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

APRIL 11, 2018

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

APRIL 26, 2018

Reported by Mr. GRASSLEY, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Special Counsel Independence and Integrity Act”:
SEC. 2. LIMITATION ON REMOVAL OF SPECIAL COUNSEL.

(a) IN GENERAL.—A special counsel appointed by the Attorney General, or any other official appointed by the Attorney General who exercises a similar degree of independence from the normal Department of Justice chain of command, may be removed from office only by the personal action of an Attorney General who has been confirmed by the Senate, or, if the Attorney General is recused from the matter, the most senior Department of Justice official who has been confirmed by the Senate and is not recused from the matter.

(b) REMOVAL FOR CAUSE.—A special counsel or other appointed official described in subsection (a) may be removed only for misconduct, dereliction of duty, incapacity, conflict of interest, or other good cause, including violation of policies of the Department of Justice.

(c) NOTICE OF REMOVAL.—

(1) IN GENERAL.—The Attorney General or other Department of Justice official described in subsection (a), as the case may be, shall provide written notice to the special counsel or other appointed official described in subsection (a) of the specific reason or reasons for the removal.

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

(d) TIMING.—Not later than 10 days after the date on which written notice was provided under subsection (c)(1), the special counsel or other appointed official described in subsection (a), as the case may be, may file an action challenging the removal in accordance with subsection (e).

(e) REVIEW.—

(1) IN GENERAL.—An individual that received written notice under subsection (c)(1) may file an action in accordance with paragraph (2) that the removal was in violation of this Act.

(2) REQUIREMENTS.—Any action filed under this subsection shall be heard and determined by a court of 3 judges not later than 14 days after the date on which the action is filed in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court.

(3) RELIEF.—If a court determines that the removal of the individual who filed an action under this subsection violates this Act, the removal shall not take effect. The court may also provide other appropriate relief.
(4) Status during proceedings.—

(A) In general.—At the request of the individual who filed an action under this subsection, the court shall determine whether the individual shall remain in office during the pendency of the action described in paragraph (2).

(B) Preservation of materials.—During the pendency of an action filed under this subsection, the staff, documents, and materials of the special counsel or other appointed official described in subsection (a) shall be preserved.

(C) Limitation.—During the pendency of an action filed under this subsection, a replacement for the special counsel or other appointed official described in subsection (a) who is challenging the removal shall not be designated.

(f) Effective date.—This Act shall apply to any special counsel or other appointed official described in subsection (a) appointed on or after January 1, 2017.

(g) Severability.—If any provision of this Act or the application of such provision to any person or circumstance is held to be invalid or unconstitutional, the remainder of this Act and the application of the provisions
of this Act to any person or circumstance shall remain
and shall not be affected thereby.

SECTION 1. SHORT TITLE.

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

SEC. 2. DEPARTMENT OF JUSTICE SPECIAL COUNSEL.

(a) In General.—Part II of title 28, United States
Code, is amended by inserting after chapter 40A the fol-
lowing:

“CHAPTER 40B—SPECIAL COUNSEL

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

“(a) In General.—The Attorney General shall ap-
point a Special Counsel if the Attorney General determines
that—

“(1) criminal investigation of a person or matter
is warranted;

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

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

“(b) RECUSAL.—The Attorney General who has been confirmed to that position by the Senate or, in the case of the vacancy, absence, disability, or recusal of the Attorney General, the most senior Senate-confirmed officer of the Department listed in section 508 who is not recused from the matter shall exercise the authority under this chapter.

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

“(a) IN GENERAL.—When matters are brought to the attention of the Attorney General that might warrant consideration of appointment of a Special Counsel, the Attorney General may—

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

“(2) direct that an initial investigation, consisting of such factual inquiry or legal research as the Attorney General determines appropriate, be conducted in order to better inform the decision; or
“(3) conclude that under the circumstances of the
matter, the public interest would not be served by re-
moving the investigation from the normal processes of
the Department, and that the appropriate component
of the Department should handle the matter.

“(b) ADDITIONAL DIRECTION.—If the Attorney Gen-
eral reaches a conclusion described in subsection (a)(3), the
Attorney General may direct that appropriate steps be
taken to mitigate any conflicts of interest, such as recusal
of particular officials.

§ 599K–3. Qualifications of the Special Counsel

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

“(1) a lawyer with a reputation for integrity
and impartial decisionmaking, and with appropriate
experience to ensure both that the investigation will
be conducted ably, expeditiously, and thoroughly, and
that investigative and prosecutorial decisions will be
supported by an informed understanding of the crimi-
nal law and Department policies; and

“(2) selected from outside the United States Gov-
ernment.

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

“(c) APPOINTMENT METHOD.—

“(1) IN GENERAL.—The Attorney General shall consult with the Assistant Attorney General for Administration to ensure an appropriate method of appointment, and to ensure that a Special Counsel undergoes an appropriate background investigation and a detailed review of ethics and conflicts of interest issues.

“(2) CONFIDENTIAL EMPLOYEE.—A Special Counsel shall be appointed as a confidential employee, as described in section 7511(b)(2)(C) of title 5.

“§ 599K–4. Jurisdiction

“(a) ORIGINAL JURISDICTION.—

“(1) IN GENERAL.—The jurisdiction of a Special Counsel appointed under this chapter shall be established by the Attorney General, and shall include the authority to investigate and prosecute Federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence,
and intimidation of witnesses, and to conduct appeals arising out of the matter being investigated or prosecuted.

“(2) STATEMENT OF THE MATTER TO BE INVESTIGATED.—The Special Counsel shall be provided with a specific factual statement of the matter to be investigated.

“(b) ADDITIONAL JURISDICTION.—If in the course of the investigation by a Special Counsel appointed under this chapter, the Special Counsel concludes that additional jurisdiction beyond that specified in the original jurisdiction is necessary in order to fully investigate and resolve the matters assigned, or to investigate new matters that come to light in the course of the investigation, the Special Counsel shall consult with the Attorney General, who shall determine whether to include the additional matters within the jurisdiction of the Special Counsel or assign them elsewhere.

“(c) CIVIL AND ADMINISTRATIVE JURISDICTION.—

“(1) IN GENERAL.—If in the course of an investigation by a Special Counsel appointed under this chapter, the Special Counsel determines that administrative remedies, civil sanctions, or other governmental action outside the criminal justice system might be appropriate, the Special Counsel shall con-
sult with the Attorney General with respect to the appropriate component to take any necessary action.

“(2) LIMITATION.—A Special Counsel appointed under this chapter shall not have civil or administrative authority unless specifically granted such jurisdiction by the Attorney General.

“§ 599K–5. Staff

“(a) IN GENERAL.—A Special Counsel appointed under this chapter may request the assignment of appropriate personnel of the Department to assist the Special Counsel. The Department shall gather and provide the Special Counsel with the names and resumes of appropriate personnel available for detail. The Special Counsel may also request the detail of specific personnel, and the office for which the designated personnel work shall make reasonable efforts to accommodate the request.

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

“(c) HIRING OF ADDITIONAL PERSONNEL.—If necessary, a Special Counsel appointed under this chapter may request that additional personnel be hired or assigned from outside the Department.
“(d) COOPERATION.—All personnel in the Department shall cooperate to the fullest extent possible with a Special Counsel appointed under this chapter.

“§ 599K–6. Powers and authority

“(a) IN GENERAL.—Subject to the limitations of this chapter, a Special Counsel appointed under this chapter shall exercise, within the scope of the jurisdiction of the Special Counsel, the full power and independent authority to exercise all investigative and prosecutorial functions of any United States attorney.

“(b) SPECIAL COUNSEL DISCRETION.—Except as otherwise provided in this chapter, a Special Counsel appointed under this chapter shall determine whether and to what extent to inform or consult with the Attorney General or others within the Department about the conduct of the duties and responsibilities of the Special Counsel.

“§ 599K–7. Conduct and accountability generally

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

“(1) comply with the rules, regulations, procedures, practices, and policies of the Department; and

“(2) consult with appropriate offices within the Department for guidance with respect to established practices, policies, and procedures of the Department,
including ethics and security regulations and procedures.

“(b) EXTRAORDINARY CIRCUMSTANCES.—If a Special Counsel appointed under this chapter determines that the extraordinary circumstances of any particular decision would render compliance with required review and approval procedures by the designated departmental component inappropriate, the Special Counsel may consult directly with the Attorney General.

“(c) LIMITATION ON SUPERVISION.—

“(1) IN GENERAL.—A Special Counsel appointed under this chapter shall not be subject to the day-to-day supervision of any official of the Department, except that the Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established practices of the Department that it should not be pursued.

“(2) REVIEW.—In conducting a review described in paragraph (1), the Attorney General shall give great weight to the views of the Special Counsel. If the Attorney General concludes that a proposed action by a Special Counsel should not be pursued, the Attorney
General shall notify Congress in accordance with section 599K–10(a)(3).

“(d) Disciplinary Action for Misconduct.—A Special Counsel appointed under this chapter, and any staff of the Special Counsel, shall be subject to disciplinary action for misconduct and breach of ethical duties under the same standards and to the same extent as are other employees of the Department. Inquiries into such matters shall be handled through the appropriate office of the Department upon the approval of the Attorney General.

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

“(a) In General.—A Special Counsel appointed under this chapter, or any other official appointed by the Attorney General who exercises a similar degree of independence from the normal chain of command of the Department, may be removed from office only by the personal action of an Attorney General who has been confirmed to that position by the Senate, or the most senior Senate-confirmed officer of the Department listed in section 508 who is not recused from the matter.

“(b) Removal for Cause.—A Special Counsel or other appointed official described in subsection (a) may be removed only for misconduct, dereliction of duty, inca-
pacity, conflict of interest, or other good cause, including violation of policies of the Department.

“(c) NOTICE OF REMOVAL.—

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

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

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

“(e) REVIEW.—

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

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

“(3) RELIEF.—If a court determines that the re-
moval of the individual who filed an action under
this subsection violates this chapter, the removal shall
not take effect. The court may also provide other ap-
propriate relief.

“(4) STATUS DURING PROCEEDINGS.—

“(A) IN GENERAL.—At the request of the in-
dividual who filed an action under this sub-
section, the court shall determine whether the in-
dividual shall remain in office during the pend-
ency of the action described in paragraph (2). If
an individual makes such a request, the court
shall order that the effective date of the removal
shall be stayed until the court rules on the re-
quest.

“(B) PRESERVATION OF MATERIALS.—Dur-
ing the pendency of an action filed under this
subsection, the personnel, documents, and materials of the Special Counsel or other appointed official described in subsection (a) shall be preserved.

“(C) LIMITATION.—During the pendency of an action filed under this subsection, a replacement for the Special Counsel or other appointed official described in subsection (a) who is challenging the removal shall not be designated.

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

“(a) BUDGET.—

“(1) IN GENERAL.—A Special Counsel appointed under this chapter shall be provided all appropriate resources by the Department.

“(2) PROPOSED BUDGET.—Not later than 60 days after the date on which a Special Counsel is appointed under this chapter, the Special Counsel shall develop a proposed budget for the current fiscal year with the assistance of the Justice Management Division for review and approval by the Attorney General.

“(3) ESTABLISHMENT OF BUDGET.—Based on a proposal developed under paragraph (2), the Attorney General shall establish a budget for the operations of the Special Counsel, which shall include a request for
assignment of personnel, with a description of the qualifications needed.

“(4) ADDITIONAL BUDGET REQUESTS.—After a budget has been established under paragraph (3), the Special Counsel shall, not later than 90 days before the beginning of each fiscal year, report to the Attorney General the status of the investigation, and provide a budget request for the following fiscal year. The Attorney General shall determine whether the investigation should continue and, if so, establish the budget for the next fiscal year.

“(b) NOTIFICATION OF SIGNIFICANT EVENTS.—A Special Counsel appointed under this chapter shall notify the Attorney General of events in the course of the investigation by the Special Counsel in conformity with the guidelines of the Department with respect to Urgent Reports.

“(c) CLOSING DOCUMENTATION.—

“(1) IN GENERAL.—At the conclusion of the work of a Special Counsel appointed under this chapter, the Special Counsel shall submit to the Attorney General, the Chairman and Ranking Minority Member of the Committee on the Judiciary of the Senate, and the Chairman and Ranking Minority Member of the Committee on the Judiciary of the House of Representativ
the investigation and explaining the prosecution or declination decisions reached by the Special Counsel. If the Attorney General granted or denied a request from the Special Counsel to change the Special Counsel’s jurisdiction under section 599K–4(b), that information shall be included.

“(2) INFORMATION REQUIRED.—The report submitted under paragraph (1) shall include information regarding significant prosecutorial decisions and significant expenditures by the Office of the Special Counsel.

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

“(a) In General.—If the Attorney General appoints a Special Counsel under this chapter, the Attorney General shall submit to the Chairman and Ranking Minority Member of the Committee on the Judiciary of the Senate and the Chairman and Ranking Minority Member of the Committee on the Judiciary of the House of Representatives a written notification, with a report explaining—

“(1) the appointment of the Special Counsel;

“(2) the intent of the Attorney General to remove the Special Counsel; and

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

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

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

“(2) include—

“(A) the factual basis necessitating the appointment of the Special Counsel, including a description of any effort made before appointing the Special Counsel to mitigate potential conflicts of interests of relevant individuals or within relevant components; and

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

“(c) NOTICE OF REMOVAL.—A notification and report under subsection (a)(2) shall—

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

“(2) include the reasons for the removal.
“§ 599K–11. No creation of rights

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

(b) TABLE OF CHAPTERS.—The table of chapters for part II of title 28, United States Code, is amended by inserting after the item relating to chapter 40A the following:

“40B. Special Counsel ................................................................. 599K–1”.

(c) APPLICATION TO EXISTING SPECIAL COUNSEL.—

(1) IN GENERAL.—For purposes of applying chapter 40B of title 28, United States Code, as added by this Act, to a Special Counsel who is subject to any provision of part 600 of title 28, Code of Federal Regulations, and who is serving as a Special Counsel on the date of enactment of this Act—

(A) in addition to the authority under which the Special Counsel was originally appointed, the Special Counsel shall be deemed to be a Special Counsel appointed under such chapter 40B; and

(B) such chapter 40B shall apply for purposes of any action described in such chapter 40B by or with respect to the Special Counsel taken on after the date of enactment of this Act
(including removing the Special Counsel from office).

(2) REMOVAL BEFORE ENACTMENT.—

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

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

(ii) subject to any provision of part 600 of title 28, Code of Federal Regulations; and

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

(B) IMPLEMENTATION.—If there is a Special Counsel who is described in subparagraph (A)—

(i) not later than 10 days after the date of enactment of this Act, the Attorney General shall provide written notice relating to the removal—

(I) to the Special Counsel, that

provides the information required under section 599K–8(c)(1) of title 28,
United States Code, as added by this Act; and

(II) to the Chairman and Ranking Minority Member of the Committee on the Judiciary of the Senate and the Chairman and Ranking Minority Member of the Committee on the Judiciary of the House of Representatives, that provides the information required under section 599K–10(c)(2) of such title;

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

(iii) in an action filed under clause (ii), the court shall determine whether the removal of the Special Counsel meets the requirements for removal under subsections (a), (b), and (c)(1) of section 599K–8 of such title; and

(iv) if a court determines that the removal of the individual who filed an action
under clause (ii) violates a requirement described in clause (iii), the court may order reinstatement or provide other appropriate relief.

(d) SEVERABILITY.—If any provision of this Act, or an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be invalid or unconstitutional, the remainder of this Act, and the amendments made by this Act, and the application of such provisions and amendments to any person or circumstance shall remain and shall not be affected thereby.
A BILL

S. 2644

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

Referred to an amendment
April 26, 2018

Reported with an amendment
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