

Calendar No. 673

115TH CONGRESS
2D SESSION**H. R. 1132****[Report No. 115-387]**

IN THE SENATE OF THE UNITED STATES

MARCH 7, 2018

Received; read twice and referred to the Committee on Homeland Security and
Governmental Affairs

NOVEMBER 26, 2018

Reported by Mr. JOHNSON, with an amendment and an amendment to the
title[Strike out all after the enacting clause and insert the part printed in *italie*]

AN ACT

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.

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 “Political Appointee
5 Burrowing Prevention Act”.

1 **SEC. 2. LIMITATION ON EMPLOYMENT OF POLITICAL AP-**
2 **POINTEES IN CAREER CIVIL SERVICE POSI-**
3 **TIONS.**

4 (a) IN GENERAL.—Subchapter I of chapter 31 of title
5 5, United States Code, is amended by adding at the end
6 the following:

7 **“§ 3115. Employment of political appointees**

8 **“(a) APPOINTMENT APPROVAL REQUIRED.—**

9 **“(1) IN GENERAL.—**The head of an agency may
10 not appoint any individual described in paragraph
11 (5) to a career position within the agency without
12 receiving prior written approval from the Associate
13 Director of Merit Systems Accountability and Com-
14 pliance, consistent with the requirements of this sub-
15 section.

16 **“(2) REQUEST.—**The head of an agency shall
17 submit a request to the Associate Director to ap-
18 prove the appointment of any individual described in
19 paragraph (5) to a career position. Any such request
20 shall include certification by the head of the agency
21 to the Associate Director that the appointment is
22 necessary for the agency to meet its mission.

23 **“(3) REVIEW AND DETERMINATION.—**The As-
24 sociate Director shall review any request received
25 pursuant to paragraph (2) and deny any such re-
26 quest unless the Associate Director determines that

1 the appointment process with respect to the request
2 was fair, open, and free from political influence. If
3 the Associate Director makes that determination,
4 the Associate Director may approve the request.

5 “(4) NOTIFICATION TO CONGRESS.—With re-
6 spect to any request approved under paragraph (3),
7 the Associate Director shall, not less than five days
8 before the date the Associate Director provides ap-
9 proval to the head of the requesting agency, provide
10 to the Committee on Oversight and Government Re-
11 form of the House of Representatives and the Com-
12 mittee on Homeland Security and Governmental Af-
13 fairs of the Senate the agency certification under
14 paragraph (2) and the agency head’s rationale for
15 that certification.

16 “(5) COVERED INDIVIDUALS.—An individual
17 described in this paragraph is—

18 “(A) a political appointee;

19 “(B) a former political appointee who held
20 any political position during the 5-year period
21 before the date of the request described in para-
22 graph (2); or

23 “(C) at the discretion of the Director of
24 the Office of Personnel Management, a former
25 political appointee who held any political posi-

1 tion before the five-year period described in
2 subparagraph (B).

3 “(b) RESTRICTION ON APPOINTMENT.—

4 “(1) IN GENERAL.—Notwithstanding any other
5 law, rule, or regulation, during the 2-year period fol-
6 lowing the date a political appointee leaves or de-
7 parts from a political position, such appointee may
8 not be appointed to any career position in the civil
9 service.

10 “(2) EXCEPTION.—Paragraph (1) shall not
11 apply to a political appointee who has not personally
12 and substantially participated in any particular mat-
13 ter while employed in a political position.

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

17 “(1) entitled to reinstatement under section
18 3593(b); or

19 “(2) eligible for reinstatement under section
20 3593(a).

21 “(d) DEFINITIONS.—In this section—

22 “(1) the term ‘agency’ has the meaning given
23 the term ‘Executive agency’ in section 105;

24 “(2) the term ‘Associate Director’ means the
25 Associate Director of Merit Systems Accountability

1 and Compliance at the Office of Personnel Manage-
2 ment;

3 “(3) the term ‘political appointee’ means an in-
4 dividual serving in an appointment of any duration
5 to a political position;

6 “(4) the term ‘political position’ means—

7 “(A) a position with respect to which ap-
8 pointment is made—

9 “(i) by the President; or

10 “(ii) by the President, by and with the
11 advice and consent of the Senate;

12 “(B) a position which has been excepted
13 from the competitive service by reason of its
14 confidential, policy-determining, policy-making,
15 or policy-advocating character;

16 “(C) a position described under sections
17 5312 through 5316 (relating to the Executive
18 Schedule); and

19 “(D) a general position in the Senior Exec-
20 utive Service during such time as it is filled
21 by—

22 “(i) a noncareer appointee, as defined
23 in paragraph (7) of section 3132(a); or

24 “(ii) a limited term appointee or lim-
25 ited emergency appointee, as defined in

1 paragraphs (5) and (6) of section 3132(a),
2 who is serving under a political appoint-
3 ment.

4 “(5) the term ‘career position’ means—

5 “(A) a position in the competitive service
6 filled by career or career-conditional appoint-
7 ment;

8 “(B) a position in the excepted service
9 filled by an appointment of equivalent tenure as
10 a position described in subparagraph (A);

11 “(C) a career reserved position, as defined
12 in paragraph (8) of section 3132(a), in the Sen-
13 ior Executive Service; or

14 “(D) a general position in the Senior Exec-
15 utive Service when filled by a career appointee,
16 as defined in section 3132(a)(4);

17 “(6) the term ‘participated’ means an action
18 taken as an officer or employee through decision, ap-
19 proval, disapproval, recommendation, the rendering
20 of advice, investigation, or other such action; and

21 “(7) the term ‘particular matter’ includes any
22 investigation, application, request for a ruling or de-
23 termination, rulemaking, contract, controversy,
24 claim, charge, accusation, arrest, or judicial or other
25 proceeding.”

1 (b) CLERICAL AMENDMENT.—The table of sections
2 of chapter 31 of title 5, United States Code, is amended
3 by adding after the item relating to section 3114 the fol-
4 lowing:

“3115. Employment of political appointees.”.

5 (c) APPLICATION.—

6 (1) APPOINTMENT REQUESTS.—Section
7 3115(a) of title 5, United States Code, as added by
8 subsection (a), shall apply to any appointment or re-
9 quest for appointment described in such section sub-
10 mitted to the Associate Director of Merit Systems
11 Accountability and Compliance after the date of en-
12 actment of this Act.

13 (2) LIMITATION ON APPOINTMENTS.—Section
14 3115(b) of title 5, United States Code, as added by
15 subsection (a), shall apply to any individual who
16 leaves or departs from a political position (as that
17 term is defined in section 3115(c)(2) of such title,
18 as added by such subsection) after the date of enact-
19 ment of this Act.

20 (d) REGULATIONS REQUIRED.—The Director of the
21 Office of Personnel Management shall issue regulations
22 necessary to carry out this Act. Such regulations shall in-
23 clude guidance on the definition of the term “personally
24 and substantially participated in a particular matter” in
25 section 3115(b)(2) of title 5, United States Code, as added

1 by subsection (a), consistent with section 2641.201 of title
 2 5, Code of Federal Regulations.

3 **SECTION 1. SHORT TITLE.**

4 *This Act may be cited as the “Political Appointee Bur-*
 5 *rowing Prevention Act”.*

6 **SEC. 2. LIMITATION ON EMPLOYMENT OF POLITICAL AP-**
 7 **POINTEES IN CAREER CIVIL SERVICE POSI-**
 8 **TIONS.**

9 *(a) IN GENERAL.—Subchapter I of chapter 31 of title*
 10 *5, United States Code, is amended by adding at the end*
 11 *the following:*

12 **“§ 3117. Employment of political appointees**

13 *“(a) APPOINTMENT APPROVAL REQUIRED.—*

14 *“(1) IN GENERAL.—The head of an agency may*
 15 *not appoint a covered individual to a career position*
 16 *within the agency without receiving prior written ap-*
 17 *proval from the Associate Director, consistent with the*
 18 *requirements of this subsection.*

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

1 “(A) *the career position would not involve*
2 *confidential, policy-determining, policy-making,*
3 *or policy-advocating responsibilities (unless the*
4 *career position is in the Senior Executive Serv-*
5 *ice);*

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

8 “(C) *the appointment process did not give*
9 *any preference or special advantage to the cov-*
10 *ered individual based on a prior political ap-*
11 *pointment, political influence, or political affili-*
12 *ation.*

13 “(3) *REVIEW AND DETERMINATION.—*

14 “(A) *IN GENERAL.—The Associate Director*
15 *shall—*

16 “(i) *review each request received pursu-*
17 *ant to paragraph (2); and*

18 “(ii) *make a favorable or unfavorable*
19 *determination whether, with respect to the*
20 *request, the position classification and*
21 *qualifications requirements and the ap-*
22 *pointment process were fair, open, and free*
23 *from political influence.*

24 “(B) *APPROVAL.—If the Associate Director*
25 *makes a favorable determination under subpara-*

1 *graph (A)(ii), the Associate Director may ap-*
2 *prove the request.*

3 “(C) *DENIAL.*—*If the Associate Director*
4 *makes an unfavorable determination under sub-*
5 *paragraph (A)(ii), the Associate Director shall*
6 *deny the request.*

7 “(4) *NOTIFICATION TO CONGRESS.*—*With respect*
8 *to any request approved under paragraph (3), the As-*
9 *sociate Director shall, not later than 5 days before the*
10 *date the Associate Director provides the approval to*
11 *the head of the requesting agency, submit to the Com-*
12 *mittee on Oversight and Government Reform of the*
13 *House of Representatives and the Committee on*
14 *Homeland Security and Governmental Affairs of the*
15 *Senate the certification under paragraph (2) relating*
16 *to the request and the rationale of the head of the*
17 *agency for the certification.*

18 “(b) *PROBATIONARY PERIOD.*—

19 “(1) *IN GENERAL.*—*A covered individual shall*
20 *complete a 2-year period of probation before an ap-*
21 *pointment to a career position in the competitive*
22 *service approved under subsection (a) becomes final.*

23 “(2) *EXCEPTION.*—*Paragraph (1) shall not*
24 *apply to—*

1 “(A) a political appointee who has not per-
2 sonally and substantially participated in any
3 particular policy-making activity or similar
4 matter while employed in a political position; or

5 “(B) a political appointee who has pre-
6 viously held a career position in the competitive
7 service and successfully completed a proba-
8 tionary period for that position under section
9 3321.

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

13 “(1) entitled to reinstatement under section
14 3593(b); or

15 “(2) eligible for reinstatement under section
16 3593(a).

17 “(d) DEFINITIONS.—In this section—

18 “(1) the term ‘agency’ has the meaning given the
19 term ‘Executive agency’ in section 105;

20 “(2) the term ‘Associate Director’ means—

21 “(A) the Associate Director of Merit Sys-
22 tems Accountability and Compliance of the Of-
23 fice of Personnel Management; or

24 “(B) if the Associate Director described in
25 subparagraph (A) is not responsible for carrying

1 *out the authorities under section 1104(b)(2), the*
2 *Associate Director of the Office of Personnel*
3 *Management responsible for carrying out such*
4 *authorities;*

5 *“(3) the term ‘career position’ means—*

6 *“(A) a position in the competitive service*
7 *filled by a career or career-conditional appoint-*
8 *ment;*

9 *“(B) a position in the excepted service filled*
10 *by an appointment of equivalent tenure as a po-*
11 *sition described in subparagraph (A);*

12 *“(C) a career reserved position, as defined*
13 *in paragraph (8) of section 3132(a), in the Sen-*
14 *ior Executive Service; or*

15 *“(D) a general position in the Senior Exec-*
16 *utive Service filled by a career appointee, as de-*
17 *finied in section 3132(a)(4);*

18 *“(4) the term ‘covered individual’ means—*

19 *“(A) a political appointee;*

20 *“(B) a former political appointee who held*
21 *any political position during the 5-year period*
22 *before the date of the request described in sub-*
23 *section (a)(2); or*

24 *“(C) at the discretion of the Director of the*
25 *Office of Personnel Management, a former polit-*

1 *ical appointee who held any political position*
2 *before the 5-year period described in subpara-*
3 *graph (B);*

4 “(5) *the term ‘participated’ means an action*
5 *taken as an officer or employee through decision, ap-*
6 *proval, disapproval, recommendation, the rendering*
7 *of advice, investigation, or other such action;*

8 “(6) *the term ‘particular matter’ includes any*
9 *investigation, application, request for a ruling or de-*
10 *termination, rulemaking, contract, controversy, claim,*
11 *charge, accusation, arrest, or judicial or other pro-*
12 *ceeding;*

13 “(7) *the term ‘political appointee’ means an in-*
14 *dividual serving in an appointment of any duration*
15 *to a political position; and*

16 “(8) *the term ‘political position’ means—*

17 “(A) *a position with respect to which ap-*
18 *pointment is made—*

19 “(i) *by the President; or*

20 “(ii) *by the President, by and with the*
21 *advice and consent of the Senate;*

22 “(B) *a position which has been excepted*
23 *from the competitive service by reason of its con-*
24 *fidential, policy-determining, policy-making, or*
25 *policy-advocating character;*

1 “(C) a position described under sections
2 5312 through 5316 (relating to the Executive
3 Schedule); or

4 “(D) a general position in the Senior Exec-
5 utive Service filled by—

6 “(i) a noncareer appointee, as defined
7 in paragraph (7) of section 3132(a); or

8 “(ii) a limited term appointee or lim-
9 ited emergency appointee, as defined in
10 paragraphs (5) and (6) of section 3132(a),
11 who is serving under a political appoint-
12 ment.”.

13 (b) *CLERICAL AMENDMENT.*—The table of sections of
14 chapter 31 of title 5, United States Code, is amended by
15 adding after the item relating to section 3116 the following:

 “3117. *Employment of political appointees.*”.

16 (c) *APPLICATION.*—

17 (1) *APPOINTMENT REQUESTS.*—Section 3117(a)
18 of title 5, United States Code, as added by subsection
19 (a), shall apply to any appointment or request for
20 appointment described in such section submitted to
21 the Associate Director of Merit Systems Account-
22 ability and Compliance after the date of enactment of
23 this Act.

24 (2) *LIMITATION ON APPOINTMENTS.*—Section
25 3117(b) of title 5, United States Code, as added by

1 *subsection (a), shall apply to any individual who*
2 *leaves or departs from a political position (as that*
3 *term is defined in section 3117 of such title, as added*
4 *by such subsection) after the date of enactment of this*
5 *Act.*

6 *(d) REGULATIONS REQUIRED.—The Director of the Of-*
7 *fice of Personnel Management, in consultation with the Of-*
8 *fice of Special Counsel, shall issue regulations necessary to*
9 *carry out this Act and the amendments made by this Act,*
10 *which shall include guidance on the definition of the term*
11 *“personally and substantially participated in a particular*
12 *policy-making activity or similar matter” in section*
13 *3117(b)(2) of title 5, United States Code, as added by sub-*
14 *section (a), consistent with section 2641.201 of title 5, Code*
15 *of Federal Regulations.*

Amend the title so as to read: “An Act to amend title 5, United States Code, to appropriately limit employment in a career civil service position for political appointees and former political appointees, and for other purposes.”.

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2^D SESSION

H. R. 1132

[Report No. 115-387]

AN ACT

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

Reported with an amendment and an amendment to the
title