

**Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
At an Executive Business Meeting
April 26, 2018**

Good morning. We have two bills and several nominees on today's agenda. I'm also going to take a point of personal privilege this morning.

Today, we have a number of judicial nominees on the agenda, all of whom are on the agenda for the first time. The minority has requested that they be held over, so they'll be held over. They are:

- Mark Bennett, 9th Circuit
- Nancy Brasel, District of Minnesota
- Robert Summerhays, Western District of Louisiana
- Eric Tostrud, District of Minnesota

There are also 2 US Marshal nominees on today's agenda we'll vote on.

The *Marrakesh Treaty Implementation Act*, S.2559, is on the agenda for the first time today, so it will be held over. I want to thank Senators Feinstein, Corker, Menendez, Hatch, Harris, and Leahy for joining as cosponsors of this measure. The *Marrakesh Treaty Implementation Act* is supported by the National Federation of the Blind, publishers, libraries, the entire copyright community, and other public interest stakeholders. The bill has been a truly bipartisan effort and I applaud the Ranking Member and our cosponsors for all of their hard work. I look forward to taking it up when we get back from the Senate recess.

Today we will also consider S. 2644, the *Special Counsel Independence and Integrity Act*, introduced by Senators Graham, Coons, Tillis, and Booker. The intent of this bill is to ensure that special counsels appointed by the Justice Department are only removed for cause. The bill allows a special counsel a way to appeal his or her removal by the Attorney General to a panel of judges.

The current bill is the result of months of negotiations between the bill's bipartisan sponsors, who introduced two versions of a special counsel bill in August. This Committee held a hearing on those bills in September.

At that hearing, we heard from constitutional scholars, some who considered the bills to be constitutional, and others who did not.

To some extent, the constitutionality of these bills depends on whether you think that the Supreme Court's decision in *Morrison v. Olson* is good law. Justice Scalia's dissent in *Morrison v. Olson* is justifiably famous and influential, but its reasoning has not yet been adopted by the

majority of the Supreme Court. And the majority opinion in *Morrison v. Olson* was cited with approval by Chief Justice Roberts as recently as 2010.

If you believe in principles of stare decisis, you have to admit that it's at least an open question as to whether *Morrison v. Olson* is good law and whether these bills are constitutional. You can try to predict what the Supreme Court will do, and they could overturn *Morrison v. Olson*, but you might be wrong. And you wouldn't be the first to make that mistake.

After the hearing, I told the sponsors that I would put their bill on the agenda for the full committee to consider if they could negotiate some compromise language. After they did so a few weeks ago, I kept my word. The committee will debate and vote on the bill today.

As I've stated before, I have constitutional concerns about this bill. I agree with Justice Scalia that the prosecution of crimes is an executive function. But I also think it's clear that Congress has an oversight role to play.

Our constitutional system, premised on the principle of separation of powers, cannot function unless Congress exercises robust oversight over the Executive branch. The Supreme Court has recognized as much, stating that Congress's oversight powers are "broad" and that "a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."

Special counsel investigations directly involve the legislative work of Congress. Congress wrote the laws that any special counsel investigation is based on, and can revise them. Congress appropriates the funds that make special counsel investigations possible. And Congress may use information gained from its oversight efforts to conduct hearings or to consider whether to resort to the extreme remedy of impeachment.

What's more, because special counsel investigations only occur where there is a conflict of interest within the executive branch, special counsel investigations are usually matters of great national concern. And Congress, by exercising its oversight powers, can help the American people to have confidence that these investigations are conducted efficiently and independently.

To strengthen the oversight provisions of S. 2644, I've proposed text that has been included in the manager's amendment which I hope the committee will support. This amendment is modeled after current statutory reporting requirements that require the executive branch to issue a report to Congress upon the removal of inspectors general. It also codifies certain DOJ regulations governing the special counsel.

My amendment is supported by the bipartisan sponsors of the bill and requires the Attorney General to provide a report to Congress when a special counsel is appointed or removed, or when the investigation of the special counsel concludes. At least in the concluding report, the Attorney General must include information about decisions to expand or contract the scope of the investigation.

My amendment is also narrowly tailored so as not to interfere with the progress of an ongoing investigation, and to take into account national security and other concerns.

Transparency and accountability are in the public interest. The reporting requirements in my amendment will help Congress and the executive branch to do their jobs better.

While my constitutional concerns remain, I believe this bill should be considered by the full Senate. And I think my amendment improves it. In addition, if other components of the bill are judged to be unconstitutional, I believe the reporting requirements in my amendment would survive.

In some ways, today's vote will say a lot about how each of us views our responsibilities as Senators. We took an oath to protect and defend the Constitution of the United States, but we're not judges or Presidents. We are stewards of the legislative branch. The founders anticipated that we would wield the powers the Constitution affords us with great ambition so that we could effectively check the powers of the other branches. This bill certainly does that.

It's possible the bill goes too far, and I understand the position of those with strong constitutional objections who will vote against it. But, at the very least, if my amendment is adopted, it will require the executive branch to give more information to Congress. And that will enable Congress to do its job more effectively, and to safeguard the interests of the American people.

Before I turn to Senator Feinstein for her remarks, I'd like to recognize and thank Senator Hatch's Senior Nominations Counsel Tom Jipping. Tom has spent the last 15 years advising Senator Hatch on judicial nominees. Today will be Tom's last Committee meeting as a Senate staffer. The Committee has benefitted greatly from his expertise and insight. Thank you Tom, I wish you the best in your next chapter.