



Reprinted
February 1, 2022

SENATE BILL No. 165

DIGEST OF SB 165 (Updated January 31, 2022 4:21 pm - DI 106)

Citations Affected: IC 4-6; IC 33-39.

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, Sandlin, Freeman

January 4, 2022, read first time and referred to Committee on Judiciary.
January 27, 2022, reported favorably — Do Pass.
January 31, 2022, read second time, amended, ordered engrossed.

SB 165—LS 6663/DI 106



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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,

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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 county in which the
9 noncompliant prosecutor serves; and

10 (2) may not exceed:

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

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

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

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

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

27 (1) shall be paid out of the unappropriated funds of the county
28 in which the noncompliant prosecutor serves to the treasurer
29 of the county in which the special prosecuting attorney
30 regularly serves; and

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

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

39 (1) as provided under this section; or

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

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

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



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



- 1 (A) the prosecuting attorney or a deputy prosecuting attorney
 2 in a county other than the county in which the person is to
 3 serve as special prosecutor; or
 4 (B) a senior prosecuting attorney as described in section 1 of
 5 this chapter. A senior prosecuting attorney may be appointed
 6 to serve as a special prosecutor in a county in which the senior
 7 prosecuting attorney previously served if the court finds that
 8 the appointment would not create the appearance of
 9 impropriety.
- 10 (d) A person appointed to serve as a special prosecutor in a county
 11 has the same powers as the prosecuting attorney of the county.
 12 However, the appointing judge shall limit the scope of the special
 13 prosecutor's duties to include only the investigation or prosecution of
 14 a particular case or particular grand jury investigation.
- 15 (e) Upon making an appointment under this section, the court shall
 16 establish the length of the special prosecutor's term. At least one (1)
 17 time every six (6) months throughout the appointed term, a special
 18 prosecutor shall file a progress report with the appointing court. A
 19 progress report:
- 20 (1) must inform the court of the:
- 21 (A) status of the investigation; and
 22 (B) estimated time for completion of the special prosecutor's
 23 duties; and
- 24 (2) may not:
- 25 (A) include substantive facts or legal issues; or
 26 (B) offer preliminary conclusions.
- 27 The court may extend the term of appointment upon the request of the
 28 special prosecutor or terminate any appointment if the special
 29 prosecutor has failed to file reports or a request for an extended term
 30 under this subsection.
- 31 (f) If the target of an investigation by the special prosecutor is a
 32 public servant (as defined in IC 35-31.5-2-261), the court shall order
 33 the special prosecutor to file a report of the investigation with the court
 34 at the conclusion of the investigation. A report filed under this
 35 subsection is a public record under IC 5-14-3.
- 36 (g) If a special prosecutor is not regularly employed as a full-time
 37 prosecuting attorney or full-time deputy prosecuting attorney, the
 38 compensation for the special prosecutor's services:
- 39 (1) shall be paid, as incurred, to the special prosecutor, following
 40 an application to the county auditor, from the unappropriated
 41 funds of the appointing county; and
 42 (2) may not exceed:



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



COMMITTEE REPORT

Madam President: The Senate Committee on Judiciary, to which was referred Senate Bill No. 165, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill DO PASS.

(Reference is to SB 165 as introduced.)

BROWN L, Chairperson

Committee Vote: Yeas 7, Nays 3

SENATE MOTION

Madam President: I move that Senate Bill 165 be amended to read as follows:

Page 4, line 8, delete "appointing county;" and insert "**county in which the noncompliant prosecutor serves**";

Page 4, line 26, delete "appointing county's".

Page 4, line 27, after "funds" insert "**of the county in which the noncompliant prosecutor serves**".

(Reference is to SB 165 as printed January 28, 2022.)

YOUNG M

