

AMENDMENT NO. _____ Calendar No. _____

Purpose: To include congressional findings.

IN THE SENATE OF THE UNITED STATES—115th Cong., 2d Sess.

S. 2644

To ensure independent investigations and judicial review of the removal of a special counsel, and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENTS intended to be proposed by _____

Viz:

1 On page 1, between lines 5 and 6, insert the following:
2

3 **SEC. 2. FINDINGS.**

4 Congress finds the following:

5 (1) In *Morrison v. Olson*, 487 U.S. 654 (1988)
6 (referred to in this section as “Morrison”), the Supreme Court of the United States upheld the restrictive independent counsel provisions in title VI of the
7 Ethics in Government Act of 1978 (Public Law 95–
8 521; 92 Stat. 1824), with 7 justices from across the
9 ideological spectrum in the majority holding that the
10 law did not impermissibly interfere with executive
11 power.
12
13

1 (2) Among the provisions contained in title VI
2 of the Ethics in Government Act of 1978 (Public
3 Law 95–521; 92 Stat. 1824), which the Supreme
4 Court of the United States upheld in *Morrison*, the
5 law provided that the independent counsel could be
6 removed only by the Attorney General and only for
7 “good cause, physical disability, mental incapacity,
8 or any other condition that substantially impairs the
9 performance of such independent counsel’s duties”.

10 (3) Justice Scalia wrote a dissent in *Morrison*,
11 which articulated a different theory of separation-of-
12 powers than the other 7 justices accepted, and iden-
13 tified policy concerns with the authorities afforded to
14 the independent counsel under title VI of the Ethics
15 in Government Act of 1978 (Public Law 95–521; 92
16 Stat. 1824).

17 (4) Title VI of the Ethics in Government Act
18 of 1978 (Public Law 95–521; 92 Stat. 1824) ex-
19 pired in 1999, and the Department of Justice pro-
20 mulgated regulations to govern the authority of the
21 special counsel.

22 (5) The special counsel regulations in part 600
23 of title 28, Code of Federal Regulations, delegate
24 substantial authority over the special counsel to the
25 Attorney General, including the ability to determine

1 when a special counsel should be used, select the
2 special counsel, request explanations for investiga-
3 tory or prosecutorial steps, determine that such a
4 step should not be pursued, determine whether the
5 investigation should continue into the next fiscal
6 year, and establish the investigation's annual budg-
7 et.

8 (6) Many of the policy concerns articulated in
9 the Morrison dissent written by Justice Scalia were
10 addressed by the additional appointment and over-
11 sight authorities afforded to the Attorney General in
12 the special counsel regulations.

13 (7) Morrison has been cited favorably dozens of
14 times, including in a January 2018 case, PHH
15 Corp. v. Consumer Financial Protection Bureau,
16 881 F.3d 75, 93, 96 (D.C. Cir. 2018), in which the
17 United States Court of Appeals for the District of
18 Columbia Circuit recognized that "Morrison remains
19 valid and binding precedent" and ordinary good-
20 cause removal protections are regularly upheld.

21 (8) There are many other executive branch po-
22 sitions that have good-cause removal restrictions, in-
23 cluding, the Department of Defense Chief of Navy
24 Reserve, the Commander of the Marine Forces Re-
25 serve, Chief of the Air Force Reserve, Director of

1 the Joint Staff of the National Guard, and the In-
2 spector General of the United States Postal Service.

3 (9) The founders of the United States envi-
4 sioned a system of checks and balances, which af-
5 fords power to Congress to define offices and exer-
6 cise control over the budget.

7 (10) It is in the interests of Congress to con-
8 tinue to exercise its constitutional authorities to sup-
9 port the rule of law.

10 On page 2, line 6, strike “2” and insert “3”.