

Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
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Good morning. Today, we are considering a piece of legislation and several nominations.

But before we turn to that, I'll say a few things about retiring Supreme Court Justice Anthony Kennedy.

More than thirty years ago, Justice Kennedy was confirmed by the Senate by a vote of 97-0. I was one of those senators who cast a vote for his confirmation. He has been one of the most influential Justices in our time. His opinions will continue to be studied by law students, cited by attorneys, and relied upon by judges for generations to come.

If I were to pick one area of the law where Justice Kennedy had his most significant impact, it would be the First Amendment. Justice Kennedy had a deep reverence for the liberties guaranteed by the First Amendment, writing or joining the majority in cases protecting the freedom of speech and freedom of religion.

He wrote the majority opinion in *Citizens United* in 2010, holding that the government can't prevent corporations, unions, and non-profits from engaging in political speech—speech that is at the heart of the First Amendment.

Justice Kennedy joined the majority opinion in *Hobby Lobby*, agreeing that the government may not force institutions with sincere religious objections to subsidize contraception coverage for employees. He also recently joined the majority opinion in *Masterpiece Cakeshop*, which was decided by a vote of 7-2. The Court held that Colorado could not single out an individual for punishment based on his religious beliefs.

And, just this week, Justice Kennedy shot down another state law abridging free speech. He rejected the argument that pro-life pregnancy centers should be required to advertise where women could obtain government-funded abortions.

I could go on describing Justice Kennedy's contributions to the law—his commitment to federalism, protecting our Second Amendment right to own firearms, and recognizing the constitutionality of the tradition of legislative prayer.

I expect the President will send us his nominee for Justice Kennedy's seat in the near future. Once we receive this nomination, I'll look forward to holding the hearing in the upcoming weeks. I expect we'll follow the same approximate schedule as we have for the past several Supreme Court nominations.

Regarding schedule, the Minority Leader suggested that the Senate not hold a hearing this year because it's an election year, claiming that was the Majority's position in 2016. So, I wanted to

clarify his total, if not intentional, misunderstanding of the Biden rule. As I'm sure most of you recall, in 1992, then-senator Biden urged the Senate to not consider any potential Supreme Court nomination that year because it would be dropping a nominee into a "cauldron in the middle of a presidential election year."

So, we followed the Biden rule in 2016—to not hold a hearing for a Supreme Court nominee in the midst of a **Presidential election year**, not any election year. Senator Schumer seems to be suggesting that the Senate couldn't hold hearings for Supreme Court Justices every other year, which is a preposterous suggestion.

Just like Democrats held a hearing and confirmation for Justice Kagan in 2010, in the midst of a midterm election year, we will hold a hearing in the upcoming months for the President's nominee this year.

Now, turning to today's agenda:

Unfortunately, we will not be able to vote on the two nominees to the appellate Court on the agenda today, even though they are ready for a vote under the rules.

So, Britt Grant to the 11th Circuit and David Porter to the 3rd Circuit will be held over for another week.

We will, however, vote on several nominees today, including Andrew Brasher for the Middle District of Alabama. Mr. Brasher serves as Alabama's Solicitor General. In this capacity, he has argued in front of the Supreme Court three times, and he has filed a number of briefs to the Court.

Of course, as Solicitor General, he represents the interests of his client—the state of Alabama—and does so faithfully, whether he agrees with every position his client takes.

It's clear from his hearing and from his written responses that Mr. Brasher understands the different role a judge plays as contrasted with his current role as an advocate on behalf of a client. In fact, he acknowledged that as a judge he will "faithfully apply all Supreme Court precedent." I'm confident that he will do so. I'm also confident that if Mr. Brasher is confirmed, the parties who come before him will get a fair shake, regardless of who they are. I won't hold against him any of the positions his state has taken and I'll be voting to support his nomination today.

We also have on the agenda today the S. 2823, the *Music Modernization Act*. I'm pleased to be a cosponsor of Senator Hatch's bill.

Music copyright and licensing laws have been criticized for being too difficult to comply with, and for not adequately rewarding musical creativity. This bill would help improve the current music licensing framework and reward the professionals who create American music.

The *Music Modernization Act* (MMA) would set up a mechanical licensing collective for all digital music, so that streaming entities can more efficiently find and compensate artists for their work. The bill includes the *CLASSICS Act*, which would add copyright protection for pre-1972 sound recordings, and the *AMP Act*, a bill sponsored by myself and Senator Feinstein, which would allow for the payment of performance royalties to producers, mixers and sound engineers of sound recordings.

The MMA enjoys broad stakeholder support. In fact, the House version of this bill passed unanimously, 415-0. So I'm pleased we're considering it today.

We also have on the agenda for the first time S. 2946, the *Anti-Terrorism Clarification Act of 2018*. This bipartisan bill will be held over at the request of the Ranking Member.

The *KIWI Act* will be held over again for one week while the bill's sponsors continue to resolve outstanding issues.

Finally, I want to again address the issue of family separation. As my colleagues are aware, on Tuesday evening the United States District Court for the Southern District of California issued a nationwide preliminary injunction.

This injunction requires the Department of Homeland Security (DHS) to expedite the reunification of separated families. I think we all can agree that's a good thing. However, I'm concerned about the remainder of the court's ruling.

In addition to requiring expedited family reunification, the court's ruling also prevents DHS from separating families unless the parent "presents a danger to the child." Now, while this may sound innocent, this judicial mandate is anything but.

When combined with the DHS's existing mandates under the *Flores* consent decree, Tuesday's judicial ruling effectively mandates catch and release on a nationwide basis.

As my Republican colleagues and I have said multiple times, nothing in the *Flores* consent decree allows accompanied children to be detained past 20 days. When coupled with a mandate that family units cannot be separated, this essentially means on day 21 that all detained family units will be released into the interior with a notice to appear at some future immigration court hearing.

While well intentioned, this judicial mandate will have disastrous unintended consequences.

As I said Tuesday afternoon on the Senate floor, human smugglers know how to exploit our immigration loopholes. They're smart, and their business model is very adaptive. As soon as they learn of Tuesday's decision, and how it relates to *Flores*, they will take advantage of it.

Previous oversight work conducted by my office has shown that human smuggling rings exploit children and sell them to the highest bidder to get to the US and avoid detention. That's right. Smugglers use kids like pawns in an effort to help adults avoid detention when coming across our border. Kids are literally being kidnapped and smuggled to the border so they can be placed with their "family member" and gain entrance into the United States.

Even the *New York Times* has noted the incentives illegal immigrants have to exploit the *Flores* settlement. In a piece published this past Friday, the *Times* quoted Guillermo, a construction worker who recently arrived in Arizona.

He decided to leave his home country and cross the border illegally, and he was told that bringing his 16-year-old daughter would assure passage. As he told the times "she was [his] passport" into the country.

Clearly unauthorized immigrants and dangerous cartels are aware of this loophole, and are exploiting it shamelessly.

Thankfully, there's a simple, easy fix to the unintended consequences of Tuesday's ruling: repeal the *Flores* settlement as it relates to accompanied children.

If we repeal the *Flores* settlement purely as it relates to accompanied children, it would allow DHS to keep families together in residential facilities pending the outcome of their proceedings. And, I would point out, that cases on the so-called "detained" docket are resolved significantly quicker than other cases, usually within 40-45 days.

The approach my Democratic colleagues are advocating—codifying the failed catch and release policies of the Obama Administration—is not only the wrong approach, it's also unpopular.

According to an Economist/YouGov poll, only 19% of the American people support releasing families and having them report back to an immigration court at a later date.

CBS News confirms the unpopularity of this policy. In their poll, only 21% support releasing family units into the interior and having them return to a court proceeding at a later date.

I know Senators Tillis and Cruz are working in good-faith with Ranking Member Feinstein and Senator Durbin on a potential bipartisan compromise. I hope their discussions will produce a result that will keep families together, and allow for the humane detention of family units pending the outcome of their cases.

In order to facilitate these discussions, Ranking Member Feinstein and I have requested the Departments of Homeland Security and Health and Human Services to brief all Senators on this Committee about this situation, and how we solve it legislatively. Their insight will be valuable, and will allow us to legislatively effectively and quickly on this issue.

Once this briefing is finalized we'll be sharing more information with all of your offices.