carl Tobias)

The country's attention was recently focused on the Senate confirmation vote for U.S. Second Circuit Court of Appeals Judge Sonia Sotomayor, President Barack Obama's initial Supreme Court nominee and judicial appointment. This emphasis was proper because the tribunal is the highest court in the nation and decides appeals involving fundamental constitutional rights.

Nonetheless, the same day that Justice Sotomayor received appointment, Second Circuit Judge Robert Sack assumed senior status, a type of semi-retirement, thereby joining his colleague, Guido Calabresi, who had previously taken senior status. Moreover, on Oct. 10, Judge Barrington Parker also assumed senior status. These developments mean that the Second Circuit will have vacancies in four of its thirteen authorized judgeships.

Operating without nearly 25 percent of the tribunal's judicial complement will frustrate expeditious, inexpensive and equitable disposition of appeals. Thus, President Obama should promptly nominate, and the Senate must swiftly confirm, outstanding judges to all four openings.

The numerous vacancies can erode the delivery of justice by the Second Circuit, which is the court of last resort for all but one percent of appeals taken from Connecticut, New York and Vermont. The tribunal resolves more critical business disputes than any of the 12 regional circuits and decides very controversial issues relating to questions, such as free speech, property rights and terrorism.

Among the appellate courts, the Second Circuit needs more time to conclude appeals than all except one, which is a useful yardstick of appellate justice. The August loss of two active judges and the October loss of a third will exacerbate the circumstances, especially by additionally slowing the resolution of cases that are essential to the country's economy.

There are several reasons why the tribunal lacks almost one quarter of its members. Judge Chester Straub took senior status in July 2008, and President George W. Bush nominated Southern District of New York Judge Loretta Preska on Sept. 9 after minimally consulting New York's Democratic Senators Charles Schumer and Hillary Clinton. September was too late in a presidential election year for an appointment, and the 110th Senate adjourned without affording the nominee a hearing.

Moreover, President Obama has nominated no one for the Calabresi or Sack opening, although both jurists announced that they intended to take senior status last March. In fairness, Judge Calabresi did not actually assume senior status until late July, while Judge Sack only took senior status and Justice Sotomayor was confirmed in August.

President Obama has implemented several measures that should foster prompt appointments. First, he practiced bipartisanship to halt the detrimental cycle of accusations, countercharges and non-stop paybacks. Moreover, the White House has promoted consultation by seeking advice on designees from Democratic and GOP Senate members, especially home state senators, before official nominations. Obama has also submitted consensus nominees, who have even temperaments and are very smart, ethical, diligent and independent. The Executive has worked closely with Senator Patrick Leahy (D–Vt.), the Judiciary Committee chair, who schedules hearings and votes, and Senator Harry Reid (D–Nev.), the Majority Leader, who arranges floor debates and votes, and