

# SENATE BILL No. 165

---

## DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 4-6-2-13; IC 33-39-10-2.

**Synopsis:** Noncompliant prosecutor. Permits the attorney general to request the appointment of a special prosecuting attorney if a prosecuting attorney is categorically refusing to prosecute certain crimes, and establishes a procedure for the appointment of a person to serve as a special prosecuting attorney to prosecute cases that the county prosecuting attorney is refusing to prosecute.

**Effective:** July 1, 2022.

---

---

## Young M

---

---

January 4, 2022, read first time and referred to Committee on Judiciary.

---

---



Second Regular Session of the 122nd General Assembly (2022)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2021 Regular Session of the General Assembly.

# SENATE BILL No. 165

A BILL FOR AN ACT to amend the Indiana Code concerning courts and court officers.

*Be it enacted by the General Assembly of the State of Indiana:*

1 SECTION 1. IC 4-6-2-13 IS ADDED TO THE INDIANA CODE  
2 AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY  
3 1, 2022]: **Sec. 13. (a) The following definitions apply throughout**  
4 **this section:**  
5 **(1) "Categorically refusing to enforce a criminal law" means**  
6 **a blanket refusal to enforce a criminal law. The term includes**  
7 **the refusal to enforce a criminal law unless certain conditions**  
8 **are met. The term does not include the refusal to enforce a**  
9 **criminal law:**  
10 **(A) based on a reasonable, good faith belief that the law is**  
11 **unconstitutional, or that enforcement would violate federal**  
12 **law or an order issued by a state or federal court; or**  
13 **(B) in one (1) or more specific instances, if the**  
14 **determination not to enforce the law is based on an**  
15 **individual investigation of the facts and circumstances of**  
16 **each particular case.**  
17 **(2) "Court of appeals district" means the First District,**



1 Second District, and Third District of the court of appeals, as  
2 set forth in IC 33-25-1-2(1) through IC 33-25-1-2(3).

3 (3) "Noncompliant prosecuting attorney" means a  
4 prosecuting attorney who has implemented a policy of  
5 categorically refusing to enforce a criminal law enacted by the  
6 general assembly.

7 (b) If the attorney general receives credible information that a  
8 prosecuting attorney is categorically refusing to enforce a criminal  
9 law enacted by the general assembly, the attorney general shall  
10 conduct an investigation to determine whether the prosecuting  
11 attorney is a noncompliant prosecuting attorney.

12 (c) If the attorney general, after conducting the investigation  
13 described in subsection (b), determines that a prosecuting attorney  
14 is a noncompliant prosecuting attorney, the attorney general may  
15 file a verified petition for appointment of a special prosecuting  
16 attorney with a circuit or superior court judge in a county that is  
17 not located in the same court of appeals district as the alleged  
18 noncompliant prosecuting attorney. In the verified petition, the  
19 attorney general shall set forth why:

20 (1) the attorney general believes that the prosecuting attorney  
21 is a noncompliant prosecuting attorney; and

22 (2) the attorney general believes that appointment of a special  
23 prosecuting attorney would serve the interests of justice.

24 The attorney general may support the verified petition by  
25 including relevant documents, transcripts, or written statements in  
26 support of the attorney general's position. The attorney general  
27 shall serve a copy of the verified petition, along with any  
28 supporting evidence, on the prosecuting attorney.

29 (d) The prosecuting attorney may file a verified answer to the  
30 attorney general's petition for appointment of a special prosecuting  
31 attorney not later than fifteen (15) days after receipt of the  
32 attorney general's petition.

33 (e) After considering the petition and answer, if any, the judge  
34 shall appoint a person to serve as a special prosecuting attorney if  
35 the judge finds that:

36 (1) the prosecuting attorney is a noncompliant prosecuting  
37 attorney; and

38 (2) appointment of a special prosecuting attorney is in the best  
39 interests of justice.

40 In making a determination under this subsection, the judge shall  
41 consider only the arguments and evidence contained in the petition  
42 and answer.



1 (f) To appoint a special prosecuting attorney, the judge shall  
 2 select three (3) persons described in IC 33-39-10-2(c) as special  
 3 prosecuting attorney candidates. None of the three (3) candidates  
 4 selected may serve as a prosecuting attorney, deputy prosecuting  
 5 attorney, or senior prosecuting attorney in the same:

6 (1) court of appeals district as the noncompliant prosecuting  
 7 attorney; or

8 (2) judicial district as another special prosecuting attorney  
 9 candidate.

10 In addition, no more than two (2) special prosecuting attorney  
 11 candidates may be members of the same political party.

12 (g) Not later than fifteen (15) days after selection of the three (3)  
 13 special prosecuting attorney candidates, the:

14 (1) attorney general may strike one (1) candidate; and

15 (2) noncompliant prosecuting attorney may strike one (1)  
 16 candidate.

17 The judge shall appoint the remaining special prosecuting attorney  
 18 candidate as a special prosecuting attorney. If one (1) or more  
 19 candidates are not struck, the judge may select the special  
 20 prosecuting attorney from the candidates who have not been  
 21 struck.

22 (h) If, after being appointed under this section, the special  
 23 prosecuting attorney refuses the appointment or categorically  
 24 refuses to prosecute the cases not prosecuted by the noncompliant  
 25 prosecuting attorney, the judge shall remove the special  
 26 prosecuting attorney and, notwithstanding IC 33-39-10-2(c)(2),  
 27 appoint the attorney general to serve as a special prosecuting  
 28 attorney.

29 (i) A special prosecuting attorney appointed under this section  
 30 has the same powers as the prosecuting attorney of the county.  
 31 However, the judge shall:

32 (1) limit the scope of the special prosecuting attorney's duties  
 33 as a special prosecuting attorney to include only the  
 34 investigation or prosecution of the cases or category of cases  
 35 that the noncompliant prosecuting attorney refused to  
 36 prosecute, including any matter that reasonably results from  
 37 the investigation or prosecution; and

38 (2) establish for a time certain the length of the special  
 39 prosecuting attorney's term.

40 For good cause shown, the judge may at any time increase the  
 41 scope of the special prosecuting attorney's duties or establish a  
 42 longer term for the special prosecuting attorney. The judge may



1 require the special prosecuting attorney to submit periodic reports.

2 (j) If a special prosecuting attorney is not regularly employed as  
3 a full-time prosecuting attorney or full-time deputy prosecuting  
4 attorney, the compensation for the special prosecuting attorney's  
5 services:

6 (1) shall be paid, as incurred, to the special prosecuting  
7 attorney, following an application to the county auditor, from  
8 the unappropriated funds of the appointing county; and

9 (2) may not exceed:

10 (A) an hourly rate based upon the regular salary of a  
11 full-time prosecuting attorney of the appointing circuit;

12 (B) travel expenses and reasonable accommodation  
13 expenses actually incurred; and

14 (C) other reasonable expenses actually incurred, including  
15 the costs of investigation, trial and discovery preparation,  
16 and other trial expenses.

17 The amount of compensation a special prosecuting attorney  
18 receives for services performed during a calendar day under  
19 subdivision (2)(A) may not exceed the amount of compensation a  
20 full-time prosecuting attorney would receive in salary for the  
21 calendar day.

22 (k) If the special prosecuting attorney is regularly employed as  
23 a full-time prosecuting attorney or full-time deputy prosecuting  
24 attorney, the compensation for the special prosecuting attorney's  
25 services:

26 (1) shall be paid out of the appointing county's  
27 unappropriated funds to the treasurer of the county in which  
28 the special prosecuting attorney regularly serves; and

29 (2) must include a per diem equal to the regular salary of a  
30 full-time prosecuting attorney of the appointing circuit, travel  
31 expenses, and reasonable accommodation expenses actually  
32 incurred.

33 SECTION 2. IC 33-39-10-2, AS ADDED BY P.L.57-2014,  
34 SECTION 10, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
35 JULY 1, 2022]: Sec. 2. (a) A person may be appointed as a special  
36 prosecutor:

37 (1) as provided under this section; ~~or~~

38 (2) in accordance with IC 4-2-7-7; ~~or~~

39 (3) **in accordance with IC 4-6-2-13.**

40 (b) A circuit court or superior court judge:

41 (1) shall appoint a special prosecutor if:

42 (A) any person, other than a prosecuting attorney or the



- 1 prosecuting attorney's deputy, files a verified petition  
 2 requesting the appointment of a special prosecutor; and  
 3 (B) the prosecuting attorney agrees that a special prosecutor is  
 4 needed;
- 5 (2) may appoint a special prosecutor if:  
 6 (A) a person files a verified petition requesting the  
 7 appointment of a special prosecutor; and  
 8 (B) the court, after:  
 9 (i) notice is given to the prosecuting attorney; and  
 10 (ii) an evidentiary hearing is conducted at which the  
 11 prosecuting attorney is given an opportunity to be heard;  
 12 finds by clear and convincing evidence that the appointment  
 13 is necessary to avoid an actual conflict of interest or there is  
 14 probable cause to believe that the prosecuting attorney has  
 15 committed a crime;
- 16 (3) may appoint a special prosecutor if:  
 17 (A) the prosecuting attorney files a petition requesting the  
 18 court to appoint a special prosecutor; and  
 19 (B) the court finds that the appointment is necessary to avoid  
 20 the appearance of impropriety;
- 21 (4) may appoint a special prosecutor if:  
 22 (A) an elected public official who is a defendant in a criminal  
 23 proceeding files a verified petition requesting a special  
 24 prosecutor within ten (10) days after the date of the initial  
 25 hearing; and  
 26 (B) the court finds that the appointment of a special prosecutor  
 27 is in the best interests of justice; and
- 28 (5) shall appoint a special prosecutor if:  
 29 (A) a previously appointed special prosecutor:  
 30 (i) files a motion to withdraw as special prosecutor; or  
 31 (ii) has become incapable of continuing to represent the  
 32 interests of the state; and  
 33 (B) the court finds that the facts that established the basis for  
 34 the initial appointment of a special prosecutor still exist.
- 35 The elected prosecuting attorney who serves in the jurisdiction of  
 36 the appointing court shall receive notice of all pleadings filed and  
 37 orders issued under this subdivision.
- 38 (c) A person appointed to serve as a special prosecutor:  
 39 (1) must consent to the appointment; and  
 40 (2) must be:  
 41 (A) the prosecuting attorney or a deputy prosecuting attorney  
 42 in a county other than the county in which the person is to



1 serve as special prosecutor; or

2 (B) a senior prosecuting attorney as described in section 1 of  
 3 this chapter. A senior prosecuting attorney may be appointed  
 4 to serve as a special prosecutor in a county in which the senior  
 5 prosecuting attorney previously served if the court finds that  
 6 the appointment would not create the appearance of  
 7 impropriety.

8 (d) A person appointed to serve as a special prosecutor in a county  
 9 has the same powers as the prosecuting attorney of the county.  
 10 However, the appointing judge shall limit the scope of the special  
 11 prosecutor's duties to include only the investigation or prosecution of  
 12 a particular case or particular grand jury investigation.

13 (e) Upon making an appointment under this section, the court shall  
 14 establish the length of the special prosecutor's term. At least one (1)  
 15 time every six (6) months throughout the appointed term, a special  
 16 prosecutor shall file a progress report with the appointing court. A  
 17 progress report:

18 (1) must inform the court of the:

19 (A) status of the investigation; and

20 (B) estimated time for completion of the special prosecutor's  
 21 duties; and

22 (2) may not:

23 (A) include substantive facts or legal issues; or

24 (B) offer preliminary conclusions.

25 The court may extend the term of appointment upon the request of the  
 26 special prosecutor or terminate any appointment if the special  
 27 prosecutor has failed to file reports or a request for an extended term  
 28 under this subsection.

29 (f) If the target of an investigation by the special prosecutor is a  
 30 public servant (as defined in IC 35-31.5-2-261), the court shall order  
 31 the special prosecutor to file a report of the investigation with the court  
 32 at the conclusion of the investigation. A report filed under this  
 33 subsection is a public record under IC 5-14-3.

34 (g) If a special prosecutor is not regularly employed as a full-time  
 35 prosecuting attorney or full-time deputy prosecuting attorney, the  
 36 compensation for the special prosecutor's services:

37 (1) shall be paid, as incurred, to the special prosecutor, following  
 38 an application to the county auditor, from the unappropriated  
 39 funds of the appointing county; and

40 (2) may not exceed:

41 (A) an hourly rate based upon the regular salary of a full-time  
 42 prosecuting attorney of the appointing circuit;



- 1 (B) travel expenses and reasonable accommodation expenses  
2 actually incurred; and  
3 (C) other reasonable expenses actually incurred, including the  
4 costs of investigation, trial and discovery preparation, and  
5 other trial expenses.
- 6 The amount of compensation a special prosecutor receives for services  
7 performed during a calendar day under subdivision (2)(A) may not  
8 exceed the amount of compensation a full-time prosecuting attorney  
9 would receive in salary for the calendar day.
- 10 (h) If the special prosecutor is regularly employed as a full-time  
11 prosecuting attorney or deputy prosecuting attorney, the compensation  
12 for the special prosecutor's services:
- 13 (1) shall be paid out of the appointing county's unappropriated  
14 funds to the treasurer of the county in which the special  
15 prosecutor regularly serves; and  
16 (2) must include a per diem equal to the regular salary of a  
17 full-time prosecuting attorney of the appointing circuit, travel  
18 expenses, and reasonable accommodation expenses actually  
19 incurred.

