

EXHIBIT 1

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WILLIAM KAYATTA AND THE NEEDLESS
DESTRUCTION OF THE THURMOND RULE

(By Andrew Cohen)

WHY DO REPUBLICAN LEADERS STILL PLAY ALONG WITH AN INFORMAL SENATE RULE THAT PREVENTS UP-OR-DOWN VOTES ON EVEN THOSE JUDGES WHO HAVE STRONG REPUBLICAN SUPPORT?

Meet William Kayatta, another one of America's earnest, capable judges-in-waiting. Widely respected in his home state of Maine, nominated by President Obama in January to fill a vacancy on the 1st U.S. Circuit Court of Appeals, eagerly endorsed by both of Maine's Republican senators, passed for confirmation to the Senate floor by an easy voice vote in the Senate Judiciary Committee, Kayatta's nomination instead has become yet another victim of the Senate GOP's suicidal tendencies.

The litigants of the 1st Circuit need Kayatta. There are no serious arguments against him. Yet the Republican leadership in the Senate has blocked a vote on the merits of his nomination in obedience to the so-called "Thurmond Rule," an informal practice as self-destructive as was its namesake. The Thurmond Rule is typically invoked by the opposition party in a presidential election year to preclude substantive votes on federal judicial appointments within six months of Election Day. It is the Senate's version of a sit-down strike.

In April, just after the Judiciary Committee favorably passed along Kayatta's nomination to the Senate floor for confirmation, Maine's junior senator, Susan Collins, had wonderful things to say about the nominee:

Bill is an attorney of exceptional intelligence, extensive experience, and demonstrated integrity, who is very highly respected in the Maine legal community. Bill's impressive background makes him eminently qualified for a seat on the First Circuit. His thirty-plus years of real world litigation experience would bring a much-needed perspective to the court. Maine has a long proud history of supplying superb jurists to the federal bench. I know that, if confirmed, Mr. Kayatta will continue in that tradition. I urge the full Senate to approve his nomination as soon as possible.

And how did her fellow Republicans respond to her request? They blew her off. There has been no vote on Kayatta's nomination and none is scheduled. Instead, last month, Sen. Mitch McConnell, the Senate Minority Leader, invoked the "Thurmond rule" to block floor consideration of appointment—as well as up-or-down votes on the rest of President Obama's federal appellate nominees (This in turn, initially prompted Sen. Collins to blame the Obama Administration for going too slow in nominating Kayatta in the first place.)

In theory, the Thurmond Rule is something official Washington defends as the price of divided government. In reality, it's another outrageous example of how the Senate has re-written the Constitution by filibuster. In practice, in the Kayatta case and many more, the Thurmond rule is the antithesis of good governance. Your Senate today perpetuates a frivolous rule which, for the most cynical political reasons, blocks qualified people from serving their nation. It's not misfeasance. It's malfeasance.

Just because Strom Thurmond was willing to jump the Senate off the bridge doesn't mean that today's Senate Republican leaders had to do likewise.

In a more prudent and practical era in Senate history, nominees like Kayatta would

have been confirmed in days. Fifty years ago, for example, when another bright Democratic appointee with strong Republican support came to the Senate seeking a judgeship, the Judiciary Committee took all of 11 minutes before it endorsed him. Byron "Whizzer" White then served the next 31 years as an associate justice of the United States Supreme Court. That's wholly unthinkable today—even with lower federal court nominees.

Now even slam-dunk candidates like Kayatta linger in the wings waiting for Senate "consent" long after the body already has definitively "advised" the executive branch of how great it thinks the nominee would be as a judge. Can you imagine the uproar if the Senate ever used its filibuster power to block the deployment of troops already endorsed by the Armed Services Committee? Now please tell me the material difference here. Surely, the judiciary needs judges as much as the army needs soldiers.

There are currently 76 judicial vacancies around the country. There are 31 districts and circuits designated as "judicial emergencies" because vacancies there have lingered so long. In the 10th Circuit, what's happening to Kayatta is happening to Robert Bacharach, who has the support of Oklahoma's two Republican senators. The Senate also is blocking Richard Taranto from a Federal Circuit spot even though he breezed through the Judiciary Committee and has been endorsed by Robert Bork and Paul Clement. The same goes for Patty Shwartz in the 3rd Circuit.

This is unacceptable on every level. When we talk about "false equivalence" in modern politics the business of these judges should be the lede. These nominations require no great policy choices on the part of Congress. They don't come with thousands of pages of ambiguous legalese disguised as the language of a federal statute. There is no room for spin. These nominees are either qualified, or they aren't, and when they sail out of the Judiciary Committee with voice votes no one can plausibly say they aren't qualified.

And yet here we are. It would be convenient to blame Strom Thurmond, one of the most divisive politicians of the 20th century, for one of the Senate's most divisive rules. But Thurmond is long gone. And there was never anything about his rule that demanded it be followed, session after session, under both Democratic and Republican control. Just because Strom Thurmond was willing to jump the Senate off the bridge, in other words, doesn't mean that today's Senate Republican leaders had to do likewise. But they have.

America has trouble enough today without a senseless Senate rule that blocks highly skilled, highly competent public servants from joining government. The nation's litigants in federal court, burdened by judicial vacancies, already are waiting long enough to have their corporate disputes decided. This isn't gridlock. This is destruction. "I think it's stupid" to block good judges from confirmation, Sen. Tom Coburn said earlier this year. For once, he is right. And Sen. Collins? Even she's come around. "I have urged my colleagues on both sides of the aisle to give Bill the direct vote by the full Senate that he deserves," she said late last month. Amen to that.

[From the Los Angeles Times, July 12, 2012]

REJECT THE "THURMOND RULE"

SENATE MINORITY LEADER MITCH MCCONNELL INVOKES THE LEGACY OF STROM THURMOND TO HOLD UP JUDICIAL CONFIRMATIONS—IT'S BAD FOR JUDGES AND BAD FOR JUSTICE

The late Strom Thurmond is best known for his 48 years in the U.S. Senate rep-

resenting South Carolina, his segregationist candidacy for the presidency in 1948 and the fact that even though he was a longtime opponent of racial equality, he fathered a child with a black teenage housekeeper. But Thurmond also lent his name to the so-called Thurmond Rule, according to which Senate action on judicial confirmations is supposed to stop several months before a presidential election.

The rule—actually a custom that sometimes has been honored in the breach—goes back to 1968, when Thurmond and other Republicans held up action on President Johnson's nomination of Abe Fortas to be chief justice of the United States. Fortas withdrew in the face of a filibuster, and President Nixon, the Republican victor in the 1968 election, was able to choose a successor to the retiring Earl Warren. In subsequent years, senators of both parties have cited the Thurmond/Fortas episode as a precedent for not acting on judicial nominations close to an election.

Even in the case of a Supreme Court appointment, the Thurmond Rule violates the spirit of the Constitution, which doesn't distinguish between nominations made earlier or later in a president's term. It is less defensible still in connection with nominations to lower courts. Yet Senate Minority Leader Mitch McConnell (R-Ky.) told colleagues last month that he was immediately invoking the rule to end nominations to the U.S. Court of Appeals, and would block confirmation votes on nominees to federal district courts after September.

Such delays are a disservice to the nominees and to an overburdened federal judiciary. At present there are 12 vacancies on federal appeals courts, 63 on district courts and two on the U.S. Court of International Trade. The Obama administration, although it has been slow to fill vacancies, currently is proposing seven candidates for the appeals court and 28 for the district courts. The Senate should hold up-or-down votes on these nominations and any others put forward in the near future.

Apart from the Thurmond Rule, the timely confirmation of judicial nominees has long been frustrated by petty partisanship. Democrats and Republicans share the blame. The most recent logjam was broken in March when Republicans agreed to timely votes on 14 nominations.

Obviously Republicans hope that Barack Obama is a lame-duck president, but even lame-ducks are entitled to expeditious consideration of their nominations. And the administration of justice shouldn't be held hostage to partisan politics even in an election year.

Mr. President, I see the distinguished senior Senator from New Jersey on the floor. If he seeks the floor, I will yield to him; otherwise, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. LAUTENBERG. 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. LAUTENBERG. Mr. President, I thank the chairman of the Judiciary Committee who always has things of relevance to talk to us about and he has done that again today and we thank the chairman.

SHOOTING IN AURORA, CO

Mr. President, I do plan on talking about a confirmation vote coming up

on the floor, but one can't address the public at-large on this day, so soon after a tragedy of enormous proportion, without taking just a few moments to discuss the events that took place in Aurora, CO, last Friday. The question arises: What do we do besides weep with these people? What do we do besides feel sad and see a gloom hanging over our country? What do we do about this? What do we want to do to prevent it in the future? That will be the test of the general character of this body and others in government.

So many promising young lives were lost, changed forever. We see pictures of those who lost a loved one in our newspapers. It is heartbreaking just to look at those pictures. What I sense from my visits around New Jersey today and over the weekend is a certain kinship one feels with the people who are mourning the loss of a child—an 8-year-old—or a daughter or son, husband or wife. One feels a certain kinship. One can feel the sadness and it is depressing, and it is not the kind of characterization we would like to see for the United States and the young lives lost forever.

But our duty in this body is not simply to mourn and offer our condolences. We want to do that. We want those families who lost someone to understand that we, in some strange way, join them in their mourning, but the best way to prove our sadness, the best way to prove we care is to take action to protect young, innocent lives. On that score, we don't rank very high.

I remember so clearly the time in 1999 the pictures of young people at a high school, hanging out the window, imploring for help, imploring to be saved, heartbroken at what they were seeing and what they were feeling. So we have to do something more.

The gun laws on the books are outdated, and we even have let key protections expire. It is tragic. In the coming days, I am sure, some of my colleagues and I will be discussing specific measures, commonsense measures, because when it comes to our gun laws, we need to act before another outburst of gun violence overtakes us with the terrible consequences that brings.

Around here we have opportunities to do great things, and I have one of those, I believe, today—an opportunity that I take with great pleasure—to come to the floor to strongly endorse Judge Michael Shipp for a position on the U.S. District Court for the District of New Jersey.

Judge Shipp brings an impressive background to the bench. To start, he was born in Paterson, NJ, as was I. It is a city of significant poverty and difficulty, but he rose from humble beginnings in Paterson to graduate from Rutgers University and Seton Hall Law School, two of New Jersey's fine educational institutions.

Judge Shipp has dedicated his career to our justice system, and he spent much of it in public service. I learned so much about him in my meeting with

him. Not only does he bring a sincerity about wanting to do what is right, but he has the knowledge and the sensitivity that will make him a terrific district court judge.

He began his career as a law clerk to a New Jersey Supreme Court justice, James H. Coleman, Jr. He then served in the office of New Jersey's attorney general, where he developed not only a thorough legal expertise but also real leadership acumen. As counsel to the attorney general, he oversaw 10,000 employees, including 800 attorneys. For more than a decade, Judge Shipp has taught our State's students as an adjunct law professor at Seton Hall University.

Since 2007, he has served our city and our Nation as a U.S. magistrate judge in the district court. In this capacity, he has conducted proceedings in both civil and criminal cases and has included rulings on motions, issuing recommendations to district court judges, and performing district court judge duties in cases with magistrate jurisdiction. With this experience, Judge Shipp is going to be well prepared to serve on the district court.

The law, our constitution, are the greatest denominators of our democracy, and the judges are the faithful stewards to protect these precious guidelines of our society. That is why, as a Senator, I consider it a sacred duty, given by the Constitution, to carefully select judicial nominees and to provide the President with advice and consent.

Our faith in the legal system depends on the just application of the law as it is soundly written law. Judge Shipp has served New Jersey extraordinarily well, he is eminently qualified, and his broad experience will prepare him well for his new role. I have no doubt he will continue his excellence as a judge on the U.S. district court.

The success of our democracy depends on all our citizens receiving equal and just representation before the law. As leaders in our judicial system, judges hold that equality and justice in their hands. It means they must be fair-minded, honorable, and humble. I am confident Judge Shipp is going to make a terrific judge. He is highly qualified to meet this challenge, and I urge my colleagues to support this confirmation.

With that, I yield the floor.

THE PRESIDING OFFICER. The Senator from New Jersey.

Mr. MENENDEZ. Mr. President, I ask unanimous consent that I be recognized for 4 minutes; that following my 4 minutes, the distinguished Senator from Iowa, the ranking member of the Judiciary Committee, be recognized for 6 minutes.

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

Mr. MENENDEZ. Mr. President, I rise to strongly support the nomination of Judge Michael Shipp for the U.S. District Court for the District of New Jersey.

All of us in New Jersey, everyone who has dealt with him, everyone who knows him is very familiar with Judge Shipp's strong qualifications and reputation for excellence. He is an exceptional candidate for the Federal bench—an accomplished jurist with impressive credentials.

I recommended Judge Shipp to President Obama, and I urge all my colleagues in the Senate to support his nomination, as the Judiciary Committee did.

With almost 5 years' experience as a Federal magistrate judge for the District of New Jersey, he is well prepared to assume a seat as a Federal district judge. As a magistrate, he has successfully managed significant and complex cases. On occasion, he has served as the district court judge in cases with magistrate jurisdiction.

The first 8 years of his distinguished legal career were spent in the litigation department at the law firm of Skadden, Arps, Slate, Meagher & Flom. In 2003, he turned to public service to give something back to the community as an assistant attorney general for consumer protection in the Office of the Attorney General of New Jersey, where he honed his expertise in consumer fraud, insurance fraud, and securities fraud cases.

Judge Shipp clearly excelled. He was twice promoted within the office, first as a liaison to the attorney general and second as counsel to the attorney general. As counsel, he was in charge, in essence, of day-to-day operations of the Department of Law and Public Safety, a department with over 10,000 employees and 800 attorneys.

An accomplished jurist, an experienced prosecutor, a dedicated public servant, and an effective administrator and manager as well, that is Michael Shipp. It is what all of us in New Jersey have known him to be.

Judge Shipp has not stayed on the sidelines. Even with a full plate, he has been deeply involved in the legal community in helping address the profession's needs and concerns. He held a leadership role with the New Jersey State Bar Association and is actively involved with the Garden State Bar Association, which is the association of African-American lawyers.

As a faculty member of Seton Hall University's School of Law's Summer Institute for Pre-Legal Studies, he helped disadvantaged students develop their interest in the law, and he served on the faculty of the New Jersey Attorney General's Advocacy Institute, which ensures that attorneys representing the State of New Jersey maintain the highest possible levels of professionalism.

Judge Shipp is also a very proud New Jersey—part of the community—with deep roots in the State. A native of Paterson, he grew up and has lived in New Jersey all his life. He earned his degrees from Rutgers, the State university, and Seton Hall University School of Law. After graduating, he

went on to clerk for the Honorable James Coleman, a former justice on the New Jersey Supreme Court.

To put it simply, Michael Shipp will be an extraordinary district court judge for the District of New Jersey. He is a man of honor, principle, and he possesses an excellent judicial temperament, has extraordinary legal experience, and a deep and abiding commitment to the rule of law.

I have full confidence he will serve the people of New Jersey and the country with all the dignity, fairness, and honor he has shown throughout his extraordinary career. We are lucky to have a nominee of his caliber, and I wholeheartedly urge the full Senate to vote to confirm Judge Shipp to the District of New Jersey.

I am thrilled we are actually going to do a confirmation vote and not a cloture vote and I appreciate those who made that possible.

With that, I yield the floor to my distinguished colleague from Iowa.

THE PRESIDING OFFICER. The Senator from Iowa.

RECOGNIZING TAYLOR MORRIS

Mr. GRASSLEY. Mr. President, when my colleagues come over to vote, I hope they will take note of a constituent of mine and wish him well.

Taylor Morris, a Navy wounded person from Afghanistan, who is an explosives expert, lost parts of four limbs. He is at the bottom of the escalator as you go to the subway. He is one of our wounded heroes, and I would like to have my colleagues recognize him.

AURORA, COLORADO SHOOTINGS

Mr. GRASSLEY. Mr. President, it was a very sad weekend and will be for a long period of time in Aurora, CO. I heard the remarks of the majority and minority leaders today expressing condolence for the victims and their families. I wish to associate myself with those remarks and offer my condolences to all the people of Aurora but particularly to those who have deceased family members and those who are hospitalized because of this tragic event that happened there.

Mr. President, I support the nomination of Michael A. Shipp to be U.S. district judge for the District of New Jersey, currently serving as a U.S. magistrate and coming out of committee on voice vote. I am not aware of any controversy regarding this nominee, and I expect he will be confirmed with an overwhelming vote.

There has been a bit of discussion regarding whether the cloture vote that had been scheduled on today's nominee was some sort of escalation of Presidential election politics or an indication of a partisan fight over judicial confirmations. Those are raised as speculation or misreading what is happening in the Senate. The fact is that the cloture vote, which is now vitiated, had nothing to do with the judicial confirmation process in general or this nominee in particular.

There is, unfortunately, an element of partisan gridlock that is affecting

this nomination, but it is not because of a Republican desire to block this nominee or to shut down the Senate floor. Republicans, in fact, have been demanding more access to the Senate floor. That gridlock is the majority leader's tactics to block amendments on the Senate floor.

Time after time the majority uses parliamentary procedure to prohibit amendments, block votes, and deny or limit debate. For example, last Thursday the Republican leader asked the majority leader if the anticipated business coming before the Senate, the Stabenow-Obama campaign tax bill, would be open for amendment. The majority leader responded that would be "very doubtful." These actions, although they may be permitted by Senate rules, are contrary to the spirit of the Senate.

Certainly we are far from being the world's greatest deliberative body at this time. So when a Senator who seeks a vote on his amendment is stymied time after time, it is not surprising that the Senator would use Senator rules and procedures to bring pressure on the majority leader for a vote—in other words, to do exactly what the Senate was set up under the Constitution to do. There is a bit of sad irony that Senators who are facing obstructionism are the ones who are labeled obstructionist when they are persistent in trying to bring a matter to a vote, which is customary in the Senate.

Unfortunately, we are now seeing this obstructionism strategy creep into committee activity as well. Again, last Thursday the Judiciary Committee marked up an important national security bill. The bill was open to amendment but apparently only amendments the chairman agreed with. In the Judiciary Committee, we have a longstanding practice of voting up or down on difficult, controversial issues. What happened last week undermined the responsibility of the committee to debate and address important issues—in this case, national security. The Judiciary Committee is a forum for these debates.

The bill that was on the agenda is one of the few vehicles that will likely be passed before the end of the year, so it was an important and appropriate vehicle for addressing such issues once the chairman opened the amendment process by adopting his own substitute amendment. Instead, the partisan gridlock, driven by the majority leader's tactics to block amendments on the Senate floor, has now spread to the committee level with made-up germaneness rules and tabling motions forced on amendments, some of which had received bipartisan support from members of the Judiciary Committee in the past. The only conclusion that can be drawn is that the Senate majority leadership wants to protect its members at every step of the legislative process from having to make difficult votes, and the majority leader-

ship will employ any procedure it can to duck debates and to govern.

Even as we turn to the 154th nominee of this President to be confirmed to the district or circuit courts, we continue to hear unsubstantiated charges of obstructionism. The fact is we have confirmed over 78 percent of President Obama's district nominees. At this point in his Presidency, 75 percent of President Bush's nominees had been confirmed. President Obama, in other words, is running ahead of President Bush on district confirmations as a percentage.

I continue to hear some of my colleagues repeatedly ask the question: What is different about this President that he is to be treated differently than all of these other Presidents? I won't speculate as to any inference that might be intended by that question, but I can tell you that this President is not being treated differently than previous Presidents. By any objective measure, this President has been treated fairly and consistently with past Senate practices.

As I stated, as a percentage of nominations, this President is running ahead of the previous President with regard to the number of confirmations. Let me put that in perspective for my colleagues with an apples-to-apples comparison. As I mentioned, we have confirmed 153 district and circuit nominees of this President. We have also confirmed two Supreme Court nominees. Everyone understands that the Supreme Court nominations take a great deal of committee time. The last time the Senate confirmed two Supreme Court nominees was during President Bush's second term, and during that term the Senate confirmed a total of 119 district and circuit court nominees. With Judge Shipp's confirmation today—which I support and which I think will be confirmed almost unanimously—we will have confirmed 35 more district and circuit court nominees for President Obama than we did for President Bush in similar circumstances.

During the last Presidential election, 2008, the Senate confirmed a total of 28 judges—24 district and 4 circuit. This Presidential election year we have already exceeded those numbers. We have confirmed 5 circuit nominees, and this will be the 27th district judge confirmed.

Judge Shipp received his B.S. from Rutgers University in 1987 and his J.D. from the Seton Hall University School of Law in 1994. Upon graduation, he clerked for the Honorable James H. Colman, Jr., a justice on the Supreme Court of New Jersey. After his clerkship, Judge Shipp joined Skadden, Arps, Slate, Meagher & Flom LLP as a litigation associate. There, he worked in general litigation matters, handling labor and employment work. He also developed an expertise in mass tort law and products liability litigation.

In 2003, Judge Shipp became an assistant attorney general in charge of