

**Calendar No. 673**

115TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
115-387 }

POLITICAL APPOINTEE BURROWING  
PREVENTION ACT

—  
R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

TO ACCOMPANY

H.R. 1132

TO AMEND TITLE 5, UNITED STATES CODE, TO PROVIDE  
FOR A 2-YEAR PROHIBITION ON EMPLOYMENT IN A CAREER  
CIVIL SERVICE POSITION FOR ANY FORMER POLITICAL  
APPOINTEE, AND FOR OTHER PURPOSES



NOVEMBER 26, 2018.—Ordered to be printed

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NOVEMBER 26, 2018.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and  
Governmental Affairs, submitted the following

R E P O R T

[To accompany H.R. 1132]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (H.R. 1132) to amend title 5, United States Code, to provide for a 2-year prohibition on employment in a career civil service position for any former political appointee, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and an amendment to the title and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

The purpose of H.R. 1132 is to ensure the hiring process for the Federal workforce is free from political influence. This Act requires the Office of Personnel Management (OPM) to review requests for a current or former political appointee to convert to a career appointment in the civil service and determine whether or not the conversion to a career position is free from political influence. This

Act would also make any political appointee who converts to a career position subject to a two-year probationary period.

## II. BACKGROUND AND THE NEED FOR LEGISLATION

Presidential administrations have the authority to hire individuals outside of the competitive service for political positions that “may involve advocacy of Administration policies and programs and the incumbents usually have a close and confidential working relationship with the agency head or other key officials.”<sup>1</sup> This hiring authority allows an administration to hire individuals without following the required procedures for announcing position openings, receiving applications for the position, and assessing and selecting applicants.<sup>2</sup> Such political positions are also not required to complete a one-year probationary period before the appointment is complete, unlike a career appointment in the competitive service.<sup>3</sup>

In December 2016, there were 8,358 noncompetitive, political appointments in the Federal Government.<sup>4</sup> Political appointments generally expire at the end of an Administration.<sup>5</sup> However, some political appointees seek a career appointment in the competitive service, also known as political conversions.<sup>6</sup>

The Government Accountability Office (GAO) stated, “the ability to convert political employees to career positions is an appropriate and valuable means of achieving a highly skilled workforce.”<sup>7</sup> GAO also noted:

[T]hese conversions must conform to the merit system principles requiring that employees be selected solely on the basis of merit. Sometimes, circumstances surrounding conversions can raise questions as to whether the individuals selected experienced favoritism or enjoyed an unfair advantage in the merit system selection process, even the appearance of which could adversely compromise the integrity of the system.<sup>8</sup>

OPM is responsible for ensuring that political conversions adhere to the merit system principles.<sup>9</sup> Before 2010, OPM required agencies to first seek OPM approval before hiring a political appointee to a career position in the competitive service during a presidential election year.<sup>10</sup> OPM expanded this approval requirement to apply for political conversions at any time and at career competitive service and career excepted service positions.<sup>11</sup> The Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015 requires OPM to report annually to Congress on

<sup>1</sup>S. Comm. on Homeland Sec. & Governmental Affairs, U.S. Gov’t Policy and Supporting Positions, S. Prt. 114–26, iii (Dec. 1, 2016).

<sup>2</sup>See 5 U.S.C. 3301–30e. See also 5 C.F.R. 2.1.

<sup>3</sup>5 U.S.C. 3321. See also 5 C.F.R. 2.4.

<sup>4</sup>S. Comm. on Homeland Sec. & Governmental Affairs, *supra* note 1 at 216.

<sup>5</sup>Gov’t Accountability Off., GAO–10–688, Personnel Practices: Conversions of Employees from Political to Career Positions May 2005–May 2009 1 (June 28, 2010).

<sup>6</sup>*Id.* at 11.

<sup>7</sup>*Id.*

<sup>8</sup>Gov’t Accountability Off., GAO–16–859, Office of Personnel Management: Actions Are Needed to Help Ensure the Completeness of Political Conversion Data and Adherence to Policy 1 (Sept. 30, 2016).

<sup>9</sup>5 C.F.R. 5.2.

<sup>10</sup>Memorandum from John Berry, Director, Off. of Personnel Mgmt., to Heads of Executive Departments and Agencies, Political Appointees and Career Civil Service Positions (Nov. 5, 2009).

<sup>11</sup>*Id.*

political conversion requests.<sup>12</sup> During the last year of a President's term, OPM must submit these reports to Congress on a quarterly basis.<sup>13</sup>

There is no statutory or regulatory requirement for agencies to obtain OPM approval before selecting a political appointee to a career position. In 2016, GAO found that 17 political appointees in 8 different agencies were converted to a career position without OPM approval.<sup>14</sup> From December 2016 through December 2017, OPM received 27 political conversion requests, 6 of which were sent after the agency hired the political appointee to the career position.<sup>15</sup> Of the 27 requests, OPM denied 8—or approximately 25 percent—of the requests, finding it was unable to “conclude the appointment was free of political influence and complied with merit system principles and applicable civil service laws and regulations.”<sup>16</sup>

H.R. 1132, as amended by the Committee, would ensure that political conversions adhere to the merit system principles and are free from political influence by requiring agencies to submit political conversion requests to OPM for approval before selecting a political appointee for a career position in the Federal service. This Act would require reporting to Congress on each political conversion request, and would also require a two-year probationary period for any political appointee who converts to a career appointment if such appointment would be the political appointee's first career position in the Federal civil service.

### III. LEGISLATIVE HISTORY

H.R. 1132 was introduced on February 16, 2017, by Representatives Ken Buck (R-CO-4), Ted Lieu (D-CA-33) and Jared Polis (D-CO-2). Representative Pete Sessions (R-TX-32) was added as a co-sponsor to the Act on February 28, 2017. The Act as amended was passed by the House of Representatives on March 6, 2018, by voice vote. The Act was received in the Senate and referred to the Committee on Homeland Security and Governmental Affairs on March 7, 2018.

The Committee considered H.R. 1132 at a business meeting on September 26, 2018. Chairman Ron Johnson offered an amendment that clarifies the determinations that the OPM Director must make under this Act, eliminates the two-year ban on career appointments for political appointees, and instead subjects employees who receive a political conversion to a two-year probationary period. Chairman Johnson also offered an amendment to change the title of the Act. The amendments were adopted favorably by voice vote. The amendments and the legislation, as amended, were passed by voice vote *en bloc* with Senators Johnson, Portman, Lankford, Enzi, Hoeven, McCaskill, Carper, Heitkamp, Peters, Hassan, Harris, and Jones present.

<sup>12</sup>The Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, Pub. L. No. 114-36, 4, 130 Stat. 301, 305-307 (Mar. 18, 2016).

<sup>13</sup>*Id.*

<sup>14</sup>Gov't Accountability Off., *supra* note 8 at 9.

<sup>15</sup>Letter from Dr. Jeff Pon, Director, Off. of Personnel Mgmt., to Senator Ron Johnson, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs (Apr. 4, 2018).

<sup>16</sup>*Id.*

Consistent with Committee Rule 11, the Committee reports the Act with a technical amendment by mutual agreement of the Chairman and Ranking Member.

#### IV. SECTION-BY-SECTION ANALYSIS OF THE ACT, AS REPORTED

##### *Section 1. Short title*

This section establishes the short title of the Act as the “Political Appointee Burrowing Prevention Act.”

##### *Section 2. Limitation on employment of political appointees in career civil service positions*

Subsection (a) establishes a review and approval process and additional requirements for political conversions. A current or former political appointee will be prohibited from converting to a career position in the Federal service without prior written approval from OPM. To receive approval, an agency head must submit a request for the political conversion to OPM that includes a certification that the career position would not carry out the same or similar responsibilities as that of a political position, that the political appointee was selected for the career position based on merit after a fair and open job competition, and that the hiring process and selection was free from political considerations or influence. OPM will review each political conversion request and make a favorable or unfavorable determination for the request. If OPM makes an unfavorable determination, the conversion request must be denied.

Under this subsection, OPM is required to notify Congress of the approval of any political conversion request, as well as the rationale of the certification by the agency head. This subsection also requires an individual approved for a political conversion to complete a two-year probationary period before the appointment to the career position becomes final. Political appointees who completed a probationary period for a career position prior to their political position are exempt from this two-year probationary period, as well as any political appointees whose job responsibilities did not involve political activities.

This subsection also defines, for the purposes of this Act, the terms “agency,” “Associate Director,” “career position,” “covered individual,” “participated,” “particular matter,” “political appointee,” and “political position.”

Subsection (b) amends the table of sections for the subchapter to add the section created under subsection (a).

Subsection (c) applies the review and approval procedures and probationary period established under subsection (a) to any political conversion or request for conversion that occurs after the date of enactment of this Act. Any political appointee who leaves Federal service after the date of enactment of this Act will also be subject to the requirements established in this Act.

Subsection (d) requires OPM, in consultation with the Office of Special Counsel (OSC), to issue regulations to carry out the requirements of this Act. These regulations must also include guidance on the definition for the term “personally and substantially participated in a particular policy-making activity or similar matter.”

## V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this Act and determined that the Act will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the Act contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

## VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, October 24, 2018.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1132, the Political Appointee Burrowing Prevention Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL,  
*Director.*

Enclosure.

*H.R. 1132—Political Appointee Burrowing Prevention Act*

H.R. 1132 would amend federal law regarding the hiring of former political appointees, as that term is defined in the act. In general, H.R. 1132 would expand and build upon the Office of Personnel Management's (OPM's) current policies and practices regarding the hiring of political appointees, though CBO expects the legislation would make some changes to OPM's processes. Specifically, the act would bar political appointees from holding civil service positions for two years unless certain criteria were met. Using information from OPM, CBO estimates that the cost of implementing H.R. 1132 would not be significant because it would not significantly change the government's current employment procedures.

Enacting H.R. 1132 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 1132 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

H.R. 1132 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On November 20, 2017, CBO transmitted a cost estimate for H.R. 1132 as ordered reported by the House Committee on Oversight and Government Reform on November 2, 2017. The two versions of H.R. 1132 address former political appointees working for the government, but some provisions differ. CBO's estimated cost of implementing either version is the same.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

## VII. CHANGES IN EXISTING LAW MADE BY THE ACT, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the Act, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

## UNITED STATES CODE

\* \* \* \* \*

### TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

\* \* \* \* \*

#### PART I—EMPLOYEES

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#### SUBPART B—EMPLOYMENT AND RETENTION

\* \* \* \* \*

#### CHAPTER 31—AUTHORITY FOR EMPLOYMENT

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##### Subchapter I—Employment Authorities

\* \* \* \* \*

**Table of Sections.**

Sec. 3101 General Authority to employ.

\* \* \* \* \*

Sec. 3117. *Employment of political appointees.*

\* \* \* \* \*

**SEC. 3117. EMPLOYMENT OF POLITICAL APPOINTEES.**

(a) *APPOINTMENT APPROVAL REQUIRED.*—

(1) *IN GENERAL.*—*The head of an agency may not appoint a covered individual to a career position within the agency without receiving prior written approval from the Associate Director, consistent with the requirements of this subsection.*

(2) *REQUEST.*—*If the head of an agency wishes to appoint a covered individual to a career position, the head of the agency shall submit a request to the Associate Director to approve the appointment, which shall include a certification by the head of the agency to the Associate Director that—*

*(A) the career position would not involve confidential, policy-determining, policy-making, or policy-advocating responsibilities (unless the career position is in the Senior Executive Service);*

*(B) the appointment process was based on merit after a fair and open competition; and*

*(C) the appointment process did not give any preference or special advantage to the covered individual based on a*

prior political appointment, political influence, or political affiliation.

(3) REVIEW AND DETERMINATION.—

(A) IN GENERAL.—The Associate Director shall—

(i) review each request received pursuant to paragraph (2); and

(ii) make a favorable or unfavorable determination whether, with respect to the request, the position classification and qualifications requirements and the appointment process were fair, open, and free from political influence.

(B) APPROVAL.—If the Associate Director makes a favorable determination under subparagraph (A)(ii), the Associate Director may approve the request.

(C) DENIAL.—If the Associate Director makes an unfavorable determination under subparagraph (A)(ii), the Associate Director shall deny the request.

(4) NOTIFICATION TO CONGRESS.—With respect to any request approved under paragraph (3), the Associate Director shall, not later than 5 days before the date the Associate Director provides the approval to the head of the requesting agency, submit to the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate the certification under paragraph (2) relating to the request and the rationale of the head of the agency for the certification.

(b) PROBATIONARY PERIOD.—

(1) IN GENERAL.—A covered individual shall complete a 2-year period of probation before an appointment to a career position in the competitive service approved under subsection (a) becomes final.

(2) EXCEPTION.—Paragraph (1) shall not apply to—

(A) a political appointee who has not personally and substantially participated in any particular policy-making activity or similar matter while employed in a political position; or

(B) a political appointee who has previously held a career position in the competitive service and successfully completed a probationary period for that position under section 3321.

(c) APPLICATION.—Nothing in this section shall be construed to restrict the appointment of an individual who is—

(1) entitled to reinstatement under section 3593(b); or

(2) eligible for reinstatement under section 3593(a).

(d) DEFINITIONS.—In this section—

(1) the term “agency” has the meaning given the term “Executive agency” in section 105;

(2) the term “Associate Director” means—

(A) the Associate Director of Merit Systems Accountability and Compliance of the Office of Personnel Management; or

(B) if the Associate Director described in subparagraph (A) is not responsible for carrying out the authorities under section 1104(b)(2), the Associate Director of the Office of Personnel Management responsible for carrying out such authorities;

- (3) the term “career position” means—
- (A) a position in the competitive service filled by a career or career-conditional appointment;
  - (B) a position in the excepted service filled by an appointment of equivalent tenure as a position described in subparagraph (A);
  - (C) a career reserved position, as defined in paragraph (8) of section 3132(a), in the Senior Executive Service; or
  - (D) a general position in the Senior Executive Service filled by a career appointee, as defined in section 3132(a)(4);
- (4) the term “covered individual” means—
- (A) a political appointee;
  - (B) a former political appointee who held any political position during the 5-year period before the date of the request described in subsection (a)(2); or
  - (C) at the discretion of the Director of the Office of Personnel Management, a former political appointee who held any political position before the 5-year period described in subparagraph (B);
- (5) the term “participated” means an action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action;
- (6) the term “particular matter” includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding;
- (7) the term “political appointee” means an individual serving in an appointment of any duration to a political position; and
- (8) the term “political position” means—
- (A) a position with respect to which appointment is made—
    - (i) by the President; or
    - (ii) by the President, by and with the advice and consent of the Senate;
  - (B) a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character;
  - (C) a position described under sections 5312 through 5316 (relating to the Executive Schedule); or
  - (D) a general position in the Senior Executive Service filled by—
    - (i) a noncareer appointee, as defined in paragraph (7) of section 3132(a); or
    - (ii) a limited term appointee, as defined in paragraphs (5) and (6) of section 3132(a), who is serving under a political appointment.