

HOW TO STOP A MOLE: A LOOK AT BURROWING IN THE FEDERAL CIVIL SERVICE

*Lauren Mendolera**

INTRODUCTION.....	644
I. BACKGROUND ON IMPROPER BURROWING	646
A. Laws Violated When Improper Burrowing Occurs.....	646
B. How Prevalent Is Burrowing?.....	648
C. Who Burrows?.....	650
II. THE DANGERS OF IMPROPER BURROWING	652
A. Improper Burrowing Leads to Unqualified Civil Servants	652
B. How Burrowing Negatively Affects the Public’s View of Government	655
III. PREVENTING ILLEGAL BURROWING IN THE FEDERAL CIVIL SERVICE	656
A. Improving Agency Oversight and Agency Reporting Requirements	657
1. Recent Changes to OPM Authority.....	657
2. The 2009 OPM Policy Changes Are Inadequate to Significantly Affect Burrowing .	658
B. Improving Termination Procedures for Federal Employees	661
C. Penalties for Violating the Civil Service Laws	665
CONCLUSION.....	671

*A decent . . . examination of the acts of the Government should not
only be tolerated, but encouraged.*

~ William Henry Harrison¹

* Associate, Sullivan & Cromwell LLP; J.D., New York University School of Law, 2010. I would like to thank Judge Robert Katzmann, Claire Martirosian, Garo Hoplamazian, and the staff of *Legislation* for their helpful contributions and unfailing support.

1. Inaugural Address (March 4, 1841).

INTRODUCTION

To ensure an efficient democracy, we must first improve the people who represent it and the processes by which those people are chosen. By its very nature, the federal government embodies diametrically opposed ideals; its role as an impartial overseer of all citizens often conflicts with its role as an interested representative of the majority. This conflict is evident in the two types of positions that exist in the federal civil service.²

The first type of civil service position, referred to as a “career position,” reflects the government’s role as an apolitical meritocracy. These positions may be filled only through impartial, non-political means referred to as “merit system principles” in the federal law.³ The second type of civil service position is a “non-career position.” These jobs are also called “political positions” because, unlike career positions, they may be made without adhering to the statutory merit system principles.⁴ Generally, civil servants hired for these positions are chosen based on their loyalties to the political party in power. Another important distinction between non-career and career positions is the length of time one serves in each position. Political appointees serve at the pleasure of the executive and may be terminated at any time for any reason.⁵ However, unlike political appointees, career civil servants serve permanently and may only be terminated for reasons specified by federal law.⁶

The use of these two different types of positions, career and non-career, is intended to reconcile the competing roles of the government. However, the opposing characteristics of each type of position create new conflicts within the government’s ranks. One such tension is referred to as “improper burrowing.”

Though the definition may differ slightly depending on the source, the term “burrower” is generally used to describe a federal civil servant who is offered a permanent career position after occupying a temporary political appointment without a lapse in time between

2. This term refers to “all appointive positions in the executive, judicial and legislative branches of the Government of the United States.” 5 U.S.C. § 2101 (2006).

3. See BARBARA L. SCHWEMLE, CONG. RESEARCH SERV., RL 34706, FEDERAL PERSONNEL: CONVERSION OF EMPLOYEES FROM APPOINTED (NONCAREER) POSITIONS TO CAREER POSITIONS IN THE EXECUTIVE BRANCH CRS-3 (2008), available at <http://fas.org/sgp/crs/misc/RL34706.pdf>.

4. See *id.* at CRS-1 to -2 (“Generally, these appointees were selected noncompetitively.”).

5. See *Transition to a New Presidential Administration*, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/transition/trans20r-ch1.htm> (last visited Oct. 20, 2010).

6. 5 U.S.C. § 7513(a) (2006).

positions, particularly when the “conversion” from a political to a career position occurs during an election year.⁷ Restated, burrowing occurs when a civil servant is first chosen for an appointed position on the basis of political affiliation; then, without taking a lengthy break, the political appointee is promoted to a non-political career position. Strictly speaking, burrowing, also referred to as non-career to career conversion, is permissible under federal law.⁸ However, one cannot legally convert a non-career civil servant to a career position unless one uses the same merit-based, objective principles that must be followed when filling every career position. This Note does not examine the merits of proper burrowing, or conversions that adhere to the applicable federal civil service laws. Instead, this Note examines only “improper conversions,” or conversions made without adhering to the proper procedures meant to safeguard against favoritism and sabotage. It is these conversions that upset the government’s delicate balance.

When improper burrowing occurs, outgoing politically-appointed executive branch officials circumvent the federal civil service laws in order to promote non-career party members into career positions. Such conversions allow the exiting executive to exert power over the incoming administration and agency personnel without abiding by the safeguards established by Congress over the last thirty years.⁹

This Note examines the mechanisms that allow improper conversions to occur in the federal government, and suggests improvements for each shortcoming. Part I provides background on the burrowing phenomenon, explaining the applicable laws, how frequently illegal burrowing occurs, and the positions vulnerable to improper conversions. Part II then discusses the negative consequences of illegal burrowing. Such side effects, which range from an unqualified civil service to decreasing public faith in agencies, motivate the suggested changes to the civil service system discussed later. Finally, Part III examines a recent development aimed at preventing burrowing and suggests other more comprehensive statutory changes to prevent and punish burrowing. While the government’s recent changes acknowl-

7. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-381, PERSONNEL PRACTICES: CONVERSION OF EMPLOYEES FROM NONCAREER TO CAREER POSITIONS MAY 2001–APRIL 2005 1 (2006) [hereinafter 2006 REPORT] (defining conversion as a change in personnel statuses without more than a three day break).

8. See SCHWEMLE, *supra* note 3, at CRS-1 (“This practice, commonly referred to as ‘burrowing in,’ is permissible when laws and regulations governing career appointments are followed.”).

9. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel before a New President Arrives*, 78 N.Y.U. L. REV. 557, 606–16 (2003) (discussing the effects of improper burrowing on policy).

edge improper burrowing as a problem, this Note argues that it would be more effective for the government to increase penalties for burrowing transgressions rather than increase agency oversight.

I.

BACKGROUND ON IMPROPER BURROWING

This section attempts to clarify important facets of burrowing. First, it explains the intricate laws that apply to civil service hiring decisions in an effort to demystify the process and explain what laws are violated when a civil servant improperly burrows. Next, it explains the widespread nature of burrowing in all levels of the government by providing empirical evidence on the frequency of, and positions vulnerable to, burrowing. Together, the information provides a backdrop for understanding why burrowing occurs and what must be done to correct it.

A. *Laws Violated When Improper Burrowing Occurs*

Understanding the federal laws applicable to burrowing remains one of the most difficult obstacles to reforming the system. The complex and convoluted nature of the civil service laws presents two major problems. Internally, training hiring personnel becomes exponentially more time-consuming and error-prone as the applicable laws increase in complexity. Externally, only a minority of the public knows the applicable civil service laws, and fewer care about improving them. Therefore, before discussing improvements, this Note explains the civil service laws that personnel must follow when converting an individual from a non-career position to a career position. When the laws are not followed by hiring personnel and a government employee is promoted from a political position to a career position without a lapse in time outside of the civil service, improper burrowing has occurred. The pertinent civil service laws are found in Title V of the United States Code and include the merit system principles, the prohibited personnel practices, veteran preference statutes, and where applicable, specific Office of Personnel Management (OPM) hiring requirements. Title V outlines the merit system principles: nine affirmative requirements that must be followed in the hiring process to ensure that career positions are filled based on objective skill and experience, rather than political ties.¹⁰ An example of a merit system principle is a prohibition on discriminatory actions due to a

10. 5 U.S.C. § 2301(b) (2006).

candidate's race, political affiliation, sex, and other qualities.¹¹ Only national security agencies or political positions are exempt from following the merit system.¹²

In addition to the merit system principles, federal law also restricts agency hiring personnel with twelve prohibited personnel practices.¹³ These prohibited acts, also contained in Title V,¹⁴ outline specific procedures or motivations that may not be considered in the hiring process. Prohibited personnel practices include such vague offenses as “grant[ing] any preference or advantage not authorized by law” and “deceiv[ing] or willfully obstruct[ing] any person with respect to such person's right to compete for employment.”¹⁵ Likewise, agencies must abide by veteran preference statutes, which prioritize qualified veteran applicants over non-veteran applicants.¹⁶ Veteran preferences award five to ten additional points, depending on such qualifications as time served or disability acquired during service, to the veteran's passing civil service examination score.¹⁷ Lastly, federal agencies must also follow any additional rules imposed by the OPM.¹⁸ The OPM not only monitors burrowing and compliance with civil service statutes in the hiring process but also establishes stringent reporting and permission requirements for conversions.¹⁹

Improper burrowing occurs if hiring personnel violate any of the aforementioned federal laws when choosing a non-career candidate for a career position. Examples of ways that burrowers violate Title V include: not adequately posting the job advertisement to reach a broad audience of candidates;²⁰ creating a career job with a workload and supervision structure identical to the political job held by a particular

11. *Id.* § 2301(b)(2).

12. Katy Saldarini, *Executive Order Asserts the Power of OPM, MSPB*, GOVERNMENTEXECUTIVE.COM (Jan. 26, 2001), <http://www.govexec.com/dailyfed/0101/012601k1.htm> (stating that Executive Order 13197 requires all federal agencies to abide by the Merit System Principles except those trusted with national security, including the Central Intelligence Agency, Federal Bureau of Investigation, Defense Intelligence Agency, and National Imagery and Mapping Agency).

13. 5 U.S.C. § 2302 (2006).

14. *Id.*

15. *Id.* § 2302(b)(4), (6).

16. *See* 5 U.S.C. § 2108 (2006); 5 U.S.C. § 3309 (2006).

17. *See VetGuide*, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/veterans/html/vetguide.asp> (last visited Aug. 30, 2009).

18. *See* 2006 REPORT, *supra* note 7, at 2.

19. *See id.*

20. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-92-51, PERSONNEL PRACTICES: PROPRIETY OF CAREER APPOINTMENTS GRANTED FORMER POLITICAL APPOINTEES 3-5 (1992) [hereinafter 1992 REPORT] (finding that agencies did not follow proper procedures or made questionable decisions in roughly 20% (9 out of 46) of conversions).

candidate, for the sole purpose of converting that person into a career position;²¹ and improperly applying veteran preferences required by federal law.²² When such violations occur, the letter and spirit of the federal law are violated, upsetting an already delicate balance inherent in government hiring.

B. *How Prevalent is Burrowing?*

Although improper burrowing is a relatively unknown phenomenon and accurate statistics on its occurrence are meager at best, the Government Accountability Office (GAO), an independent agency that acts in conjunction with OPM to ensure government transparency,²³ found instances of improper conversions in every one of its burrowing reports since 1992.²⁴ The rate of improper conversions found in the GAO reports remains steadily around fifteen to twenty percent of all political to career conversions studied over the last decade.²⁵ At the end of the Clinton Administration, 158 political appointees converted to career positions.²⁶ During the George W. Bush Administration, it is suspected that 135 people burrowed in from political to career positions.²⁷ Those numbers reflect the total number of

21. U.S. GEN. ACCOUNTING OFFICE, GAO-02-326, PERSONNEL PRACTICES: CAREER AND OTHER APPOINTMENTS OF FORMER POLITICAL APPOINTEES OCTOBER 1998–APRIL 2001 (2002) [hereinafter 2002 REPORT] (stating that converting a political appointee to a career job merely for the sake of granting them a career job violates the Civil Service Reform Act of 1978).

22. See 2006 REPORT, *supra* note 7, at 50–51, 70–71.

23. See *About GAO*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/index.html> (last visited Aug. 6, 2010).

24. See 2006 REPORT, *supra* note 7, at 4 (finding eighteen improper conversions); 2002 REPORT, *supra* note 21, at 2 (finding seventeen suspect conversions); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-97-165, PERSONNEL PRACTICES: CAREER APPOINTMENTS OF FORMER POLITICAL AND CONGRESSIONAL EMPLOYEES 1–2 (1997) [hereinafter 1997 REPORT] (finding six improper conversions); 1992 REPORT, *supra* note 20, at 3–4 (finding nine improper conversions).

25. See, e.g., 2006 REPORT, *supra* note 7, at 4–5 (finding that in roughly 14% (18 out of 130) of conversions agencies did not follow the proper federal procedures and in nineteen conversions the GAO did not have proper information to assess whether the procedures were followed); 2002 REPORT, *supra* note 21, at 1 (concluding that roughly 15% (17 out of 111) of conversions gave the appearance of political favoritism or other improper motives); 1997 REPORT, *supra* note 24, at 1–2 (finding that agencies did not follow proper procedures in roughly 17% (6 out of 36) of conversions); 1992 REPORT, *supra* note 20, at 3–4 (finding that agencies did not follow proper procedures or made questionable decisions in roughly 20% (9 out of 46) of conversions).

26. Brett Blackledge, *Inside Washington: Some Bush Picks to Keep Collecting Federal Paychecks after Obama Takes Over*, STAR TRIBUNE, Jan. 16, 2009, <http://www.startribune.com/politics/national/37701094.html?page=1&c=y>.

27. *Id.*

conversions that occurred, both proper and improper. Although the GAO has not reported burrowing statistics since 2006, if one assumes a fifteen to twenty percent rate of *improper* burrowing, the average rate reported in the previous decade, one may assume that nearly sixty civil servants illegally burrowed into career positions the last two times the executive changed political parties. Consider improper burrowing in terms of dollars spent by the government. Assuming an average government salary of \$75,000,²⁸ the government is paying over \$4.5 million in salaries each year to civil servants who acquired their jobs illegally. That conservative estimate assumes that burrowers make the average salary, an improbable assumption considering the high level positions burrowed into,²⁹ and does not account for each government employee receiving top-notch health care,³⁰ subsidized vision and dental care plans,³¹ subsidized life insurance,³² up to \$60,000 in educational debt relief,³³ and yearly benefits after retirement.³⁴ Though \$4.5 million per year may seem insignificant, it is more than one third of the amount the government will spend in 2011 to monitor agencies' compliance with the merit system principles.³⁵

Because so few agencies and studies have examined improper burrowing, the GAO's reports are viewed as an authority on the statistical prevalence of burrowing in the federal government. However, it is likely that burrowing occurs at an even higher rate than reported by the GAO. While the federal government has hundreds of agencies,³⁶ the most recent GAO report examined burrowing in only 26 agencies.³⁷ And prior to 2010, OPM did not collect information or require

28. Declan McCullagh, *It's a Good Time to Work for Uncle Sam*, CBS (May 12, 2009), http://www.cbsnews.com/8301-503983_162-5007862-503983.html.

29. See *infra* Part I.C for more discussion about the level of positions typically burrowed into.

30. See *Federal Employees Health Benefits Program*, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/insure/health/planinfo/index.asp> (last visited Aug. 17, 2010).

31. See *Dental Program*, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/insure/dental/index.asp> (last visited Aug. 17, 2010).

32. See *Federal Employees' Group Life Insurance*, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/insure/life/index.asp> (last visited Aug. 17, 2010).

33. See *Student Loan Repayment Program*, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/oca/PAY/StudentLoan/> (last visited Aug. 17, 2010).

34. Dennis Cauchon, *Pension Gap Divide Public and Private Workers*, USA TODAY, Feb. 21, 2007, http://www.usatoday.com/news/nation/2007-02-20-pensions-cover_x.htm.

35. See *infra* Part II.A for more discussion on OPM's role and budget.

36. See *Federal Agencies and Commissions*, THE WHITE HOUSE, <http://www.whitehouse.gov/our-government/federal-agencies-and-commissions> (last visited Oct. 20, 2010).

37. 2006 REPORT, *supra* note 7, at 19.

permission for burrowing into certain positions, thereby skewing the little empirical evidence available on burrowing.³⁸ Likewise, according to a recent survey³⁹ of one agency, seventy-five percent of the respondent executives reported personal knowledge of burrowing in their agency within the two previous administrations.⁴⁰ Though no conclusive empirical evidence exists, if burrowing in general (proper or improper) occurs at a higher rate than assumed by the GAO, it logically follows that the number of instances of improper burrowing may likewise be larger than reported by the GAO. The fifteen to twenty percent rate of improper conversions takes on a new urgency in that disturbing light, and that urgency requires proper analysis of how burrowing occurs and how we prevent it from clouding accountability in the federal government.

C. *Who Burrows?*

Burrowing remains an important problem in the federal civil service, not only because of its prevalence, but also because of the types of positions civil servants burrow into. Illegal burrowing may occur in any career position at any level. But because improper burrowing is illegal,⁴¹ hiring personnel seldom risk repercussions, such as job loss,⁴² to illegally burrow political cronies into inconsequential positions. Likewise, the main motivation behind improper burrowing would be frustrated by converting a political appointee into low level positions. After all, one of the main purposes of burrowing is to influence the new executive's policies and promote the old party's political agenda, and one cannot influence policy from low-ranking career positions. When one understands the crucial positions affected by improper burrowing, the need to understand and prevent illegal conversions becomes more urgent.

As an example of how improper burrowing affects high-level civil service positions, the media reported on improper burrowing in the National Aeronautics and Space Administration (NASA). During the final days of the Bush Administration, Ellen Engleman Connors may have improperly burrowed into NASA, moving from her previ-

38. See *infra* Part III.A for a discussion on the 2009 changes under Director Berry.

39. See David C. Nixon, *Burrowing into the Civil Service* 6 (Apr. 24, 2009) (unpublished paper presented at the Midwest Political Science Association 67th Annual National Conference), available at http://www.allacademic.com/meta/p362926_index.html (reporting that 42% of the respondents reported personal knowledge of burrowing situations within their own agencies).

40. *Id.* at 11.

41. See *supra* Part I.A.

42. See *infra* Part III.B for more information on the penalties for illegal burrowing.

ous political appointment at the National Transportation Safety Board to become the external affairs director at the Johnson Space Center.⁴³ Opponents of Connors' promotion highlight that Connors, now responsible for overseeing "the functions of Community Relations, Education, Public Affairs, and University Research,"⁴⁴ has no scientific or technical background.⁴⁵ Yet her responsibilities include overseeing University Research for an agency with a 2009 budget of \$17.6 billion.⁴⁶

The GAO also found examples of improper burrowing in the upper echelon of national security agencies. In 2003, the Department of Homeland Security hired an applicant to work as a Program Specialist for the Federal Emergency Management Agency (FEMA). The job of Program Specialist included orchestrating new emergency management programs, allocating resources within the agency, and "formulat[ing], present[ing] and execut[ing] budgets" and long-term plans for FEMA.⁴⁷ In making the hiring decision, the Department of Homeland Security official chose an individual with limited experience over a more qualified individual with ten years of relevant experience.⁴⁸ Two years after hiring a less qualified person to manage its budget, FEMA reappeared in the news for its misallocation of millions of dollars after Hurricane Katrina.⁴⁹

Likewise, in 2005 the Department of Health and Human Services (DHHS) publicly advertised a job opening for a Health Scientist Administrator, as required by the merit system.⁵⁰ The Health Scientist Administrator's job involved organizing agency research on an AIDS project.⁵¹ Though nineteen people applied, and four were certified as eligible, DHHS hired the candidate with the lowest rating of the four eligible applicants.⁵² That applicant had previously worked in a non-career position at DHHS.⁵³

43. Blackledge, *supra* note 30.

44. *Johnson Space Center*, NASA, <http://www.nasa.gov/centers/johnson/about/people/orgs/index.html> (last visited Mar. 10, 2010).

45. See Blackledge, *supra* note 30.

46. Press Release, NASA, NASA Unveils \$17.6 Billion Budget (Feb. 4, 2008), http://www.nasa.gov/home/hqnews/2008/feb/HQ_08034_FY2009_budget.html.

47. 2006 REPORT, *supra* note 7, at 60.

48. *Id.*

49. GOV'T ACCOUNTABILITY OFFICE, GAO-08-106, HURRICANE KATRINA: INEFFECTIVE FEMA OVERSIGHT OF HOUSING MAINTENANCE CONTRACTS IN MISSISSIPPI RESULTED IN MILLIONS OF DOLLARS OF WASTE AND POTENTIAL FRAUD (Nov. 2007), <http://www.gao.gov/new.items/d08106.pdf>.

50. 2006 REPORT, *supra* note 7, at 44.

51. *Id.*

52. *Id.*

53. *Id.*

The GAO even found burrowing in the Department of Justice, when lesser qualified individuals were chosen to be Immigration Judges.⁵⁴ The duties of an Immigration Judge include presiding over deportation and exclusion hearings.⁵⁵ That is, an Immigration Judge may uproot a person living in the United States and force them to leave the country, or may preclude a person from ever entering the United States at all. The Department of Justice gave such a crucial job, one which ultimately decides the fate of millions of immigrants currently living in the United States, to a woman with less than six months of immigration experience. In evaluating the non-career to career conversion, the GAO stated that it “raised questions” of “fairness.”⁵⁶

From the preceding anecdotes, it is clear that improper burrowing affects individual agencies and citizens. When a less qualified person is chosen to fill a government position, all citizens reliant on that person, position, and agency suffer. But the negative consequences of burrowing are not limited to individual citizens or even the functionality of individual agencies. Instead, the effects of improper burrowing inhibit the operability of the government as a whole.

II.

THE DANGERS OF IMPROPER BURROWING

When political appointees illegally burrow into career positions, it undercuts the legitimacy of the civil service system and merit-based hiring. Improper burrowing not only hinders the incoming executive’s right to impartially hire career personnel, but also entrenches the incumbent’s party members and political ideologies into the civil service to serve as a constant opposition to the new administration. Most importantly, improper burrowing weakens the government’s legitimacy and accountability in the eyes of the public. This section analyzes the downside of improper burrowing, which functions as a hindrance to open and effective government.

A. Improper Burrowing Leads to Unqualified Civil Servants

Improper burrowing results in a less qualified civil service. This was one of the main reasons for implementing the merit system of federal hiring. The Pendleton Act, passed in 1883, replaced a hiring system that was dependent on the “spoils system” and nepotism with a

54. *Id.* at 65–66.

55. *Id.* at 65.

56. *Id.*

new merit-based system.⁵⁷ Under the spoils system, politicians appointed friends and relatives to serve as civil servants; and government employees' loyalties ran to the politician who appointed them, not to the government.⁵⁸ In the years before passage of the Pendleton Act, prominent politicians in federal government acknowledged that a hiring process motivated by politics "leads necessarily to the filling of offices with incompetent persons, and to a consequent mal-execution of official duties. . . . It elevates party above country."⁵⁹ After its passage, the Pendleton Act was touted in the media as a revolutionary reform whose main purpose was to "first, secure the best service for the public; second, to throw public employment open to the competition on equal terms to all who cared to seek it, without regard to political or other favoritism."⁶⁰ The next major step in civil service merit system reform came with the passage of the Civil Service Reform Act of 1978. That Act reorganized the civil service hiring structure and created three new overseer agencies to ensure compliance with the merit system principles: the Office of Personnel Management, the Merit System Protection Board, and the Equal Employment Opportunity Commission.⁶¹ Congress reformed the merit system in 1978 in order "to provide the people of the United States with a competent, honest, and productive workforce"⁶² and to ensure that hiring personnel appoint individuals on the basis of that person's merit, rather than on political motivations. Both acts became symbols of government reform and steps toward building a civil service accountable to, and qualified to serve, the general public.

As politicians recognized over a century ago, hiring decisions based on favoritism led to a lesser quality civil servant. Improper burrowing will necessarily involve the hiring of a less competent civil servant for the open position. An example will help to illustrate this conclusion. An agency's hiring authority receives two applications

57. Some of the features of the merit-based system, incorporated by the Pendleton Act, include limitations on hiring for political purposes and using skill-based, impartial examinations during the hiring process. EVAN M. BERMAN ET AL., *HUMAN RESOURCES MANAGEMENT IN PUBLIC SERVICE: PARADOXES, PROCESSES AND PROBLEMS* 94 (2d ed. 2006).

58. Ari Hoogenboom, *The Pendleton Act and the Civil Service*, 64 AM. HIST. REV. 301, 302 (1959).

59. This was stated in an 1832 national convention speech by Daniel Webster. See GEORGE S. BERNARD, *CIVIL SERVICE REFORM VERSUS SPOILS SYSTEM* 102 (New York, John B. Alden 1885).

60. *The President and the Merit System*, N.Y. TIMES, June 22, 1901, at 8.

61. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1112 (codified in scattered sections of 5 U.S.C.).

62. *Id.* § 3(1).

(from applicants A1 and A2) for a civil service position for which he must, by law, apply the merit systems principles; he must choose a civil servant based on merit, test scores, experience, and military service rather than favoritism or political affiliation. If he has a relationship with A1 and A1's skills are better than those of A2, the hiring authority may still hire A1 for the position without violating any laws even if A1 holds a political non-career position at the time of application. After all, regardless of his political affiliation, social connection, or previous job status, A1 is the best qualified for the job. Frequently, the person who occupies a similar political position may be the most qualified candidate for a career position. In such instances, he may lawfully burrow into the career position. Therefore, any time a candidate unlawfully burrows into a position, it follows that he may not be the best candidate for the job. Otherwise, lawful burrowing would have occurred, and there would be no reason to circumvent the federal merit system principles.

The GAO, in its burrowing reports, outlined specific instances where less qualified individuals burrowed into career positions on the basis of their political ties.⁶³ For example, the GAO reported that the Department of Homeland Security chose a former non-career appointee with limited experience over a career employee with over ten years of relevant experience.⁶⁴ The Department of Homeland Security offered no explanation for its questionable decision. Similarly, the Department of Housing and Urban Development hired a political appointee with minimal experience over an attorney with twenty-six years of relevant experience at the agency.⁶⁵ Such examples, and others discussed in Part I, demonstrate that when politics rather than merit determine how a position is filled, more qualified applicants fall by the wayside.

Designed to capitalize on relevant experience and ability, the merit system serves as an objective method of ensuring that the best candidate receives the career government job. When hiring deviates from the applicable merit system principles, as with improper burrowing, the agency's staff quality and work product are likely to suffer as a result. Such consequences may only be avoided by adhering to the merit system principles as Congress intended and discouraging violations through stringent penalties.

63. See *supra* Part I.C for more examples.

64. 2006 REPORT, *supra* note 7, at 60–61.

65. *Id.* at 63–64.

B. *How Burrowing Negatively Affects the Public's View of Government*

In 2010, a *CBS News/New York Times* poll showed that the percentage of Americans that disapprove of Congress is at an all-time high, with seventy percent of Americans feeling dissatisfied or angry with Washington politics.⁶⁶ Eighty percent of Americans think that the legislature caters to special interest groups and politics, rather than constituent needs.⁶⁷ It is likely that improper burrowing, a classic example of politicizing a crucial government function, contributes to such a deleterious view of the federal government. In both the media's negative portrayals of burrowing during election years and a public scandal that revolved around a specific instance of burrowing, it is clear that improper conversions negatively affect the public's view of the federal government.

The media plays a large role in connecting improper burrowing with the transparency problems in government. Because the public is largely ignorant about the intricacies of the civil service system and the concept of "burrowing," the media is able to use burrowing to incite disdain for the "politicization" of the civil service and the federal government, especially during election periods. Most remarkably, the media colors the public's view of the government when it portrays illegal conversions as an attempt by the outgoing administration to strategically "plant" supporters into permanent jobs in the incoming administration.⁶⁸ The *Washington Post* reported that burrowing results in a "total disregard for the concerns raised by career field personnel."⁶⁹ Similarly, media coverage of one particular burrowing scandal likely provided the public with a reason to distrust the federal government. In 1997, the GAO reported that the OPM's Chief of Staff himself may have burrowed into a career civil service position without following the applicable civil service laws.⁷⁰ Created in the Civil Ser-

66. See Daniel Farber, *Poll: 70 Percent Angry or Dissatisfied with Washington*, CBS NEWS (Feb. 11, 2010, 6:30 PM), <http://www.cbsnews.com/blogs/2010/02/11/politics/politicalhotsheet/entry6199132.shtml?tag=contentMain;contentBody>.

67. See *id.*

68. See, e.g., Juliet Eilperin & Carol D. Leonnig, *Administration Moves to Protect Key Appointees*, WASH. POST, Nov. 18, 2008, at A1; Christopher Lee, *Political Appointees 'Burrowing In'*, WASH. POST, Oct. 5, 2007, at A19; Dan Froomkin, *Midnight Rulemaking, Last-minute Hires and Executive Fiats*, NIEMAN WATCHDOG (June 10, 2008), http://www.niemanwatchdog.org/index.cfm?fuseaction=ask_this.view&askthisid=00340.

69. Eilperin & Leonnig, *supra* note 68, at A1.

70. 1997 REPORT, *supra* note 24, at 24–26 (finding that, while the GAO could not conclusively prove that there was legal impropriety, the Chief of Staff played a crucial

vice Reform Act of 1978,⁷¹ the OPM monitors agency personnel compliance with the civil service laws.⁷² It is the main agency responsible for burrowing oversight.⁷³ In this instance, the Chief of Staff helped create a new federal career position, called the “Director of the Partnership Center,” while he worked for the OPM.⁷⁴ Then, the OPM Director selected his Chief of Staff to fill the position.⁷⁵ The GAO concluded in its report that this at least created an air of impropriety and at worst was illegal.⁷⁶ When officials tasked with monitoring compliance with civil service laws personally burrow into those oversight positions the public is likely to dismiss government “oversight” as a mere myth.

Despite the GAO’s public reports and the media’s coverage of burrowing in the news, no empirical evidence exists regarding the public’s view of burrowing. But burrowing stands as another example, fuel for an anti-government fire, which may strengthen the public’s disdain for the internal politics of government. It embodies the exact conflict that politicians in the late Nineteenth Century battled with before eliminating the spoils system method of hiring: the fear that the government prioritizes politics over merit.

III.

PREVENTING ILLEGAL BURROWING IN THE FEDERAL CIVIL SERVICE

Precisely because of the aforementioned problems of illegality, accountability, and competence, improper burrowing remains an important problem in the federal civil service. Yet it is a problem that has proven difficult to solve. The intricacies of the federal civil service create easy opportunities for burrowers, in many cases inadvertently *encouraging* people to burrow. This section discusses the shortcomings in the federal civil service that facilitate burrowing and offers suggestions for, if not “solving” burrowing, at least decreasing its occurrence and its benefits to the burrower.

role in creating the position, and worked closely with the Director for three years prior to the creation of the position, thus creating an appearance of corruption).

71. See Civil Service Reform Act of 1978, *supra* note 64.

72. See U.S. OFFICE OF PERS. MGMT., MES-97-1A, INSTRUCTOR’S GUIDE: THE MERIT SYSTEM PRINCIPLES TRAINING MODULE 8 (1999) [hereinafter INSTRUCTOR’S GUIDE], <http://www.opm.gov/ACCOUNT/msptrain.pdf>.

73. See SCHWEMLE, *supra* note 3, at Summary section (“The Office of Personnel Management (OPM) has general authority to examine conversions.”).

74. 1997 REPORT, *supra* note 24, at 24.

75. *Id.* at 25.

76. *Id.* at 24–26.

A. *Improving Agency Oversight and Agency Reporting Requirements*

Recognizing the importance of the OPM, the agency responsible for ensuring compliance with the merit system principles, the Obama Administration recently improved the OPM's power to oversee improper burrowing.⁷⁷ Though the changes to the OPM's oversight role close a longstanding gap that exempted certain positions and conversions, depending on when they occurred, from the OPM's oversight, it will be insufficient to discourage or prevent burrowing. Instead, the government should focus less on oversight agencies and instead expend its resources changing the laws that penalize burrowers.

1. *Recent Changes to OPM Authority*

The Office of Personnel Management, as its name suggests, supervises the federal workforce to ensure accountability in the government.⁷⁸ The OPM monitors compliance with federal laws through specific reporting requirements and random agency checks. It has the statutory authority to create hiring standards and oversee hiring practices regularly to ensure compliance with federal civil service laws.⁷⁹ Additionally, the OPM sporadically reviews specific agency personnel practices to determine if hiring practices are consistent with federal and agency standards.⁸⁰

Until 2009, the OPM only required agencies to seek its permission when they sought to convert any non-career personnel into career personnel during a presidential election review term.⁸¹ Every four years the OPM redefined the length of a presidential review period, though it generally consisted of a twenty-month period prior to an administration change.⁸² Extra measures were warranted during election years because outgoing administrations sought to burrow in their followers before the executive switched political parties.

77. Memorandum from John Berry, Director of the U.S. Office of Personnel Management, Political Appointees and Career Civil Service Positions (Nov. 5, 2010), available at <http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalId=2588>.

78. OFFICE OF PERS. MGMT., STRATEGIC PLAN 2010–2015 3, http://www.opm.gov/strategicplan/StrategicPlan_20100310.pdf (last visited Oct. 17, 2010).

79. See 5 U.S.C. § 1104 (2006).

80. 2006 REPORT, *supra* note 7, at 2.

81. See *id.* (stating that for the 2004 presidential elections, the review period was from roughly eight months before the election, March 18, 2004, until two days before inauguration of the new president, January 18, 2005).

82. See *id.*

Likewise, prior to 2009 the OPM did not review conversions to so-called “career excepted positions.”⁸³ These positions are referred to as “excepted” positions because they are excepted, by law, from the OPM’s competitive hiring procedures.⁸⁴ Not all agencies have career excepted positions. Generally, agencies with career excepted positions have national security or confidential federal missions, including the Central Intelligence Agency and the Federal Bureau of Investigation.⁸⁵

In response to the growing public concern about burrowing, OPM Director John Berry announced a change of policy in a 2009 memorandum.⁸⁶ Instead of only seeking the OPM’s permission during presidential election periods, agencies must now seek permission any time they convert non-career personnel to career personnel under Title V.⁸⁷ Similarly, the memo announced a new procedure for career excepted service. Instead of being exempted from reporting requirements, as they were before the memo, agency personnel that are converted into the career excepted service must now report to the OPM also.⁸⁸ Director Berry’s changes closed important gaps in the federal civil service law. Without OPM oversight, the GAO does not have adequate information to monitor non-presidential election period conversions or excepted service positions.⁸⁹ Director Berry’s changes will now provide the GAO with the empirical evidence to draw conclusions about possible transgressions in the excepted service.

2. *The 2009 OPM Policy Changes Are Inadequate to Significantly Affect Burrowing*

While the 2009 OPM policy changes close an important loophole in the civil service laws, the new policy may have little practical effect on burrowing. Director Berry’s memo assumes that more OPM oversight will prevent, or at least significantly decrease, instances of burrowing. However, empirical evidence suggests that OPM review does not prevent burrowing. According to the 2006 GAO report, of the eighteen instances of burrowing in which agencies failed to follow

83. *See id.* at 9.

84. 5 U.S.C. § 2103 (2000) (defining the term “excepted service”); 5 C.F.R. § 213.101(a) (2000) (explaining that excepted service positions are those that are exempted from OPM oversight by the president or OPM itself).

85. *Federal Employment*, USAJOBS, <http://www.usajobs.gov/EI/howjobsarefiled.asp> (last visited Mar. 10, 2010).

86. *See Berry*, *supra* note 77.

87. *See id.*

88. *See id.*

89. 2006 REPORT, *supra* note 7, at 14 (reporting that GAO could not review nineteen conversions, sixteen of which were because the conversion was to an excepted service position).

proper protocol, seven were subject to OPM review.⁹⁰ That is, the OPM approved roughly forty percent of the cases of illegal burrowing found by the GAO. In one instance, the hiring agency failed to report to the OPM at all as required by federal law.⁹¹ In another case, the OPM failed to review the appointment at all before the required deadline and therefore automatically approved the improper conversion.⁹² On another occasion, the OPM rejected the conversion as improper, but then subsequently approved it when the agency resubmitted an application.⁹³ The conversion, though approved by the OPM on re-review, was still found to be improper by the GAO.⁹⁴ In the remaining instances, the OPM reviewed the conversions and approved them, though the conversions failed to follow federal civil service laws.⁹⁵

The sources of the OPM's shortcomings are unknown. One possible source is lack of accountability. With its director appointed by the president,⁹⁶ the OPM may lack motivation to find and punish improper burrowers. Oftentimes, the director appointed by the president will monitor burrowing of that president's political party at the end of his term. Another possible source of the OPM's inadequate supervision of burrowing may be a lack of resources. For 2010, the OPM's yearly discretionary budget is roughly \$240 million.⁹⁷ The OPM's responsibilities include managing insurance and retirement benefits for more than two million government retirees,⁹⁸ monitoring all agencies' compliance with merit system principles and other federal civil service laws,⁹⁹ and recruiting employees for federal service.¹⁰⁰ Yet despite its great responsibility, the OPM's budget is miniscule when compared to other federal agencies. For example, in 2010 the Equal Employment Opportunity Commission, an agency "responsible for enforcing federal laws that make it illegal to discriminate against a job appli-

90. *Id.* at 5.

91. *Id.* at 14.

92. *Id.*

93. *Id.*

94. *Id.* at 69.

95. *Id.* at 14.

96. Though the director is chosen by the president, directors must also be confirmed by the Senate. Ed O'Keefe, *Berry Sails Through Confirmation Hearing*, WASH. POST, Mar. 26, 2009, http://voices.washingtonpost.com/federal-eye/2009/03/john_berry.html.

97. OFFICE OF PERS. MGMT. CONGRESSIONAL BUDGET JUSTIFICATION 9 (2010), <http://www.opm.gov/budget/2011/2011budget.pdf>.

98. STRATEGIC PLAN, *supra* note 78, at 16.

99. *Id.* at 3.

100. *Id.*

cant,”¹⁰¹ a task that parallels the OPM’s responsibilities, will receive over \$100 million more than the OPM in its yearly budget.¹⁰² Likewise, the amount allocated to the OPM for “merit system audit and compliance,” to ensure that agencies hire people into career positions on the basis of merit rather than political affiliation, has dramatically decreased in the last three years. In 2009, the OPM received \$26 million to ensure agency compliance with the merit system principles.¹⁰³ In 2011, the OPM will receive only \$14 million,¹⁰⁴ an almost fifty percent decrease despite Director Berry’s overwhelming expansion of its workload. If the OPM lacks adequate resources to monitor burrowing, then Director Berry’s mandate will stretch resources even further. Short of delegating the OPM’s activities to another agency or congressional committee, or increasing the OPM’s yearly budget, the OPM may become crippled under Director Berry’s mandate. Because further OPM oversight will likely not reduce incidences of burrowing, either due to political or economic constraints, other solutions should be identified.¹⁰⁵

Because the OPM may not have the resources to review and prevent all instances of burrowing, individual agencies should take a more proactive role to prevent burrowing. Though the OPM generally monitors compliance with federal civil service laws, intra-agency supervision also exists. For example, agency personnel who violate federal civil service laws may be subject to intra-agency discipline.¹⁰⁶ Instead of relying solely on the OPM’s oversight, Congress could develop more stringent intra-agency conversion monitoring. It could require the head of each agency to report annually to congressional committees and provide Congress, under oath, with information about agency conversions. For example, the Department of Justice would report to the Senate Committee on the Judiciary every year, detailing any conversions and the reason the position was filled or created. Such

101. *About the EEOC*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/> (last visited Mar. 20, 2010).

102. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010, app. at 1211–13 (2009), available at <http://www.gpoaccess.gov/usbudget/fy10/pdf/appendix/oia.pdf> (allocating \$367.3 million for the Equal Employment Opportunity Commission for fiscal year 2010).

103. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2011, app. at 1187 (2010), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/opm.pdf>.

104. *Id.*

105. For more discussion about intra-agency improvements, *see generally* PAUL LIGHT, THICKENING GOVERNMENT (1995).

106. For discussion of intra-agency discipline, *see infra* Part III.C.

a change would eliminate the need for GAO reports and provide Congress with an accountable party when improper burrowing occurs.

Alternatively, Congress may seek to concentrate on the protocol in particular agencies, rather than overhauling the whole system at once. The GAO found that certain agencies convert employees from political to non-political positions at an above-average rate. In its 2006 report, the GAO found that four agencies accounted for sixty-six percent of all the non-career to career conversions of federal personnel during the four year time period examined: the Departments of Health and Human Services (thirty-six conversions), Justice (twenty-three conversions), Defense (twenty-one conversions), and Treasury (fifteen conversions).¹⁰⁷ The government could focus its resources on the agencies with the highest rates of conversion, without spending money to expand monitoring for all federal agencies. If one agency presents specific problems, Congress could hold a hearing to examine the OPM's reports and review the agency's hiring decisions for improper conversions. Or, it could require those agencies to reformulate their training procedures to address agency-specific problems and obtain OPM approval of their new training protocols. Such a solution would not only force individual agencies to acknowledge improper burrowing problems and reform their policies, but congressional involvement would increase accountability and public awareness.

However, because the current political climate and economic downturn makes expansion of government oversight or increasing agency budgets unlikely,¹⁰⁸ amending the federal civil service statutes may be more practical. Working to deter burrowing through extra-agency solutions that add risks or decrease rewards to burrowing would lessen the OPM's burden in overseeing burrowing, thereby minimizing the negative effects OPM's insignificant budget has on government accountability.

B. Improving Termination Procedures for Federal Employees

The year the Civil Service Reform Act of 1978 passed, the *National Journal* published an article describing the general public sentiment about government employees: "Bureaucrats. If you're not one of them, you probably can't stand them But you can't do anything

107. 2006 REPORT, *supra* note 7, at Introduction.

108. See generally Paul Steinhauser, *CNN Poll: Majority Says Government a Threat to Citizens' Rights*, CNN (Feb. 26, 2010), <http://www.cnn.com/2010/POLITICS/02/26/citizens.rights.poll/index.html>.

about it, because it's impossible to fire a bureaucrat."¹⁰⁹ One reason that personnel seek to convert from political to career positions is that career civil servants receive extensive protections from suspension and termination. Intended to isolate career civil servants from politically motivated firings, the federal laws also hinder one's ability to correct an improper conversion. The laws applicable when suspending or terminating a career civil servant are numerous and the appeals process is exhaustive. Therefore, to prevent and punish burrowing, this section will consider clarifying and amending the federal termination process specifically to target burrowers.

Under the Lloyd LaFollette Act, a federal employee may only be terminated for "such cause as will promote the efficiency of the service."¹¹⁰ The standard is a stringent one, and the burden of proof is on the government agency seeking the termination.¹¹¹ To meet the standard, the agency must demonstrate a "nexus," or connection, between the employee's particular conduct and a specific injurious effect on the efficiency of the civil service.¹¹² Proving a "nexus" imposes a substantial burden on the government and embodies only egregious conduct. For example, an employee carrying illegal drugs into his federal job does not automatically constitute a "nexus."¹¹³ That is, if a Department of Justice employee carries marijuana into 950 Pennsylvania Avenue, the Department headquarters, that act may not be "cause" for the Department to terminate him. Rather, the Department must prove that his possession of illegal substances adversely affects the civil service system specifically. Such a burdensome and unclear standard presents unique problems for agencies. Agencies lack a tangible, predictable standard to rely on in making termination decisions. Also, because of the vague statutory language, "such cause as will promote the efficiency of the service" may depend more on creative pleading and argumentation than the seriousness of an employee's conduct.¹¹⁴

In addition to burdening the government with a high, ambiguous standard of proof, Title V also imposes procedural burdens on agencies seeking to terminate federal career employees. For example, Title V requires an agency to give employees thirty days notice, except in

109. *Special Report – Bureaucrats Under Fire*, NATIONAL JOURNAL, Sept. 30, 1978, at 1.

110. 5 U.S.C. § 7513(a) (2006).

111. *See Abrams v. U.S. Dep't of Navy*, 714 F.2d 1219 (3d Cir. 1983).

112. *Id.* at 1221.

113. *See McLeod v. Dep't of the Army*, 714 F.2d 918, 921 (9th Cir. 1983).

114. For example, agencies seeking to terminate burrowers may be able to fulfill the "nexus" requirement by arguing that burrowing interrupts "efficiency of the service" because it leads to unqualified personnel and affects agency morale.

the event of a crime,¹¹⁵ thereby increasing the administrative costs and burdens on agency personnel. Because of the grace period, an employee may participate in the activities of the agency for a month before being properly terminated. While these laws frequently exempt the national security agencies,¹¹⁶ they ignore the sensitive material and time constraints imposed on other non-national security agencies. And although requiring such a substantial waiting period provides the employee with an opportunity to examine and challenge the claim, it also imposes a burden on any agency deciding to terminate a career employee for any reason other than outright commitment of a crime.

After seeking termination or suspension of a career civil servant, the agency must also inform the employee of his right to appeal and the time frame for filing an appeal, provide a copy of the model appeal form and board's regulations, and provide the location of the Merit Systems Protection Board (MSPB) office with jurisdiction over any appeal filed by the employee.¹¹⁷ A civil servant may then file a complaint with the Office of Special Counsel (OSC).¹¹⁸ The OSC investigates complaints and may act on its own volition to reach a resolution between the complainant and agency personnel.¹¹⁹ If the OSC cannot resolve a complaint, it may petition for a hearing before the MSPB.¹²⁰ The MSPB hears cases when a civil servant believes an agency violated a federal law that infringed on his employment rights.¹²¹ If a civil servant applies to the MSPB and the Board agrees to review her claim, it generally takes between 180 days and one year for the MSPB to resolve the matter.¹²²

Even if an agency can fulfill the "nexus" requirement and is not discouraged by the extensive waiting periods, agencies need a predictable legal standard in order to evaluate the strength of their termination decisions. Agencies will not terminate employees if there is a

115. 5 U.S.C. § 7513(b)(1) (2006).

116. See Saldarini, *supra* note 15.

117. ISIDORE SILVER, *PUBLIC EMPLOYEE DISCHARGE AND DISCIPLINE* 497-98 (3d ed. 2001).

118. For more information on the role of the OSC and the other agencies discussed, such as the MSPB, see *supra* Part II.

119. See *generally Prohibited Personnel Practices*, U.S. OFFICE OF SPECIAL COUNSEL, <http://www.osc.gov/ppp.htm> (last visited June 17, 2009) (website listing OSC practices and procedures regarding prohibited personnel practices).

120. *Id.* In order to involve the MSPB, the civil servant must be terminated or suspended for more than fourteen days. 5 U.S.C. § 1201.3(a)(2) (2006).

121. See *INSTRUCTOR'S GUIDE*, *supra* note 72, at 9 ("The relationship between the OSC and the Merit System Protection Board resembles that of prosecutor to court.").

122. See U.S. DEP'T OF AGRICULTURE, *JUSTICE ON THE JOB: DISPUTE RESOLUTION OPTIONS FOR USDA FOREST SERVICE EMPLOYEES AND SUPERVISORS* 4 (2000), <http://www.fs.fed.us/cr/eo/correspondence/justice.pdf>.

chance the employee will be reinstated by the MSPB.¹²³ Therefore, before terminating an employee, agencies assess whether a termination decision will be upheld on appeal. Only when an agency is certain that the termination decision will be upheld, initially and on appeal, will it have any incentive to terminate a career employee. However, the vague legal standards do not allow agencies to predict which termination decisions will be upheld. Such unpredictability discourages action. Rather than risk wasting valuable resources on a proceeding that may be overturned, it becomes more efficient for agencies to acquiesce and allow unqualified employees to stay. If agencies consistently allow burrowers to stay in their new career positions, rather than seek their termination, it incentivizes burrowing.

A clearer, more specific legal standard would encourage agencies to bring termination actions against unqualified burrowers. The courts have never determined whether an improper conversion constitutes “cause” for termination purposes. To clarify this ambiguity, the legislature must define “for such cause” to explicitly include improper burrowers. Expounding the legal standard will allow agencies to predict, before the appeals process, whether they can successfully terminate an employee, resulting in a more efficient use of agency resources and a more frequent termination of burrowers. For example, Congress could define “cause” under 5 U.S.C. § 7513 to include this specific language:

“Cause” will include any employee converted improperly from a political position to a career position and whose conversion negatively affects the efficiency of the service; an improperly converted employee negatively affects the efficiency of the service in the following situations: when the candidate was unqualified for the position, when a more qualified person applied for the position, or when the employee himself violated the civil service laws.

Congress would then define “converted improperly” as this Note does, to include “when a federal civil servant is converted from a non-career position to a career position without proper adherence to Title V.” This clarified standard would explicitly allow agencies to terminate improperly converted employees, thereby removing the employee’s incentive to burrow. But it would also confine termination to unqualified employees, or employees whose conversions substantially

123. See, e.g., MERIT SYS. PROT. BD., THE PROBATIONARY PERIOD: A CRITICAL ASSESSMENT OPPORTUNITY 7 (2005), available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=224555&version=224774&application=ACROBAT> (reporting that 52% of agency supervisors, even though they would not have hired the personnel again if given the choice, still expect to retain that personnel).

affect the inner workings of the agency. Burrowing would not constitute per se “cause” on the rare occasions when the best candidate was promoted but the proper protocol was not followed. That way, the proposed statute still adheres to the spirit of Title V by requiring the burrower’s conversion to affect the efficiency of the civil service, but it clarifies the standard to encourage agencies to terminate burrowers.

The opposition may argue that penalties, like termination, should only apply to the agency personnel who authorized the improper conversion, rather than the individual civil servants hired improperly. However, it is only through punishing the beneficiary, in conjunction with penalties for agency personnel who hire without adhering to the Title V requirements,¹²⁴ that one may properly address the source and result of the illegal hiring activity.

C. Penalties for Violating the Civil Service Laws

Another mechanism that facilitates improper conversions is the inconsequential penalties for violating federal civil service laws. If personnel face miniscule penalties for their actions, the cost benefit analysis tips in the favor of burrowing. The legislature should implement meaningful penalties that follow the civil servant even if he chooses to leave his agency. This section considers amending the civil service laws to create a misdemeanor offense for agency personnel who violate or contribute to the violation of the federal hiring statutes.

Under federal law, when an agency’s hiring personnel violate the merit system principles they are subject to intra-disciplinary action from their own agency-employer.¹²⁵ Once the employee exits the agency though, the agency maintains no authority to punish the employee for his violation of federal law or participation in illegal burrowing.¹²⁶ Technically, if agency personnel leave the agency before an investigation is conducted into their transgressions, the OSC may choose to prosecute them and impose up to a \$1,000 civil fine.¹²⁷ In

124. See *infra* Conclusion.

125. See 5 U.S.C. § 2302(c) (2006) (“The head of each agency shall be responsible for the prevention of prohibited personnel practice, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management.”).

126. See U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 138 (2008), <http://www.usdoj.gov/oig/special/s0807/final.pdf>.

127. The OSC investigates and prosecutes the prohibited personnel practices. If agency personnel violate a specific prohibited personnel practice, then a fine may be imposed. *Introduction to OSC*, U.S. OFFICE OF SPECIAL COUNSEL, <http://osc.gov/intro.htm> (last visited June 17, 2009).

order to subject an ex-employee to the small fine though, the OSC must first present a case against the employee before the MSPB.¹²⁸ The Board must then hold a hearing, which requires the agency to submit a narrative response and includes a prehearing conference and discovery period.¹²⁹ After the Board issues a final order fining the employee, the employee may appeal the decision further.¹³⁰ Because such a hearing is an impractical use of the agency's and the OSC's resources, the OSC does not bring such cases before the Board and opts for private settlements instead.¹³¹ Practically, punishment for agency personnel who participate in illegal burrowing is only available if the employee remains with his agency. There are no criminal sanctions for violating the federal civil service laws.¹³²

In practice, when an agency employee participates in burrowing and then exits the agency before the investigation commences, he escapes punishment. The media highlighted this lack of extra-agency penalty during the DOJ hiring scandals in 2008. In its report, the Office of Professional Responsibility and the Office of the Inspector General, two overseer agencies that monitor DOJ hiring, concluded that the DOJ improperly used political motivations to hire, or not hire, employees and interns. The violations were egregious and ranged from asking each candidate about his party affiliation, to using pre-interview internet searches containing the search terms "democrat," "abortion or pro-choice," and "homosexual" to determine whether the DOJ would hire candidates.¹³³ Each of these hiring tactics violated federal civil service laws, which disallow hiring decisions based on a

128. See 5 U.S.C. § 1215(a)(3) (2006) ("A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed five years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000.").

129. See *Judges' Handbook: Merit Systems Protection Board*, MERIT SYS. PROT. BD. 28, 32, <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT>.

130. *MSPB Initial Appeals Frequently Asked Questions*, MERIT SYS. PROT. BD., <https://e-appeal.mspb.gov/faq.aspx#17> ("A petition for review by the MSPB must be filed within 35 days after the date the initial decision is issued.").

131. This author cannot find any cases in which the OSC successfully brought an action to fine an employee that had left the agency since the transgression occurred. The MSPB contact, Matt Shannon, claims that OSC does not bring such employee transgressions before the Board and will more often negotiate with the employee. See Email from Matt Shannon, Clerk of the Board, Merit Sys. Prot. Bd. (Mar. 19, 2009, 7:29:42 EST) (on file with author).

132. *Politicized Hiring at the Department of Justice Before the S. Comm. on the Judiciary*, 110th Cong. 21 (2008) [hereinafter *Politicized Hiring*] ("There is no criminal punishment that we see for this conduct.").

133. See U.S. DEP'T OF JUSTICE, *supra* note 126, at 50.

candidate's political views.¹³⁴ While the Office of the Inspector General found that three individuals in the DOJ upper echelon violated federal civil service laws and DOJ policies, the Inspector filed and publicized the report four years after the first violations occurred.¹³⁵ By that time, none of the individuals implicated by the report still worked at the Department.¹³⁶ The DOJ reported that, because the employees left the DOJ prior to the investigation, no one could be disciplined.¹³⁷ The report made no mention of pursuing a civil fine or MSPB hearing against the individuals,¹³⁸ a predictable omission given the impractical nature of the MSPB fining procedure.

One way to encourage compliance with the merit system is to increase the penalties for violating the merit system principles and prohibited personnel acts. The penalties for violating civil service laws remain too lenient. They do not function to deter violators, nor do they adequately lay out a policy of intolerance to improper personnel actions, especially when an employee leaves the department before any investigative report surfaces. During a July 2008 hearing before the Senate Judiciary Committee, Senator Charles Schumer (D-NY) considered creating a misdemeanor statute for personnel who made hiring decisions without adhering to the federal civil service laws.¹³⁹ He lamented about the DOJ hiring scandal, "it sticks in many people's craw that these horrible things were done and simply because you resign

134. See 5 U.S.C. § 2301(b)(1)–(2) (2006).

135. The report used surveys from employees and potential employees interviewed by the Department of Justice from January 2004 to 2007. The Inspector General found violations dating back to 2004, and published the report in July 2008. U.S. DEP'T OF JUSTICE, *supra* note 126, at 3.

136. The report that examined the civil service law violations in the DOJ implicated three individuals: Monica Goodling, then White House liaison; Kyle Sampson, then Chief of Staff to the Attorney General; and Jan Williams, who became White House liaison after Monica Goodling left the Department. Actions that violated civil service and Department of Justice hiring laws included providing the Office of Inspector General with false information, rejecting a well qualified prosecutor because of his wife's political ideologies, and appointing an unqualified more junior attorney for a position prosecuting counterterrorism issues. But because the statutes only allow intra-departmental discipline, the three violators could not be punished after leaving the Department. U.S. DEP'T OF JUSTICE, *supra* note 133, at 135–39.

137. *Id.* at 138. ("Because Goodling, Sampson, and Williams have resigned from the Department, they are no longer subject to discipline by the Department for their action described in the report.")

138. See generally *id.*

139. In a Congressional hearing before the Senate Judiciary Committee, Senator Charles Schumer voiced his opinion about Department of Justice personnel who violated civil service laws then left the Department before punishment. He proposed a misdemeanor statute, but Inspector Glenn Fine resisted the idea, stating that he believed criminal and civil laws should be kept separately. See *Politicized Hiring*, *supra* note 132.

from the department you escape without punishment.”¹⁴⁰ However, the Senator never submitted a bill to committee for consideration.

The legislature should consider creating a misdemeanor statute for agency personnel who violate civil service laws. Creating a misdemeanor offense would establish two substantial deterrents: it would present a harsher penalty and it would be more effectively implemented than any currently available punishments. By creating harsher penalties for violators, such as an increased fine or possible jail time, a misdemeanor would encourage greater adherence to civil service procedures. Likewise, a misdemeanor would follow any employee who violated federal law, thereby preventing employees from leaving the agency and escaping all meaningful punishment. Aside from increasing the penalty and providing a punishment for employees that leave the hiring agency, a misdemeanor statute would also improve the structure for imposing a fine on violators. Unlike the current MSPB structure used to fine employees, which requires the agency, the OSC and the MSPB to work seamlessly to impose a negligible fine of up to \$1,000, a misdemeanor statute transfers sole prosecutorial duties to the DOJ where prosecutions would occur in federal court under federal rules. Because a misdemeanor would eliminate the lengthy and numerous procedures that must currently be followed by the OSC and the MSPB to fine an employee, and because the resulting fine would not be restricted to \$1,000, this statute would create a more practical punishment structure. In summary, a misdemeanor statute would deter burrowing by increasing the available punishments, and it would solve the practical problems associated with having to rely almost exclusively on intra-agency punishments.

However, the misdemeanor statute must be carefully crafted in order to prevent over- and under-enforcement issues. When writing the misdemeanor statute, the sponsor’s most important consideration will be which level of culpability to require for the misdemeanor to apply. The two logical choices are “knowingly,” whereby the violator is aware of or knows he is violating the law, and “recklessly,” whereby the violator disregards or is indifferent to the risk that he is breaking the law.¹⁴¹ To prove that a civil servant violated the law “knowingly,” the prosecutor would have to prove that the servant was “practically certain that his conduct will result in” a violation of civil service laws.¹⁴² The prosecutor must present evidence that the hiring

140. *Id.*

141. To find the definitions of “reckless” and “knowledge,” see BLACK’S LAW DICTIONARY 1053 (8th ed. 2008).

142. MODEL PENAL CODE § 2.02(2)(b)(ii) (1985).

personnel or supervisor knew about the laws, either through intra-agency training or OPM memoranda, and hired an improper burrower without adhering to them. “Recklessly,” on the other hand, does not require explicit knowledge of the laws violated. Rather, a civil servant “recklessly” facilitates burrowing if his actions “grossly deviate from the standard of care that a law-abiding person would observe.”¹⁴³ Under “recklessly,” the prosecutor would not have to provide evidence of particular training or OPM memoranda that the hiring personnel disregarded. Instead, the prosecutor could argue that hiring personnel, by virtue of their profession, are on notice that laws apply to their hiring decisions and a law-abiding citizen would investigate the merit system principles and prohibited personnel practices before hiring burrowers.

In determining the proper culpability level, the sponsor should weigh two important factors: the expansiveness of the statute and problems of proof. For example, opponents to the misdemeanor statute may claim that the statute will snare too many innocent civil servants. During the aforementioned Senate committee hearing, Inspector General Fine voiced a concern that the misdemeanor statute would encompass unwitting participants and would provide too harsh a penalty for hiring mistakes.¹⁴⁴ While Inspector Fine’s concern may come to fruition if the statute was strict liability or required mere “negligence,” the issue is hedged by requiring a “knowing” or “reckless” violation for the misdemeanor to apply. That way, if personnel violate civil service laws due to ignorance or improper training, they will not incur a criminal penalty, only the less severe intra-agency consequences.

Because “knowingly” and “recklessly” are the two highest levels of culpability, they may place a substantial burden of proof on the prosecutor. While adopting a “knowing” standard would provide the most protection to hiring personnel who inadvertently violate civil service laws because of improper training, using “knowingly” will increase the prosecution’s burden even more. To combat proof problems, regardless of the statutory culpability, drafters may consider suggestions from the Congressional Resource Service (CRS). CRS, in its report on agency burrowing, suggested that all agency officials involved in hiring decisions should sign an annual statement, verifying that they understand the applicable legal and regulatory require-

143. *Id.* § 2.02(2)(c).

144. See *Politicized Hiring*, *supra* note 132 (“To criminalize violations of civil service law might expose a lot of people to potential misdemeanors in circumstances not like that.”).

ments.¹⁴⁵ Such a statement should be persuasive proof for the prosecution to use, as it bears directly on the violator's knowledge or reckless disregard of the civil service laws. Likewise, with the OPM now requiring OPM permission and oversight for all instances of burrowing,¹⁴⁶ courts would have paperwork from hiring personnel for each conversion. The only conversions with no paperwork would be per se illegal, and persuasive as evidence of intentional violations, especially in conjunction with the CRS statement of knowledge.

A "recklessness" standard balances these competing interests most effectively. Recklessness requires more than negligence or unwitting violation of the civil service laws. Federal hiring personnel know that there are applicable federal statutes that restrict their hiring decisions. Specific examples of burrowing found by the GAO, such as creating a position that exactly maps to an appointee's current position and skills,¹⁴⁷ demonstrate an understanding of the federal laws and a blatant attempt to circumvent them. Recklessness would apply to such individuals without trapping inexperienced low-level personnel who make the rare legitimate mistake. Yet with the recklessness standard the evidentiary burden is not so high that the misdemeanor statute becomes ineffective due to proof problems.

One may resist a misdemeanor statute by arguing that intra-disciplinary penalties are favorable, since they enable a department to handle its own personnel problems; the head of an agency has more institutional competence to investigate transgressions, and the government should defer to a day-to-day supervisor over a criminal prosecutor. However, to be effective, oversight must come from outside the agency. With improper burrowing, any violation may also implicate the agency head or high level agency officials in such a way that would impair an intra-agency investigation. If an agency head refuses to investigate or report personnel in his department for their knowing violation of federal law, he should not be protected by weak penalties.

Regardless of the level of culpability, creating a misdemeanor offense for violating civil service laws would add an additional layer of protection against improper burrowing. While a misdemeanor statute with a heightened culpability requirement may only punish the most egregious offenses, the misdemeanor offense will not replace current intra-agency solutions. If personnel violate civil service laws with a lesser culpability than "knowingly" or "recklessly," the personnel's department may still issue intra-departmental penalties and, in

145. See SCHWEMLE, *supra* note 3, at 11.

146. See *supra* Part II.A.

147. 2006 REPORT, *supra* note 7, at 62.

the case in which violators leave the department, may report the violation to other government agencies to be weighed in future hiring decisions. By creating such a distinction, the legislation would punish the most flagrant violators in a way they cannot escape by changing departments or jobs, but still allow agency control over internal affairs of a less severe nature.

Ultimately, while the intricacies of culpability and hiring authority must be ironed out by the bill's sponsor, a misdemeanor statute would effectively reduce instances of illegal burrowing. If federal employees know, and are informed each year in a periodic memo from the OPM, that their violations of federal civil service laws will follow them even after leaving their respective agencies, they will be less likely to risk their job security and futures. And with Director Berry's push towards more accountability and oversight in government, the climate is ripe for this substantial change in policy.

CONCLUSION

Each step down the civil service road, from the applicable laws to the oversight agencies, contains dramatic room for improvement. Improper burrowing, unlike other civil service transgressions, has the disadvantage of only appearing in the newspapers and the blogosphere when the executive changes political parties, at a minimum every four years. Such timing removes urgency from the issue; after all, we have four more years to create a solution. And even then, the complicated nature of the civil service system placates the public from demanding substantial changes to the system. It presents a vicious circle: an executive tries to leave his influence on an agency by improperly burrowing his friends, the transgression (sometimes) comes to light years after that executive leaves office, there is public ideological opposition, then the topic is written off as an unfortunate side effect of living in a democracy. The problem resurfaces four, eight, or more years later when the political climate is changed and the incoming administration is bogged down in transition work. By then, no one in the executive remains motivated to institute change in agencies to prevent burrowing, because when they leave office, they may need to exploit the same loopholes. Such inadequacies in the civil service lead to unqualified personnel and a lack of accountability to the public.

Therefore, the push for change must come from Congress or from outside government, from legal scholars and former public servants. And while Director Berry's expansion of OPM oversight demonstrates a willingness to improve the civil service system, OPM oversight will have a negligible effect on burrowing. Therefore, Congress should

seek solutions in amending the federal civil service termination and punishment statutes. Only by reducing the benefits of burrowing and increasing the extra-agency consequences will Congress fully address the problems that have perverted our civil service system since the 1880s.