



Federal Personnel: Conversion of Employees from Appointed (Noncareer) Positions to Career Positions in the Executive Branch

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Summary

The term “burrowing in” is sometimes used to describe an employment status conversion whereby an individual transfers from a federal appointed (noncareer) position to a career position in the executive branch. Critics of such conversions note that they often occur during the transitional period in which the outgoing Administration prepares to leave office and the incoming Administration prepares to assume office. Conversions are permissible when laws and regulations governing career appointments are followed, but they can invite scrutiny because of the differences in the appointment and tenure of noncareer and career employees.

Appointments to career positions in the executive branch are governed by law and regulations that are codified in Title 5 of the *United States Code* and Title 5 of the *Code of Federal Regulations*, and are defined as personnel actions. In taking a personnel action, each department and agency head is responsible for preventing prohibited personnel practices; for complying with, and enforcing, applicable civil service laws, rules, and regulations and other aspects of personnel management; and for ensuring that agency employees are informed of the rights and remedies available to them. Such actions are required to adhere to the merit principles and prohibited personnel practices that are codified at 5 U.S.C. §2301(b) and §2302(b), respectively. These principles and practices are designed to ensure that the process for selecting career employees is fair and open (competitive), and without political influence. The Office of Personnel Management (OPM), on an ongoing basis, and the Government Accountability Office (GAO), periodically, each conduct oversight related to conversions of employees from noncareer to career positions to ensure that proper procedures have been followed. Certain senior politically appointed officers are prohibited from receiving financial awards during the Presidential Election Period, defined in statute and currently covering June 1, 2012, through January 20, 2013.

As part of its oversight of government operations, Congress also monitors conversions. In the 110th Congress, staffing at the Departments of Homeland Security (DHS) and Justice (DOJ) was of particular interest, especially in the wake of the leadership and management deficiencies at DHS during and after Hurricane Katrina, and improper procedures used by DOJ staff in selecting and removing United States attorneys. Both departments received letters from Members of Congress reminding them to examine conversions: the Chairman of the House Committee on Homeland Security, Representative Bennie Thompson, wrote to the DHS Secretary in February 2008, and Senators Dianne Feinstein and Charles Schumer, members of the Senate Committee on the Judiciary, wrote to the Attorney General in July 2008 about this issue. In a December 19, 2008, letter to OPM, Senator Joseph Lieberman requested information on conversions that occurred during the period April 1, 2008, through December 19, 2008. In February 2009 (111th Congress), Senator Feinstein sent a letter to the Secretary of Defense related to conversions within the Office of Detainee Affairs.

In assessing the current situation, Congress may decide that the existing oversight is sufficient. If Congress determines that additional measures are needed, OPM could be directed to report to Congress on the operation of its current policy governing pre-appointment reviews, including recommendations on whether Section 1104 of Title 5, *United States Code* should be amended to codify the policy. The GAO and OPM could be asked to explore options that might result in their recommending and taking timely remedial actions that are seen as necessary to address conversions that occurred under improper procedures. Congress could amend Title 5, *United States Code* to increase the penalties for violating Civil Service laws. This report will be updated as events dictate.

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Background

Some individuals, who are serving in appointed (noncareer) positions in the executive branch, convert to career positions in the competitive service, the Senior Executive Service (SES), or the excepted service.¹ This practice, commonly referred to as “burrowing in,” is permissible when laws and regulations governing career appointments are followed. While such conversions may occur at any time, frequently they do so during the transition period when one Administration is preparing to leave office and another Administration is preparing to assume office.

Generally, these appointees were selected noncompetitively and are serving in such positions as Schedule C, noncareer SES, or limited tenure SES² that involve policy determinations or require a close and confidential relationship with the department or agency head and other top officials. Many of the Schedule C appointees receive salaries at the GS-12 through GS-15 pay levels.³ The noncareer and limited tenure members of the SES receive salaries under the pay schedule for senior executives that also covers the career SES.⁴ Career employees, on the other hand, are to be selected on the basis of merit and without political influence following a process that is to be fair and open in evaluating their knowledge, skills, and experience against those of other applicants. The tenure of noncareer and career employees also differs. The former are generally limited to the term of the Administration in which they are appointed or serve at the pleasure of the person who appointed them. The latter constitute a work force that continues the operations of government without regard to the change of administrations.

Paul Light, a professor of government at New York University, who has studied appointees over the past several administrations, reportedly believes that the pay, benefits, and job security of career positions underlie the desire of individuals in noncareer positions to “burrow in.”⁵ The President of the Senior Executives Association, Carol Bonosaro, echoed this viewpoint in stating that, “Remember, not everybody who comes in is going to have a very high-profile job where they are going to be able to leave and make really good money.... Not everyone has had

¹ Appointments to career competitive service positions include requirements for approved qualification standards, public announcement of job vacancies, rating of applicants, and completion of a probationary period and three years of continuous service; career SES positions include review by the Office of Personnel Management (OPM) and certification of a candidate’s ability by a Qualifications Review Board; and career excepted service positions allow agencies to establish their own hiring procedures, but require those systems to conform to merit system principles and veterans preference. During agency head transitions, OPM suspends the processing of QRB cases under the authority of 5 C.F.R. §317.502(d).

² Appointments to SES positions that have a limited term may be for up to 36 months, and those that are to meet an emergency (unanticipated or urgent need) may be for up to 18 months.

³ GS refers to the General Schedule, the pay schedule that covers white-collar employees in the federal government. As of January 2012 (salaries frozen at January 2010 rates), the salaries from GS-12, step 1, to GS-15, step 10, in the Washington, DC, pay area ranged from \$74,872 to \$155,500.

⁴ Salaries for members of the SES are determined annually by agency heads “under a rigorous performance management system,” and range from the minimum rate of basic pay for a senior level (SL) employee (120% of the minimum basic pay rate for GS-15; \$119,554, as of January 2012; salaries frozen at January 2010 rates) to either EX Level III (\$165,300, as of January 2012; salaries frozen at January 2010 rates), in agencies whose performance appraisal systems have not been certified by OPM as making “meaningful distinctions based on relative performance,” or EX Level II (\$179,700, as of January 2012; salaries frozen at January 2010 rates), in agencies whose performance appraisal systems have been so certified.

⁵ Christopher Lee, “Political Appointees Burrowing In,” *Washington Post*, October 5, 2007, p. A19.

necessarily a strong enough background to go back out. They may just have been a campaign worker.”⁶

Beyond the fundamental concern that the conversion of an individual from an appointed (noncareer) position to a career position may not have followed the legal and regulatory requirements, “burrowing in” raises other concerns. When the practice occurs, there may be these perceptions (whether valid or not): that an appointee converting to a career position may limit the opportunity for other employees (who were competitively selected for their career positions, following examination of their knowledge, skills, and experience) to be promoted into another career position with greater responsibility and pay; or that the individual who is converted to a career position may seek to undermine the work of the new Administration whose policies may be at odds with those that he or she espoused when serving in the appointed capacity. Both perceptions may increase the tension between noncareer and career staff, thereby hindering the effective operation of government at a time when the desirability of creating “common ground” between these staff to facilitate government performance continues to be emphasized.⁷

Selected Law and Regulations

Appointments to career positions in the executive branch are governed by law and regulations that are codified in Title 5 of the *United States Code* and Title 5 of the *Code of Federal Regulations*. For purposes of both, appointments to career positions are among those activities defined as “personnel actions,” a class of activities that can be undertaken only in accordance with strict procedures.⁸ In taking a personnel action, each department and agency head is responsible for preventing prohibited personnel practices; for complying with, and enforcing, applicable civil service laws, rules, and regulations and other aspects of personnel management; and for ensuring that agency employees are informed of the rights and remedies available to them. Such actions must adhere to the nine merit principles and twelve prohibited personnel practices that are codified at 5 U.S.C. §2301(b) and §2302(b), respectively. These principles and practices are designed to ensure that the process for selecting career employees is fair and open (competitive), and without political influence. **Table 1** below presents these principles and practices.

⁶ Ibid.

⁷ See, for example, Robert Maranto, *Beyond a Government of Strangers: How Career Executives and Political Appointees Can Turn Conflict to Cooperation*, Lanham: Lexington Books, 2005, Chapters 2, 3, and 7 in Mark A. Abramson and Paul R. Lawrence (eds.), *Learning the Ropes: Insights for Political Appointees* (Lanham: Rowman and Littlefield Publishers, Inc., 2005); G. Edward DeSeve, *Speeding Up the Learning Curve: Observations From a Survey of Seasoned Political Appointees* (Washington: National Academy of Public Administration and the IBM Center for the Business of Government, 2009); and Paul R. Lawrence and Mark A. Abramson, *Paths to Making a Difference Leading in Government* (Lanham: Rowman and Littlefield Publishers, Inc., 2011).

⁸ The law, codified at 5 U.S.C. §2302(a), defines personnel actions as appointments; promotions; adverse actions or other disciplinary or corrective action; details, transfers, or reassignments; reinstatements; restorations; reemployment; performance evaluations; decisions concerning pay, benefits, or awards, concerning education or training, if such may reasonably be expected to lead to a personnel action; a decision to order psychiatric testing or examination; and any other significant change in duties, responsibilities, or working conditions.

Table I. Merit System Principles and Prohibited Personnel Practices

Merit System Principles	Prohibited Personnel Practices
Recruit from qualified individuals to achieve a workforce from all segments of society; selection and advancement solely on the basis of relative ability, knowledge, and skills; and assure equal opportunity through fair and open competition.	Discriminating for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation.
Fair and equitable treatment of employees and applicants for employment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.	Soliciting or considering any recommendation or statement, oral or written, with respect to any individual who requests, or is under consideration for, any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it, and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of such individual, or an evaluation of the character, loyalty, or suitability of such individual.
Equal pay for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition for excellence in performance.	Coercing the political activity of any person (including the providing of any political contribution or service) or taking any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity.
Employee adherence to high standards of integrity, conduct, and concern for the public interest.	Deceiving or willfully obstructing any person with respect to such person's right to compete.
Efficient and effective use of the federal work force.	Influencing any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.
Retain employees on the basis of the adequacy of their performance; correct inadequate performance; and separate those who cannot or will not improve performance to meet required standards.	Granting any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.
Provide employees effective education and training to improve organizational and individual performance.	Appointing, employing, promoting, advancing, or advocating such, in or to a civilian position any individual who is a relative of such employee if such position is in the agency in which such employee is serving as a public official or over which such employee exercises jurisdiction or control as an official.
Protect employees against arbitrary action, personal favoritism, or coercion for partisan political purposes, and prohibit the use of official authority or influence to interfere with or affect the result of an election or a nomination for election.	Taking or failing to take, or threatening such, a personnel action with respect to any employee or applicant for employment because of any disclosure of information, including to the Special Counsel or an agency Inspector General, by the individual which he or she reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; provided the disclosure is not specifically prohibited by law and if such information is not specifically required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Merit System Principles	Prohibited Personnel Practices
Protect employees against reprisal for the lawful disclosure of information reasonably believed to evidence a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.	<p>Taking or failing to take, or threatening such, any personnel action against any employee or applicant for employment because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; testifying for, or otherwise lawfully assisting, any individual in the exercise of any right referred to above; cooperating with or disclosing information to, the Inspector General of an agency, or the special counsel, in accordance with the law; or for refusing to obey an order that would require the individual to violate a law.</p> <p>Discriminating for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the individual or the performance of others; except this shall not prohibit an agency from taking into account, in determining suitability or fitness, any conviction of the employee or applicant for any crime under federal, state, or District of Columbia law.</p> <p>Knowingly taking, recommending, or approving, or failing to do such, any personnel action if the taking of, or failing to take, such action would violate a veterans' preference requirement.</p> <p>Taking or failing to take any other personnel action if such would violate any law, rule, or regulation implementing, or directly concerning, the merit system principles.</p>

Department and agency heads also must follow regulations, codified at Title 5 of the *Code of Federal Regulations*, that govern career appointments. Among these are Civil Service Rules 4.2 and 7.1:

Sec. 4.2. Prohibition against racial, political or religious discrimination. No person employed in the executive branch of the Federal Government who has authority to take or recommend any personnel action with respect to any person who is an employee in the competitive service or any eligible or [sic] applicant for a position in the competitive service shall make any inquiry concerning the race, political affiliation, or religious beliefs of any such employee, eligible, or applicant. All disclosures concerning such matters shall be ignored, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive branch of the Federal Government against or in favor of any employee in the competitive service, or any eligible or applicant for a position in the competitive service because of his race, political affiliation, or religious beliefs, except as may be authorized or required by law.

Sec. 7.1 Discretion in filling vacancies. In his discretion, an appointing officer may fill any position in the competitive service either by competitive appointment from a civil service register or by noncompetitive selection of a present or former Federal employee, in accordance with the Civil Service Regulations. He shall exercise his discretion in all personnel actions solely on the basis of merit and fitness and without regard to political or religious affiliations, marital status, or race.

Other regulations provide that Office of Personnel Management (OPM) approval is required before employees in Schedule C positions may be detailed to competitive service positions, public announcement is required for all SES vacancies that will be filled by initial career

appointment, and details to SES positions that are reserved for career employees (known as Career-Reserved) may only be filled by career SES or career-type non-SES appointees.⁹

During the period June 1, 2012, through January 20, 2013, defined as the Presidential Election Period, certain appointees are prohibited from receiving financial awards.¹⁰ These appointees, referred to as senior politically appointed officers, are

- individuals serving in noncareer SES positions;
- individuals serving in confidential or policy determining positions as Schedule C employees; and
- individuals serving in limited term and limited emergency positions.

OPM and GAO Oversight of Conversions from Noncareer to Career Positions

When a department or agency, for example, converts an employee from an appointed (noncareer) position to a career position without any apparent change in duties and responsibilities, or that appears to be tailored to the individual's knowledge and experience, such actions may invite scrutiny. OPM, on an ongoing basis, and the Government Accountability Office (GAO), periodically, each conduct oversight related to conversions of employees from noncareer to career positions to ensure that proper procedures have been followed.

An OPM memorandum to the heads of departments and agencies that was issued on November 5, 2009, reiterated that, under Section 1104(b)(2) of Title 5, *United States Code*, and Section 5.2 of Title 5, *Code of Federal Regulations*, "OPM requires Federal agencies to seek our approval before selecting a political appointee for a competitive service position during a Presidential election year" and "conducts merit staffing reviews of proposed SES appointments whenever they occur."¹¹ The memorandum noted that, "if the proposed civil service job is below the SES level, OPM's review has been limited only to competitive service appointments and only those appointments that take place during a Presidential election year."¹²

In a significant change to the policy, the memorandum announced that, beginning on January 1, 2010, departments and agencies "must seek prior approval from OPM before they can appoint a current or recent political appointee to a competitive or non-political excepted service position at any level." A written authorization from OPM is now required whenever an department or agency appoints

[a] current political Schedule A or Schedule C Executive Branch employee or a former political Schedule A or Schedule C Executive Branch employee who held the position within the last five years to a competitive or non-political excepted service position under title 5 of the U.S. Code; or

⁹ These regulations are codified at 5 C.F.R. §300.301(c), 5 C.F.R. §317.501, and 5 C.F.R. §317.903(c), respectively.

¹⁰ 5 U.S.C. §4508 and 5 C.F.R. §451.105.

¹¹ U.S. Office of Personnel Management, Memorandum for Heads of Departments and Agencies, from John Berry, Director, *Political Appointees and Career Civil Service Positions*, November 5, 2009.

¹² Ibid.

[a] current Non-career SES Executive Branch employee or a former Non-career SES Executive Branch employee who held the position within the last five years to a competitive or non-political excepted service position under title 5 of the U.S. Code.

According to the memorandum, the central personnel agency “will continue to conduct merit staffing reviews for all proposed career SES selections involving a political Schedule A, Schedule C, or noncareer SES political appointee before the SES selections are presented to OPM’s Qualifications Review Board (QRB) for certification of executive qualifications.” OPM reminded agencies “to carefully review all proposed SES selections to ensure they meet merit system principles before such cases are forwarded to the QRB.”¹³

OPM Director John Berry explained the policy change by saying that the agency’s “responsibility to uphold the merit system is not limited to Presidential election years nor to competitive service appointments.”¹⁴ He also said that he “delegated decisionmaking authority over these matters to career Senior Executives at OPM to avoid any hint of political influence.” “Pre-Appointment Checklists” for Competitive Service Positions and Non-Political Excepted Service Positions were included as attachments to the OPM memorandum and list the documentation that a department’s or agency’s Director of Human Resources must submit to OPM along with a dated cover letter.

The competitive service pre-appointment checklist includes the following required documentation:

- The position descriptions for the candidate’s current or former appointment and the proposed appointment, including information on why and how the respective positions were established and the relationship between the positions.
- A statement that explains the disposition of the proposed selectee’s current political Schedule A, Schedule C, or noncareer SES position, if vacated.
- The complete file for the proposed merit selection, including the vacancy announcement published in USAJOBS website; recruiting sources and advertising methods used in addition to USAJOBS; the qualification standard; the job analysis, justification of any selective factor, and rating schedule/crediting plan; applications from all candidates who applied with information on how each was rated; agency correspondence with applicants; information on how the regulatory requirements of the Interagency Career Transition Assistance Program were met; documentation on any candidates who declined offers or were passed over; and the referral list(s) issued to the selecting official and the completed referral list documenting the tentative selection.
- The name, title, telephone number, and type of appointment (e.g., career SES, Schedule C, presidential appointee) of the selecting official.

¹³ Ibid. According to OPM, “Qualifications Review Boards (QRBs) are OPM-administered independent boards of senior executives that assess the executive core qualifications of SES candidates [that] must certify that an SES candidate has the broad leadership skills to be successful in a variety of SES positions.”

¹⁴ Ibid.

- The name, title, telephone number, and type of appointment (e.g., career SES, Schedule C, presidential appointee) of the rating panel members, if appropriate.

The pre-appointment checklist for non-political excepted service positions requires documentation that includes the following:

- The position descriptions for the candidate's current or former appointment and the proposed appointment, including information on why and how the respective positions were established and the relationship between the positions.
- A statement that explains the disposition of the proposed selectee's current political Schedule A, Schedule C, or noncareer SES position, if vacated.
- The complete file for the proposed appointment, including evidence of fair and open competition and the recruiting notice, if one was used; recruiting sources and advertising methods; the established qualifications and previous qualification standards, if changed within the previous 12 months; the agency's policy for accepting applications for excepted service positions; applications from all candidates who applied with information on how each was rated; information showing how veterans' preference was considered; and the referral list(s) issued to the selecting official and the completed referral list documenting the tentative selection.
- The name, title, telephone number, and type of appointment (e.g., career SES, Schedule C, presidential appointee) of the selecting official.
- The name, title, telephone number, and type of appointment (e.g., career SES, Schedule C, presidential appointee) of the rating panel members, if appropriate.

For the 2012 presidential election year, OPM reminded the heads of departments and agencies of this policy in a memorandum issued on June 8, 2012. Attachment 3 of the memorandum, on the "Do's and Don'ts" of the policy, OPM cautioned departments and agencies not to

[c]reate or announce a competitive or non-political excepted service vacancy for the sole purpose of selecting a current or former political appointee, Schedule C employee or Noncareer SES employee; or

[r]emove the Schedule C or Noncareer SES elements of a position solely to appoint the incumbent into the competitive or non-political excepted service.¹⁵

To assist departments and agencies, OPM also publishes the *Presidential Transition Guide to Federal Human Resources Management*.¹⁶ The most current edition, released in June 2008, includes detailed guidance on standards of ethical conduct, appointments, and compensation for federal employees.

¹⁵ U.S. Office of Personnel Management, Memorandum for Heads of Departments and Agencies, from John Berry, Director, *Appointments and Awards During the 2012 Presidential Election Period*, June 8, 2012.

¹⁶ U.S. Office of Personnel Management, *Presidential Transition Guide to Federal Human Resources Management*, June 2008, available at <http://www.chcoc.gov/Transmittals/Attachments/trans1300.pdf>.

GAO's oversight focuses on periodic review, after the fact, and, at the request of Congress, of conversions from political to career positions. The agency's last evaluation was published in June 2010, and reported on a review of conversions at 42 agencies. The results of that audit covered the period May 2005 through May 2009, and provide the most current retrospective data. Twenty-six agencies reported 139 conversions. Of that total, 79, or 57% occurred in "five agencies, the Departments of Justice, Homeland Security, Defense, Energy, and Commerce." Sixteen agencies reported no conversions. The evaluation found that

117 of the conversions were at the GS-12 level or above and agencies appear to have used appropriate authorities and followed proper procedures in making the majority (92) of these 117 conversions;

for seven conversions, agencies may not have adhered to merit systems principles or may have engaged in prohibited personnel practices or other improprieties. Five of these appointments were career competitive [and] two were appointments to the excepted service;

for 18 conversions, agencies did not provide enough information for us to make a determination as to whether appropriate authorities and proper procedures were followed; and

thirteen of these conversions were to competitive service positions and five were to career excepted service (non-Schedule C) positions.¹⁷

Oversight by Congress During the 2008 Transition

As part of its oversight of government operations, Congress also monitors conversions. In the 110th Congress, staffing at the Departments of Homeland Security (DHS) and Justice (DOJ), was of particular interest, especially in the wake of the leadership and management deficiencies at DHS during and after Hurricane Katrina, and improper procedures used by DOJ staff in selecting and removing United States attorneys.¹⁸

In a January 2008 report to the DHS Secretary on the transition, the Homeland Security Advisory Council recommended that the department "consider current political appointees with highly specialized and needed skills for appropriate career positions."¹⁹ That same month, an entry in the DHS leadership journal, published on the department's website, discussed transition planning. Then Acting Deputy Secretary Paul Schneider wrote that,

¹⁷ U.S. Government Accountability Office, *Personnel Practices: Conversions of Employees from Political to Career Positions May 2005-May 2009*, GAO-10-688, June 2010, pp. 7, 9, and 11.

¹⁸ See, for example, U.S. Congress, House Select Bipartisan Committee to Investigate the Preparation For and Response to Hurricane Katrina, *A Failure of Initiative: Final Report of the Select Bipartisan Committee to Investigate the Preparation For and Response to Hurricane Katrina*, 109th Cong., 2nd sess. (Washington: GPO, February 15, 2006); U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Hurricane Katrina: A Nation Still Unprepared. Special Report*, 109th Cong., 2nd sess., S.Rept. 109-322 (Washington: GPO, 2006); and U.S. Department of Justice, Office of Professional Responsibility and Office of the Inspector General, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, July 28, 2008.

¹⁹ U.S. Department of Homeland Security, Homeland Security Advisory Council, *Report of the Administration Transition Task Force*, January 2008, p. 6.

as part of this planning, we're filling some of the top jobs previously held by political appointees with career professionals. For example, last year, we made Jay Ahern, a 30-year veteran of the federal government, second-in-command of our Customs and Border Protection component. Just recently, at our Transportation Security Administration, we filled our deputy slot with Gale Rossides, who also has had a 30-year federal career and has served at TSA since its inception six years ago. And we are training and cross-training such senior career people to ensure that DHS will have the continuity of leadership it needs following the transition.²⁰

The *Wall Street Journal* discussed the initiative in a January 11, 2008, article noting that DHS “has begun an unusual—and potentially controversial—effort to smooth the transition to a new administration.”²¹

Both DHS and DOJ received letters from Members of Congress reminding them to examine conversions. On February 7, 2008, Representative Bennie Thompson, Chairman of the House Committee on Homeland Security, wrote a letter to DHS Secretary Michael Chertoff. He reiterated his concerns about personnel vacancies at DHS and stated these views:

I am sure that you would agree that it would be inappropriate to fill career non-political executive level positions with political appointees absent an open and fully competitive process. While I understand that some could argue that these individuals may be well-qualified and can provide continuity during a transition period, others could well argue that to permit political appointees to occupy non-political positions could be viewed by some as an attempt to insulate political appointees from the vagaries of the political appointment system and provide an internal obstruction to the policies of the new administration. Clearly, the latter interpretation is deeply troubling.²²

Representative Thompson also requested that Secretary Chertoff “issue a policy directive to prohibit the ‘burrowing in’ of political appointees into non-political career positions within the Department.”²³ CRS research did not locate a publicly available record of any such directive.

With regard to personnel actions at the Department of Justice, Senators Dianne Feinstein and Charles Schumer, members of the Senate Committee on the Judiciary, reportedly wrote a letter to Attorney General Michael Mukasey on July 24, 2008. According to the *Washington Post*, the letter asked the Attorney General to “exercise vigilance” against political appointees moving into career positions, and stated that, “When unqualified political appointees take over jobs better left to skilled candidates, it threatens the agency’s professionalism and independence. We don’t need ideological stowaways undermining the work of the next administration.”²⁴

On December 19, 2008, Senator Joseph Lieberman, Chairman of the Senate Committee on Homeland Security and Governmental Affairs, sent a letter to the OPM Acting Director, Michael Hager, requesting that data on conversions from noncareer to career positions during the period

²⁰ U.S. Department of Homeland Security, Leadership Journal, “Transition: Heads We Win, Tails You Lose,” January 19, 2008, available at <http://www.dhs.gov/journal/leadership/2008/01/transition-heads-we-win-tails-you-lose.html>.

²¹ Siobhan Gorman, “Politics and Economics: Homeland Security Handoff; Career Employees Move Into Positions Once Held by Political Appointees,” *Wall Street Journal*, January 11, 2008, p. A5.

²² Letter from Representative Bennie G. Thompson to Michael Chertoff, Secretary of the Department of Homeland Security, February 7, 2008.

²³ Ibid.

²⁴ Carrie Johnson, “Mukasey Asked to Watch for Lingerers,” *Washington Post*, July 25, 2008, p. A8.

April 1, 2008, through December 19, 2008, and information on the number of staff responsible for reviewing and approving the pre-appointment requests for FY2005 through FY2009, be provided to the committee by January 9, 2009. Specifically, Senator Lieberman requested these data:

- “for each agency, the number of completed requests for conversions from noncareer to career positions, the number of requests that have been approved by OPM, the number of requests that have been denied by OPM, and the number of requests that have been withdrawn by the requesting agency;
- the date that OPM received each pre-appointment review request and the date that OPM completed the request for each selectee;
- any forms and documentation that provide an explanation of OPM’s review of each appointee’s pre-appointment review for conversion, including the individual’s name, noncareer position, and proposed career position; and
- the number of staff responsible for reviewing and approving the pre-appointment requests for fiscal years 2005 through 2009.”²⁵

OPM responded to Senator Lieberman in a letter, with an attachment, dated January 16, 2009, and provided information available at that time. During the period April 1, 2008, through June 30, 2008, eight individuals who were political appointees converted to career positions in the competitive service or the SES. The letter also stated that requests for conversion to non-SES positions are reviewed by “ten staff members, including three career Senior Executives,” and that requests for conversion to SES positions are reviewed by “eight staff members, including two career Senior Executives.” OPM stated that, in carrying out its statutory role as “guardian of the merit system,” the personnel agency:

rigorously examines each request against mandatory legal requirements that apply in every competitive hiring action. We also apply additional standards aimed specifically at uncovering improper political influence. We require agencies to submit a full record with each request, including vacancy announcements, job analyses and crediting plans, and job applications. We painstakingly look for any evidence that the hiring process was tainted by political influence or unfair competition. If we find such evidence, we withhold our consent to the appointment.²⁶

In February 2009 (111th Congress), Senator Feinstein sent a letter to the Secretary of Defense, Robert Gates, related to “allegations that political appointees at the Department of Defense were improperly converted to career positions by the outgoing Bush Administration.” Stating that “This is especially disconcerting within the Office of Detainee Affairs due to the nature of the policy recommendations that office provides regarding Guantanamo,” she asked the Secretary to “immediately review the circumstances behind the conversion of these positions and the hiring of any former Bush administration appointees as career or temporary appointments in that office.”²⁷

²⁵ “Lieberman Seeks Information to Prevent ‘Burrowing In,’” News Release, December 19, 2008.

²⁶ Letter to Senator Joseph Lieberman from Michael Hager, Acting Director, Office of Personnel Management, with an attachment, January 16, 2009. Provided to CRS by staff of the Senate Committee on Homeland Security and Governmental Affairs by electronic mail on January 28, 2009. Information on developments related to conversions that occurred within OPM following the November 2008 presidential election is available from the author.

²⁷ Press Release, “Feinstein Seeks Investigation Into Reports of ‘Burrowing’ by Bush Appointees at Pentagon,” February 5, 2009, available at [http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=47fe7484-5056-\(continued...\)](http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=47fe7484-5056-(continued...))

In November 2008, and January 2009, *The Washington Post* identified several conversions from noncareer to career positions at such departments and agencies as the National Oceanic and Atmospheric Administration of the Department of Commerce, the Department of Housing and Urban Development, the Department of the Interior, the Customs and Border Protection Agency and the Federal Emergency Management Agency of the Department of Homeland Security, and the Department of Labor, as likely examples of “burrowing in.”²⁸ Following publication of the first of these news reports, Senators Feinstein and Schumer reportedly wrote to President Bush expressing concern about conversions:

Today’s report reveals that senior members of your administration are undermining your public commitment to ease the transition by reorganizing agencies at the eleventh hour and installing political appointees in key positions for which they may not be qualified. We respectfully urge you to stand by your public commitment to a smooth transition by directing executive agencies immediately to halt any conversions of political appointees to career positions.²⁹

White House Press Secretary Dana Perino responded to a question about “burrowing in” during the press briefing conducted on November 18, 2008, by stating that

As a matter of policy, the White House has not encouraged non-career appointees to seek career positions in order to further the President’s policies. The White House doesn’t play a role in that career hiring process. There’s a very specific process that OPM had put forward, ... that gives guidelines for people who are eligible to apply for career positions. Once they do that, they are handled on a case-by-case basis by OPM, and the review is conducted by career employees.³⁰

The President and General Counsel of the Senior Executives Association, in a November 24, 2008, letter to OPM Acting Director Hager, requested that “evidence” that “the competitive selection process was indeed followed, that the selectee who was the former political appointee was the most qualified candidate, and that political influence had no place in the selection” be provided to the organization. The SEA suggested that the evidence consist of “a copy of the job announcement that was released to the general public, a statement explaining the process for each selection, and an accurate listing of the names of political appointees who have been converted to the career SES and the positions to which they were converted.”³¹ The American Federation of Government Employees (AFGE) also called for transparency in the conversion process. The Associated Press reported that OPM personnel records show that 135 appointees received career positions over the period January 2001, when the George W. Bush Administration commenced,

(...continued)

8059-76a9-8a0701b64a57. The letter was dated February 4, 2009.

²⁸ See, for example, Juliet Eilperin and Carol D. Leonnig, “Administration Moves to Protect Key Appointees,” *Washington Post*, November 18, 2008, p. A1. Juliet Eilperin and Carol D. Leonnig, “Top Scientist Rails Against Hirings,” *Washington Post*, November 22, 2008, p. A3. Al Kamen, “The Blair House Witch Hunt Project,” *Washington Post*, January 8, 2009, p. A13. Al Kamen, “Build a Diverse Staff? Yes, He Can—and Did,” *Washington Post*, January 14, 2009, p. A15.

²⁹ Carol D. Leonnig and R. Jeffrey Smith, “Senators Urge Bush to Halt Job Shifts; Officials Deny Sheltering Appointees,” *Washington Post*, November 19, 2008, p. A4.

³⁰ Press Briefing by Press Secretary Dana Perino, November 18, 2008, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=84861>.

³¹ Letter to Michael Hager, Acting Director, Office of Personnel Management from Carol A. Bonosaro, President, and William L. Bransford, General Counsel, Senior Executives Association, November 24, 2008.

through June 2008, and that its own review “identified at least 26 such cases approved during Bush’s final year in office.”³²

Considerations to Enhance Oversight

In assessing the current situation, Congress may decide that the existing system of oversight is sufficient. If Congress determines that additional measures are needed to further ensure that conversions from appointed (noncareer) positions to career positions are conducted according to proper procedures and transparent, the following options could be considered:

- OPM could be directed to report to Congress on the operation of its current policy governing pre-appointment reviews, including recommendations on whether Section 1104 of Title 5, *United States Code* should be amended to codify the policy. The report could be included in the agency’s annual performance plan that accompanies the budget justification submitted to the House and Senate Committees on Appropriations each February. It could provide information on conversions that did not follow proper procedures and the remedial actions taken.
- OPM is authorized to review awards programs at departments and agencies. Congress could direct OPM to review awards granted in the executive branch and certify in its annual performance plan that awards were not granted during the Presidential Election Period. OPM also could be directed by Congress to report on whether any changes are needed in the time period for the Presidential Election Period, that restricts financial awards to senior politically appointed officers. As discussed above, the dates of the Presidential Election Period are defined by law, and in a presidential election year, cover the period from June 1 through the following January 20.
- Congress could mandate that the annual performance plans that accompany department and agency budget justifications submitted to Congress in February of each year include detailed information on conversions during the applicable fiscal year. The performance plans, submitted in the month following the inauguration of the President, could include a certification that awards were not granted during the Presidential Election Period.
- Departments and agencies could mandate that all officials with hiring authority be required to annually certify, in writing, that they understand the legal and regulatory requirements on the conversion of employees from appointed (noncareer) positions to career positions and on the prohibition on awards during the Presidential Election Period. A training session, that could be available electronically, could be provided to those officials who desire to review their knowledge and understanding of the procedures. A hiring official’s failure to follow the proper procedures could be noted on the individual’s performance evaluation.
- GAO and OPM could jointly explore options for the personnel agency, and the departments and agencies, to expedite the transmittal of information on

³² Brett J. Blackledge, “Inside Washington: Appointees Find U.S. Gov’t. Jobs,” Associated Press, January 16, 2009.

conversions to GAO so that any necessary remedial actions can be recommended by GAO and taken by OPM quickly, and closer to the time that the conversions occurred.

- Congress could amend Title 5 *United States Code* to increase the penalties for violating Civil Service laws by “creat[ing] a misdemeanor offense for agency personnel who violate or contribute to the violation of the federal hiring statutes.”³³
- Congress could examine whether Title 5, *United States Code* should be amended to prohibit conversion from political to career positions.

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³³ Lauren Mendolera, “How to Stop a Mole: A Look at Burrowing in the Federal Civil Service,” *New York University Journal of Legislation and Public Policy*, Vol. 13:643, 2010, see pp. 665-671.