

116TH CONGRESS
1ST SESSION

S. 71

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

IN THE SENATE OF THE UNITED STATES

JANUARY 9, 2019

Mr. GRAHAM (for himself, Mr. COONS, Mr. TILLIS, and Mr. BOOKER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

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

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Special Counsel Inde-
5 pendence and Integrity Act”.

6 **SEC. 2. DEPARTMENT OF JUSTICE SPECIAL COUNSEL.**

7 (a) IN GENERAL.—Part II of title 28, United States
8 Code, is amended by inserting after chapter 40A the fol-
9 lowing:

1 **“CHAPTER 40B—SPECIAL COUNSEL**

“Sec.

“599K–1. Grounds for appointing a Special Counsel.

“599K–2. Alternatives available to the Attorney General.

“599K–3. Qualifications of the Special Counsel.

“599K–4. Jurisdiction.

“599K–5. Staff.

“599K–6. Powers and authority.

“599K–7. Conduct and accountability generally.

“599K–8. Limitation on removal of Special Counsel and certain other officials.

“599K–9. Notification and reports by the Special Counsel.

“599K–10. Notification and reports by the Attorney General.

“599K–11. No creation of rights.

2 **“§ 599K–1. Grounds for appointing a Special Counsel**

3 “(a) IN GENERAL.—The Attorney General shall ap-
4 point a Special Counsel if the Attorney General determines
5 that—

6 “(1) criminal investigation of a person or mat-
7 ter is warranted;

8 “(2) investigation or prosecution of the person
9 or matter described in paragraph (1) by the office
10 of a United States attorney or litigating Division of
11 the Department of Justice (in this chapter referred
12 to as the ‘Department’) would present a conflict of
13 interest for the Department or other extraordinary
14 circumstances; and

15 “(3) under the circumstances, it would be in
16 the public interest to appoint an outside Special
17 Counsel to assume responsibility for the matter.

18 “(b) RECUSAL.—The Attorney General who has been
19 confirmed to that position by the Senate or, in the case

1 of the vacancy, absence, disability, or recusal of the Attor-
 2 ney General, the most senior Senate-confirmed officer of
 3 the Department listed in section 508 who is not recused
 4 from the matter shall exercise the authority under this
 5 chapter.

6 **“§ 599K-2. Alternatives available to the Attorney Gen-
 7 eral**

8 “(a) IN GENERAL.—When matters are brought to the
 9 attention of the Attorney General that might warrant con-
 10 sideration of appointment of a Special Counsel, the Attor-
 11 ney General may—

12 “(1) appoint a Special Counsel in accordance
 13 with this chapter;

14 “(2) direct that an initial investigation, con-
 15 sisting of such factual inquiry or legal research as
 16 the Attorney General determines appropriate, be
 17 conducted in order to better inform the decision; or

18 “(3) conclude that under the circumstances of
 19 the matter, the public interest would not be served
 20 by removing the investigation from the normal proc-
 21 esses of the Department, and that the appropriate
 22 component of the Department should handle the
 23 matter.

24 “(b) ADDITIONAL DIRECTION.—If the Attorney Gen-
 25 eral reaches a conclusion described in subsection (a)(3),

1 the Attorney General may direct that appropriate steps
2 be taken to mitigate any conflicts of interest, such as
3 recusal of particular officials.

4 **“§ 599K-3. Qualifications of the Special Counsel**

5 “(a) IN GENERAL.—An individual named as Special
6 Counsel under this chapter shall be—

7 “(1) a lawyer with a reputation for integrity
8 and impartial decisionmaking, and with appropriate
9 experience to ensure both that the investigation will
10 be conducted ably, expeditiously, and thoroughly,
11 and that investigative and prosecutorial decisions
12 will be supported by an informed understanding of
13 the criminal law and Department policies; and

14 “(2) selected from outside the United States
15 Government.

16 “(b) PRIORITY OF INVESTIGATION.—An individual
17 named as Special Counsel under this chapter shall agree
18 that the responsibilities of the individual as Special Coun-
19 sel shall take first precedence in the professional life of
20 the individual, and that it may be necessary to work full
21 time on the investigation, depending on the complexity of
22 the investigation and the stage of the investigation.

23 “(c) APPOINTMENT METHOD.—

24 “(1) IN GENERAL.—The Attorney General shall
25 consult with the Assistant Attorney General for Ad-

1 ministration to ensure an appropriate method of ap-
2 pointment, and to ensure that a Special Counsel un-
3 dergoes an appropriate background investigation and
4 a detailed review of ethics and conflicts of interest
5 issues.

6 “(2) CONFIDENTIAL EMPLOYEE.—A Special
7 Counsel shall be appointed as a confidential em-
8 ployee, as described in section 7511(b)(2)(C) of title
9 5.

10 **“§ 599K–4. Jurisdiction**

11 “(a) ORIGINAL JURISDICTION.—

12 “(1) IN GENERAL.—The jurisdiction of a Spe-
13 cial Counsel appointed under this chapter shall be
14 established by the Attorney General, and shall in-
15 clude the authority to investigate and prosecute Fed-
16 eral crimes committed in the course of, and with in-
17 tent to interfere with, the Special Counsel’s inves-
18 tigation, such as perjury, obstruction of justice, de-
19 struction of evidence, and intimidation of witnesses,
20 and to conduct appeals arising out of the matter
21 being investigated or prosecuted.

22 “(2) STATEMENT OF THE MATTER TO BE IN-
23 VESTIGATED.—The Special Counsel shall be pro-
24 vided with a specific factual statement of the matter
25 to be investigated.

1 “(b) ADDITIONAL JURISDICTION.—If in the course of
2 the investigation by a Special Counsel appointed under
3 this chapter, the Special Counsel concludes that additional
4 jurisdiction beyond that specified in the original jurisdic-
5 tion is necessary in order to fully investigate and resolve
6 the matters assigned, or to investigate new matters that
7 come to light in the course of the investigation, the Special
8 Counsel shall consult with the Attorney General, who shall
9 determine whether to include the additional matters within
10 the jurisdiction of the Special Counsel or assign them else-
11 where.

12 “(c) CIVIL AND ADMINISTRATIVE JURISDICTION.—

13 “(1) IN GENERAL.—If in the course of an in-
14 vestigation by a Special Counsel appointed under
15 this chapter, the Special Counsel determines that
16 administrative remedies, civil sanctions, or other
17 governmental action outside the criminal justice sys-
18 tem might be appropriate, the Special Counsel shall
19 consult with the Attorney General with respect to
20 the appropriate component to take any necessary ac-
21 tion.

22 “(2) LIMITATION.—A Special Counsel ap-
23 pointed under this chapter shall not have civil or ad-
24 ministrative authority unless specifically granted
25 such jurisdiction by the Attorney General.

1 **“§ 599K-5. Staff**

2 “(a) IN GENERAL.—A Special Counsel appointed
3 under this chapter may request the assignment of appro-
4 priate personnel of the Department to assist the Special
5 Counsel. The Department shall gather and provide the
6 Special Counsel with the names and resumes of appro-
7 priate personnel available for detail. The Special Counsel
8 may also request the detail of specific personnel, and the
9 office for which the designated personnel work shall make
10 reasonable efforts to accommodate the request.

11 “(b) ASSIGNMENT OF DUTIES.—A Special Counsel
12 appointed under this chapter shall assign the duties and
13 supervise the work of personnel while they are assigned
14 to the Special Counsel.

15 “(c) HIRING OF ADDITIONAL PERSONNEL.—If nec-
16 essary, a Special Counsel appointed under this chapter
17 may request that additional personnel be hired or assigned
18 from outside the Department.

19 “(d) COOPERATION.—All personnel in the Depart-
20 ment shall cooperate to the fullest extent possible with a
21 Special Counsel appointed under this chapter.

22 **“§ 599K-6. Powers and authority**

23 “(a) IN GENERAL.—Subject to the limitations of this
24 chapter, a Special Counsel appointed under this chapter
25 shall exercise, within the scope of the jurisdiction of the
26 Special Counsel, the full power and independent authority

1 to exercise all investigative and prosecutorial functions of
2 any United States attorney.

3 “(b) SPECIAL COUNSEL DISCRETION.—Except as
4 otherwise provided in this chapter, a Special Counsel ap-
5 pointed under this chapter shall determine whether and
6 to what extent to inform or consult with the Attorney Gen-
7 eral or others within the Department about the conduct
8 of the duties and responsibilities of the Special Counsel.

9 **“§ 599K-7. Conduct and accountability generally**

10 “(a) IN GENERAL.—A Special Counsel appointed
11 under this chapter shall—

12 “(1) comply with the rules, regulations, proce-
13 dures, practices, and policies of the Department; and

14 “(2) consult with appropriate offices within the
15 Department for guidance with respect to established
16 practices, policies, and procedures of the Depart-
17 ment, including ethics and security regulations and
18 procedures.

19 “(b) EXTRAORDINARY CIRCUMSTANCES.—If a Spe-
20 cial Counsel appointed under this chapter determines that
21 the extraordinary circumstances of any particular decision
22 would render compliance with required review and ap-
23 proval procedures by the designated departmental compo-
24 nent inappropriate, the Special Counsel may consult di-
25 rectly with the Attorney General.

1 “(c) LIMITATION ON SUPERVISION.—

2 “(1) IN GENERAL.—A Special Counsel ap-
3 pointed under this chapter shall not be subject to
4 the day-to-day supervision of any official of the De-
5 partment, except that the Attorney General may re-
6 quest that the Special Counsel provide an expla-
7 nation for any investigative or prosecutorial step,
8 and may after review conclude that the action is so
9 inappropriate or unwarranted under established
10 practices of the Department that it should not be
11 pursued.

12 “(2) REVIEW.—In conducting a review de-
13 scribed in paragraph (1), the Attorney General shall
14 give great weight to the views of the Special Coun-
15 sel. If the Attorney General concludes that a pro-
16 posed action by a Special Counsel should not be pur-
17 sued, the Attorney General shall notify Congress in
18 accordance with section 599K–10(a)(3).

19 “(d) DISCIPLINARY ACTION FOR MISCONDUCT.—A
20 Special Counsel appointed under this chapter, and any
21 staff of the Special Counsel, shall be subject to disciplinary
22 action for misconduct and breach of ethical duties under
23 the same standards and to the same extent as are other
24 employees of the Department. Inquiries into such matters

1 shall be handled through the appropriate office of the De-
 2 partment upon the approval of the Attorney General.

3 **“§ 599K-8. Limitation on removal of Special Counsel**
 4 **and certain other officials**

5 “(a) IN GENERAL.—A Special Counsel appointed
 6 under this chapter, or any other official appointed by the
 7 Attorney General who exercises a similar degree of inde-
 8 pendence from the normal chain of command of the De-
 9 partment, may be removed from office only by the per-
 10 sonal action of an Attorney General who has been con-
 11 firmed to that position by the Senate, or the most senior
 12 Senate-confirmed officer of the Department listed in sec-
 13 tion 508 who is not recused from the matter.

14 “(b) REMOVAL FOR CAUSE.—A Special Counsel or
 15 other appointed official described in subsection (a) may
 16 be removed only for misconduct, dereliction of duty, inca-
 17 pacity, conflict of interest, or other good cause, including
 18 violation of policies of the Department.

19 “(c) NOTICE OF REMOVAL.—

20 “(1) IN GENERAL.—The Attorney General or
 21 other Department official described in subsection
 22 (a), as the case may be, shall provide written notice
 23 to the Special Counsel or other appointed official de-
 24 scribed in subsection (a) of the specific reason or
 25 reasons for the removal.

1 “(2) EFFECTIVE DATE OF REMOVAL.—Except
2 as provided in subsection (e), removal under this
3 section shall become effective on the date that is 10
4 days after the date on which the written notice was
5 provided under paragraph (1).

6 “(d) TIMING.—Not later than 10 days after the date
7 on which written notice was provided under subsection
8 (c)(1), the Special Counsel or other appointed official de-
9 scribed in subsection (a), as the case may be, may file
10 an action in the United States District Court for the Dis-
11 trict of Columbia challenging the removal in accordance
12 with subsection (e).

13 “(e) REVIEW.—

14 “(1) IN GENERAL.—An individual that received
15 written notice under subsection (c)(1) may file an
16 action in accordance with paragraph (2) that the re-
17 moval was in violation of this chapter.

18 “(2) REQUIREMENTS.—Any action filed under
19 this subsection shall be heard and determined by a
20 court of 3 judges not later than 14 days after the
21 date on which the action is filed in accordance with
22 the provisions of section 2284, and an appeal of any
23 final decision shall lie to the Supreme Court.

24 “(3) RELIEF.—If a court determines that the
25 removal of the individual who filed an action under

1 this subsection violates this chapter, the removal
2 shall not take effect. The court may also provide
3 other appropriate relief.

4 “(4) STATUS DURING PROCEEDINGS.—

5 “(A) IN GENERAL.—At the request of the
6 individual who filed an action under this sub-
7 section, the court shall determine whether the
8 individual shall remain in office during the
9 pendency of the action described in paragraph
10 (2). If an individual makes such a request, the
11 court shall order that the effective date of the
12 removal shall be stayed until the court rules on
13 the request.

14 “(B) PRESERVATION OF MATERIALS.—

15 During the pendency of an action filed under
16 this subsection, the personnel, documents, and
17 materials of the Special Counsel or other ap-
18 pointed official described in subsection (a) shall
19 be preserved.

20 “(C) LIMITATION.—During the pendency

21 of an action filed under this subsection, a re-
22 placement for the Special Counsel or other ap-
23 pointed official described in subsection (a) who
24 is challenging the removal shall not be des-
25 ignated.

1 **“§ 599K-9. Notification and reports by the Special**
2 **Counsel**

3 “(a) BUDGET.—

4 “(1) IN GENERAL.—A Special Counsel ap-
5 pointed under this chapter shall be provided all ap-
6 propriate resources by the Department.

7 “(2) PROPOSED BUDGET.—Not later than 60
8 days after the date on which a Special Counsel is
9 appointed under this chapter, the Special Counsel
10 shall develop a proposed budget for the current fis-
11 cal year with the assistance of the Justice Manage-
12 ment Division for review and approval by the Attor-
13 ney General.

14 “(3) ESTABLISHMENT OF BUDGET.—Based on
15 a proposal developed under paragraph (2), the At-
16 torney General shall establish a budget for the oper-
17 ations of the Special Counsel, which shall include a
18 request for assignment of personnel, with a descrip-
19 tion of the qualifications needed.

20 “(4) ADDITIONAL BUDGET REQUESTS.—After a
21 budget has been established under paragraph (3),
22 the Special Counsel shall, not later than 90 days be-
23 fore the beginning of each fiscal year, report to the
24 Attorney General the status of the investigation, and
25 provide a budget request for the following fiscal
26 year. The Attorney General shall determine whether

1 the investigation should continue and, if so, establish
2 the budget for the next fiscal year.

3 “(b) NOTIFICATION OF SIGNIFICANT EVENTS.—A
4 Special Counsel appointed under this chapter shall notify
5 the Attorney General of events in the course of the inves-
6 tigation by the Special Counsel in conformity with the
7 guidelines of the Department with respect to Urgent Re-
8 ports.

9 “(c) CLOSING DOCUMENTATION.—

10 “(1) IN GENERAL.—At the conclusion of the
11 work of a Special Counsel appointed under this
12 chapter, the Special Counsel shall submit to the At-
13 torney General, the Chairman and Ranking Minority
14 Member of the Committee on the Judiciary of the
15 Senate, and the Chairman and Ranking Minority
16 Member of the Committee on the Judiciary of the
17 House of Representatives a report detailing the fac-
18 tual findings of the investigation and explaining the
19 prosecution or declination decisions reached by the
20 Special Counsel. If the Attorney General granted or
21 denied a request from the Special Counsel to change
22 the Special Counsel’s jurisdiction under section
23 599K–4(b), that information shall be included.

24 “(2) INFORMATION REQUIRED.—The report
25 submitted under paragraph (1) shall include infor-

1 mation regarding significant prosecutorial decisions
2 and significant expenditures by the Office of the
3 Special Counsel.

4 **“§ 599K-10. Notification and reports by the Attorney**
5 **General**

6 “(a) IN GENERAL.—If the Attorney General appoints
7 a Special Counsel under this chapter, the Attorney Gen-
8 eral shall submit to the Chairman and Ranking Minority
9 Member of the Committee on the Judiciary of the Senate
10 and the Chairman and Ranking Minority Member of the
11 Committee on the Judiciary of the House of Representa-
12 tives a written notification, with a report explaining—

13 “(1) the appointment of the Special Counsel;

14 “(2) the intent of the Attorney General to re-
15 move the Special Counsel; and

16 “(3) after the conclusion of the investigation of
17 the Special Counsel, to the extent consistent with
18 applicable law, any instance in which the Attorney
19 General concluded that a proposed action by a Spe-
20 cial Counsel was so inappropriate or unwarranted
21 under established Departmental practices that it
22 should not be pursued.

23 “(b) NOTICE OF APPOINTMENT.—A notification and
24 report under subsection (a)(1) shall—

1 “(1) be submitted on the date on which the
2 Special Counsel is appointed; and

3 “(2) include—

4 “(A) the factual basis necessitating the ap-
5 pointment of the Special Counsel, including a
6 description of any effort made before appointing
7 the Special Counsel to mitigate potential con-
8 flicts of interests of relevant individuals or with-
9 in relevant components; and

10 “(B) a specific factual statement of the
11 matter to be investigated.

12 “(c) NOTICE OF REMOVAL.—A notification and re-
13 port under subsection (a)(2) shall—

14 “(1) be submitted not later than 30 days before
15 the date on which notice is provided to the Special
16 Counsel under section 599K–8(c)(1); and

17 “(2) include the reasons for the removal.

18 **“§ 599K–11. No creation of rights**

19 “Except as provided in section 599K–8, this chapter
20 shall not be construed to create any rights, substantive
21 or procedural, enforceable at law or equity, by any person
22 or entity, in any matter, civil, criminal, or administra-
23 tive.”.

24 (b) TABLE OF CHAPTERS.—The table of chapters for
25 part II of title 28, United States Code, is amended by

1 inserting after the item relating to chapter 40A the fol-
 2 lowing:

“40B. Special Counsel599K-1”.

3 (c) APPLICATION TO EXISTING SPECIAL COUNSEL.—

4 (1) IN GENERAL.—For purposes of applying
 5 chapter 40B of title 28, United States Code, as
 6 added by this Act, to a Special Counsel who is sub-
 7 ject to any provision of part 600 of title 28, Code
 8 of Federal Regulations, and who is serving as a Spe-
 9 cial Counsel on the date of enactment of this Act—

10 (A) in addition to the authority under
 11 which the Special Counsel was originally ap-
 12 pointed, the Special Counsel shall be deemed to
 13 be a Special Counsel appointed under such
 14 chapter 40B; and

15 (B) such chapter 40B shall apply for pur-
 16 poses of any action described in such chapter
 17 40B by or with respect to the Special Counsel
 18 taken on after the date of enactment of this Act
 19 (including removing the Special Counsel from
 20 office).

21 (2) REMOVAL BEFORE ENACTMENT.—

22 (A) IN GENERAL.—Section 599K-8 of title
 23 28, United States Code, as added by this Act,
 24 shall apply with respect to an individual who
 25 was—

1 (i) appointed as a Special Counsel
2 after January 1, 2017;

3 (ii) subject to any provision of part
4 600 of title 28, Code of Federal Regula-
5 tions; and

6 (iii) removed from office before the
7 date of enactment of this Act.

8 (B) IMPLEMENTATION.—If there is a Spe-
9 cial Counsel who is described in subparagraph
10 (A)—

11 (i) not later than 10 days after the
12 date of enactment of this Act, the Attorney
13 General shall provide written notice relat-
14 ing to the removal—

15 (I) to the Special Counsel, that
16 provides the information required
17 under section 599K–8(c)(1) of title
18 28, United States Code, as added by
19 this Act; and

20 (II) to the Chairman and Rank-
21 ing Minority Member of the Com-
22 mittee on the Judiciary of the Senate
23 and the Chairman and Ranking Mi-
24 nority Member of the Committee on
25 the Judiciary of the House of Rep-

1 representatives, that provides the infor-
2 mation required under section 599K-
3 10(c)(2) of such title;

4 (ii) not later than 10 days after the
5 date on which written notice is provided
6 under clause (i)(I), the Special Counsel
7 may file an action challenging the removal
8 in accordance with section 599K-8(e) of
9 such title;

10 (iii) in an action filed under clause
11 (ii), the court shall determine whether the
12 removal of the Special Counsel meets the
13 requirements for removal under sub-
14 sections (a), (b), and (c)(1) of section
15 599K-8 of such title; and

16 (iv) if a court determines that the re-
17 moval of the individual who filed an action
18 under clause (ii) violates a requirement de-
19 scribed in clause (iii), the court may order
20 reinstatement or provide other appropriate
21 relief.

22 (d) SEVERABILITY.—If any provision of this Act, or
23 an amendment made by this Act, or the application of
24 such provision or amendment to any person or cir-
25 cumstance is held to be invalid or unconstitutional, the

1 remainder of this Act, and the amendments made by this
2 Act, and the application of such provisions and amend-
3 ments to any person or circumstance shall remain and
4 shall not be affected thereby.

○