GOVERNMENT ACCOUNTABILITY PROJECT
1612 K STREET NW
SUITE 1100
WASHINGTON, DC 20006
(202) 457-0034 (VOICE), X 124 240-888-4080 (c)
(202) 457-0059 (FAX)
E-MAIL: INFO@WHISTLEBLOWER.ORG
WEBSITE: WWW.WHISTLEBLOWER.ORG

FACSIMILE TRANSMITTAL SHEET

TO: CLERK of the BOARD c/o OSP. CLK MATTHEW SHANNON
FROM: TOM DEVINE
COMPANY: U.S. MERIT SYSTEMS PROTECTION BOARD
DATE: 3/1/2010
FAX NUMBER: 202-653-7130
TOTAL NO. OF PAGES INCLUDING COVER: 17
PHONE NUMBER: 202-653-7500
SENDER'S REFERENCE NUMBER:
RE: AMICUS CURIAE BRIEF FOR CONWAY/NORTHWAY/CRUMPLER NSUC
YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

RECEIVED MSPB
2010 MAR -2 AM 8:10
CLERK OF THE BOARD

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CONYERS AND NORTHOVER,
Appellants,

v.

DEPARTMENT OF DEFENSE,
Agency.

Docket No. CH-0752-09-0925-I-1
Docket No. AT-0752-10-0184-I-1

BRIEF OF THE GOVERNMENT ACCOUNTABILITY PROJECT AS AMICUS CURIAE

PURSUANT TO 75 FEDERAL REGISTER 6728 NOTICE REQUESTING BRIEFS IN THE MATTERS OF *CONYERS V. DEPARTMENT OF DEFENSE* AND *NORTHOVER V. DEPARTMENT OF DEFENSE*

THOMAS M. DEVINE
LEGAL DIRECTOR,
GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street NW, Suite 1100
Washington, DC 20005
(202)408-0034 Ext. 124
COUNSEL OF RECORD, AMICUS CURIAE
ON THIS BRIEF: KASEY DUNTON

TABLE OF CONTENTS

INTRODUCTION....1

INTEREST OF THE AMICUS....3

ARGUMENT....4

I. The *Crumpler* Analysis Would Allow Federal Agencies to Cancel Any Independent Due Process Rights to Enforce Merit System Principles for "Sensitive" Jobs....4

A. The Board Would Not Be Able to Review Agency Decisions to Classify Positions as "Sensitive."....4

B. Agencies Would Not Be Required to Provide Any Due Process for Sensitivity Decisions....5

II. The Rationale Articulated in the *Crumpler* Decision Cannot Coexist with the Supreme Court's *Egan* Decision on which It Is Based....7

III. The Analysis Articulated in the *Crumpler* Decision Cannot Coexist with the Constitution.... 9

IV. The Analysis Articulated in the *Crumpler* Decision Cannot Coexist with the Merit System....11

CONCLUSION....14

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CONYERS AND NORTHOVER,
Appellants,

v.

DEPARTMENT OF DEFENSE,
Agency.

Docket No. CH-0752-09-0925-I-1
Docket No. AT-0752-10-0184-I-1

BRIEF OF THE GOVERNMENT ACCOUNTABILITY PROJECT AS AMICUS CURIAE

PURSUANT TO 75 FEDERAL REGISTER 6728 NOTICE REQUESTING BRIEFS IN THE MATTERS OF *CONYERS V. DEPARTMENT OF DEFENSE* AND *NORTHOVER V. DEPARTMENT OF DEFENSE*

INTRODUCTION

The Government Accountability Project respectfully submits this amicus curiae brief in response to the notice in 75 Federal Register 6728 (Feb. 10, 2010).

In 2009 the Merit Systems Protection Board issued two landmark decisions whose legacy could functionally eliminate consistent Executive branch-wide standards and independent enforcement of the merit system. Merit system principles generally, and whistleblower protection in particular, would be under firm agency control with no functional oversight. In *MacLean v. Department of Homeland Security*, 112 M.S.P.R. 4 (2009) the Board held that agencies may enforce open-ended secrecy rules that cancel the free speech rights found in 5 USC § 2302(b)(8) of the Whistleblower Protection Act.[1] In *Crumpler v. Department of Defense*, 2009 WL 3600334, 2009 M.S.P.B. 224, the Board went further, holding that employees are not

[1] *See* Amicus Curiae Brief of Government Accountability Project (March 9, 2009).

entitled to independent due process rights if their position has been designated by the employing agency as "sensitive," a vague category defined as any that "could enable its occupant to bring about a material adverse effect on national security." 5 CFR 732.201. Although the *Crumpler* case has been vacated, the confusion created by the decision should be erased through an unequivocal restoration of the Board's mandate to enforce the merit system. The analysis behind the *MacLean* and *Crumpler* cases replaces the national civil service with a feudal structure granting agencies, normally institutional defendants, the power to customize merit system due process rights as they see fit.

The Board is to be commended for vacating *Crumpler* and seeking views from *amici.* Pending legislation to restore the Whistleblower Protection Act is in the final stages. However, no bills address the decisions which balkanized both merit system due process rights and whistleblower free speech rights. That is unfortunate, because the *Crumpler* analysis and the *MacLean* decision would render the new legislation largely a voluntary guideline, to be followed or ignored at the whim of agency discretion. The Board's leadership is both needed and welcomed.[2]

INTEREST OF THE AMICUS

The Government Accountability Project (GAP) is a non-partisan, non-profit public interest law firm specializing in legal advocacy for "whistleblowers" – government and corporate employees who use free speech rights to challenge abuses of power that betray the public interest.

GAP's efforts are based on the belief that a professional and dedicated civil service is essential to an effective democracy. As the link between the government and the public it serves,

[2] The law would be clarified if the Board chooses to address in *Conyers* and *Northover* the misstatement of law caneling independent due process rights, and mischaracterization of defined terms such as "security clearance" in the *Crumpler* Decision. *See Crumpler*, slip op. at 5.

civil servants are the foundation of a responsible, law-abiding political and corporate system. However, when whistleblowers encounter retaliation or removal for speaking truth to power, that link is severed. While laws written to protect federal employees from prohibited personnel practices, particularly whistleblower reprisals, are an important first step, laws cannot fulfill their intended purpose if they remain unenforced. It is GAP's firm belief that, in order to protect both the independence of the civil service and the responsiveness of federal institutions to the citizenry, dedicated members of the federal civil service must not be forced to choose between their jobs and their integrity.

GAP has substantial expertise on protecting government employees' rights, having assisted over 5,000 whistleblowers since 1979. GAP attorneys have testified regularly before Congress on the effectiveness of existing statutory protections, filed numerous amicus curiae briefs on constitutional and statutory issues relevant to whistleblowers, co-authored the model whistleblower protection laws to implement the Inter-American Convention Against Corruption, and led legislative campaigns for a broad range of relevant federal laws, including the Whistleblower Protection Act of 1989, P.L. No. 101-12, 103 Stat. 16 (April 10, 1989) (WPA) and subsequent 1994 amendments, as well as the employee rights provisions in the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514(A) and all six corporate whistleblower statutes passed subsequently.

GAP also serves as counsel in *Grimes v. Department of Justice* (Docket No. AT-0752-09-0698-I-2). Ms. Grimes was a Department of Justice paralegal who blew the whistle on alleged politicization and prosecutorial misconduct by the U.S. Attorney in a prosecution of the Governor of Alabama. Although she did not need classified access for her job duties, she was terminated on grounds that she is not eligible for a security clearance due to alleged false

statements in a confidential mediation. Her case is one of several currently pending which the Board has dismissed without prejudice, pending resolution of equivalent or identical issues to those in *Conyers* and *Northover*.

ARGUMENT

I. THE *CRUMPLER* ANALYSIS WOULD ALLOW FEDERAL AGENCIES TO CANCEL ANY INDEPENDENT DUE PROCESS RIGHTS TO ENFORCE MERIT SYSTEM PRINCIPLES FOR "SENSITIVE" JOBS.

If the principles articulated in the *Crumpler* opinion are not contradicted, the Board, an independent authority charged with maintaining a consistent body of law, no longer will be able to enforce merit system principles for any "sensitive" federal position. Individual agencies would replace the Board and possess unreviewable discretion to substitute an "at will" doctrine for the current merit system enforced through due process. Two structural factors make that result inevitable.

A. The Board would not be able to review agency decisions that classify positions as "sensitive."

Whether a position actually requires eligibility for a clearance is not reviewable by the Board or any other extra-agency entity. This means agencies can designate or re-designate any position at any time as noncritical sensitive, and avoid Board review of subsequent actions by exploiting that status. Chairman McPhie emphasized that the Board does not have authority to review agency designation of a position as sensitive, including noncritical sensitive jobs for which a clearance or access to classified information is unnecessary. *Crumpler,* slip op. at 4-5; *Skees v. Department of the Navy,* 864 F. 2d 1576, 1578 (Fed. Cir. 1989); *Bolden v. Department of the Navy,* 62 M.S.P.R. 151, 154 (1994). Furthermore, these decisions can be made very casually. In *Doe v. Department of Justice*, 2009 WL 3785086 (MSPB 2009), a memorandum to

staff that "All AUSA positions and Information Technology positions are designated Level 4" was adjudicated sufficient to establish security clearance eligibility as a position requirement.

Agencies already are taking advantage of this license to disqualify workforces from the merit system *en masse*. In *Crumpler*, the Department of Defense applied noncritical sensitive status to a checkout cashier, as well as to all other civilian employees on an Air Force base. As confirmed by discovery documents in *Grimes*, in three fourths of all U.S. Attorney offices a majority of employees were rendered unprotected by the merit system as their positions are designated noncritical sensitive. The average is 57%, and up to 70%.[3]

B. Agencies would not be required to provide any due process for sensitivity decisions.

It is not disputed that under Executive Order 12698, agencies must provide internal due process for security clearance decisions, and that under *Egan* the Board can review and enforce the agency procedures. That is not the case for position classification designations under Executive Order 10450, even for noncritical sensitive positions.[4]

Ironically, that means judgment calls with the least national security significance receive the largest exemption from merit system rights, somehow on national security grounds. To illustrate, in *Grimes* the Department of Justice did not provide the employee with due process rights that would have been available had it been seeking to revoke her clearance. Under Department of Justice regulations, employees whose security clearance is revoked or denied are able to appeal that decision to the Access Review Committee (ARC).[5] However, as noted by the Administrative Judge in *Doe v. Department of Justice*, an employee whose eligibility for a clearance was revoked cannot challenge that decision before the ARC because there was no

---

[3] Grimes v. Department of Justice, Document PLS

[4] In Section 14(a)(2), the Office of Personnel Management has limited authority to conduct studies and recommend improvements to the National Security Council if it finds deficiencies such as violation of individual rights.

[5] *See* 28 C.F.R. 17.47(d) (2009)

"actual access to classified information due to [a] lack of a security clearance." *Doe* at 4-5. In *Grimes*, as in *Doe*, there were no internal processes to appeal the decision that led to termination, because there was nothing on access to classified information for the ARC to review.

Without a national merit system, the best case scenario under a *Crumpler* structure would be a feudal, inconsistent hodgepodge of job classification standards and due process rights that vary from agency to agency. This already is occurring. The term "noncritical sensitive" does not have a standard meaning across the executive branch. The national security risk can be as high as duties that require regular receipt of Secret and Confidential information, or as low as an individual who has access to "market sensitive information."[6] In some agencies, the terms "noncritical sensitive" and "public trust" are used interchangeably or in conjunction with one another, while in others they are two distinct levels requiring different degrees of background investigation.[7]

The same inconsistencies are occurring for due process rights. At the Department of Navy, procedural protections on eligibility for a sensitive position are the same as those for a clearance.[8] By contrast, as confirmed in *Grimes*, the Department of Justice does not provide any due process rights for its employees affected by the same decision. No federal law requires that agencies provide internal review processes for any employee with less than critical sensitive access, rendering a nearly incomprehensible hodgepodge of coverage for noncritical sensitive federal employees.

The worst case scenario will be cancellation of the merit system for any federal position an agency decides to call "sensitive." Had the initial ruling remained, *Crumpler* would have

---

[6] *See, e.g.*, www.sec-oig.gov/Reports/AuditsInspections/2001/339fin.pdf, www.aphis.usda.gov/mrpbs/hr/personnel_security.shtml.

[7] *See* www.usdoj.gov/oig/reports/BOP/e0001/i200001p1.htm

[8] SECNAV M-5510.30, Sections 8-4 and 8-5, retrieved at httop://doni.daps.dia.mil/SECNAV%20Manuals1/5510.30.pdf.

created a due process loophole for every position arbitrarily clothed in that label, providing agencies every incentive to abandon even preexisting internal appeal procedures, because that unreviewable act would create an "at will" doctrine beyond the Board's reach. *Conyers* and *Northover* provide an opportunity to affirmatively close this loophole. Just as nearly any piece of information can be deemed "sensitive" by a federal agency with little to no warning, nearly every position in the federal workforce can be categorized as "sensitive." If even a store clerk can be determined to potentially adversely impact national or operational security merely by virtue of her duty station on a military base, then there are very few federal positions that could not be similarly declared sensitive and reclassified as noncritical sensitive.

II. THE RATIONALE ARTICULATED IN THE *CRUMPLER* DECISION CANNOT COEXIST WITH THE SUPREME COURT'S *EGAN* DECISION ON WHICH IT IS BASED.

In its November 2 decision, the Board explained that its limitations on review of agency action came from *Department of the Navy v. Egan*, 484 U.S. 518 (1988). That premise cannot withstand scrutiny. In *Egan* the Court held that the Board does not have authority to make subjective determinations whether individuals are sufficiently trustworthy for a security clearance to view classified information when required by their jobs. It based its conclusion on the lack of any specific congressional intent to the contrary. In *Crumpler* the Board held that it cannot review any actions connected with maintaining a "sensitive" position, even one not requiring a security clearance for access to classified information. Chairman McPhie bridged the gap by explaining that "the term 'security clearance' should not be viewed as a term of art, but merely as a semantic device" extending to preliminary background investigations. *Crumpler*, slip op. at 5.

There is no authority for this landmark abdication of Board jurisdiction. Initially, there simply is no basis in legislative text, executive order, agency regulations, or precedent to downgrade the term "security clearance" from a specific legal status to an open-ended adjective.[9] This is Chairman McPhie's uniquely personal contribution. Further, as detailed by Vice Chairman Rose's opinion in *Brown v. Department of Defense*, 110 M.S.P.R. 593 (2009), there is ample authority for the Board to enforce civil service law in proceedings that are ancillary to a decision it cannot review. Similarly, there is no precedent extending *Egan*'s restrictions on the Board to eligibility scenarios where the employee neither was applying for nor had a security clearance.

Egan's foundation was an exhaustive review of the legislative record to see whether Congress specifically intended to delegate authority normally reserved for the Commander in Chief. The Court's cornerstone principle for rejecting Board jurisdiction to order a clearance was as follows: "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530 (citations omitted). The Court said it examined the whole statutory framework, as well as all Civil Service Reform Act legislative history and objectives for any indication of intent to cover security clearances, but found none. Based on that comprehensive review, the Court concluded, "The [Civil Service Reform] Act by its terms does not confer broad authority on the Board to review a security-clearance determination." *Id.*

By contrast, in *Crumpler*, the Board omitted any reference to the legislative branch. As detailed below, the Board was disregarding ample statutory language and legislative history on

[9] In its decisions in the *Conyers* and *Northover* cases, it is vital for the Board to clarify the term "security clearance" in light of Chariman McPhie's inaccurate characterization of the term in the *Crumpler* case.

employee rights with respect to adverse actions and retaliatory investigations that violate the Whistleblower Protection Act. While now vacated, the *Crumpler* analysis also must be refuted.

III. THE ANALYSIS ARTICULATED IN THE *CRUMPLER* DECISION CANNOT COEXIST WITH THE CONSTITUTION.

The Board's cancellation of due process rights in *Crumpler* was unconstitutionally vague and overly broad. That doctrine long has been applied against exercise of government authority that is so undefined or unrestricted that it chills or cancels constitutional rights, even in national security contexts. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *American Foreign Service Association v. Garfinkel*, 688 F.Supp 671 (DDC.1988).

In 5 USC § 2302(a)(2)(B) and (C), Congress already created specific boundaries for which agencies and positions are exempt from merit system appeals on national security grounds. A broad principle in regulations cannot replace unequivocal statutory language.

This loose standard is sufficient as a broad umbrella principle to guide discretionary actions in regular government business, but it is unnecessarily broad as the basis to restrict merit system rights. For example, the investigation processes for noncritical sensitive positions are vastly different than that for critical sensitive jobs. The background investigation forms a potential employee fills out are different – clearances require an SF-86, while noncritical sensitive positions require an SF-85P which is less in-depth. A DOT-OIG audit estimates that the cost for each employee's background check prior to obtaining a security clearance is $2300-2700 with a reinvestigation every five years. By contrast, the investigation for a noncritical sensitive employee (without a clearance) is $77 and requires no reinvestigation. Some agencies do require reinvestigation of noncritical sensitive employees, but less frequently than for critical

sensitive employees. Also unlike those whose positions require a clearance, those whose positions are designated noncritical sensitive do not need to be "cleared" before the employee can begin work. Federal regulations require only that the process for investigating noncritical sensitive employees be started within fourteen days of when the employee has started work.[10]

In terms of impact, it is hard to conceive of *any* job that could *not* "enable its occupant to bring about a material adverse effect on national security." Agencies are already making broad brushed, unreviewable designations to exploit the generality for noncritical jobs, canceling merit system appeal rights for all civilian employees on a military base. Even if the due process cancellation were limited to positions currently categorized as noncritical sensitive, the effect would be to dwarf the federal merit system as envisioned by Congress in the civil Service Reform Act and Whistlweblwoer Protection Act.. To illustrate, the following positions would be excluded from Board review although none have been exempted from the merit system under 5 USC 2302(a)(2)(B) and (C):

> -All Department of Defense contract and procurement officers, and those in the accounting division for the Department of Defense.[11]
>
> -Positions in the Internal Revenue Service ranging from data transcribers and clerks to program analysts and managers.[12]
>
> -Nearly all Office of Inspector General employees.
>
> -Nearly all law enforcement personnel, from Federal Air Marshals to government building security guards.
>
> -All Information Technology professionals with access to networks but who do not require Top Secret information or documents.[13]

---

10 *See* http://www.sec-oig.gov/Reports/AuditsInspections/2001/339fin.pdf.

11 *See* http://www.fedsmith.com/articles/comment_print.php?a=1363.

12 *See* http://www.irs.gov/irm/part10/irm_10-023-003.html.

13 *See, e.g.,* http://www.navair.navy.mil/forms/AIR7.4&7.2%20Memo%20dtd%2016Oct08%20IT%20Position%20Reqmts.pdf.

-Employees who have "market sensitive information" within the Securities and Exchange Commission,[14] Department of Agriculture,[15] and National Institutes of Health.

-Industrial hygienists and other analysts at the Occupational Safety and Health Administration. [16]

-Transportation Security Administration screeners.[17]

This list is by no means exhaustive, to say nothing of the number of positions that would be re-categorized as noncritical sensitive if the Board were to reject merit system review as the *Crumpler* decision suggested.

IV. THE ANALYSIS ARTICULATED IN THE *CRUMPLER* DECISION CANNOT COEXIST WITH THE MERIT SYSTEM.

As seen above, in *Crumpler* the Board did not abdicate its jurisdiction where Congress had been silent, which was the context in *Egan* for security clearances. To the contrary, the Board ignored a specific policy model and structure that Congress had created through statutory provisions and legislative history. In particular, it substituted agency definitions of "sensitive" for the legislative model with respect to suitability determinations and retaliatory investigations. The Board's resolution of the *Conyers* and *Northover* cases should eliminate any confusion on this issue.

In *Egan*, 484 U.S. at 525-26, the Supreme Court was clear that its holding on security clearance decisions did not cancel access to adverse action due process rights otherwise available under Chapter 75. *Egan's* restrictions are not ripe until the job requires access to classified information. By applying them in scenarios where classified access is irrelevant, an analysis similar to that in *Crumpler* analysis would vastly extend the *Egan* doctrine beyond the limits

---

14 *See* http://www.sec-oig.gov/Reports/AuditsInspections/2001/339fin.pdf.
15 *See* http://www.aphis.usda.gov/mrpbs/hr/personnel_security.shtml.
16 *See* http://jobs.trovit.com/jobs/industrial-hygienist.
17 *See* https://tsa.vitapowered.com/airportFAQs/alb.pdf.

drawn by the Supreme Court. For all practical purposes, the new boundary will be generic suitability determinations, instead of security clearances. .

That vast expansion comes at the expense of the Board's authority over disciplinary actions. A negative suitability determination is appealable to the Board as an adverse action under 5 USC 7513. *Dillingham v. Department of Justice*, 87 M.S.P.R. 538, 541 (1997); 5 C.F.R. 731.501 (2002). Office of Personnel Management regulations contemplate position-specific suitability determinations, *Edwards v. Department of Justice*, 87 M.S.P.R. 518, 423 (2001), rather than broad-brushed characterizations for everyone with the same job description. Further, a suitability determination cannot be camouflaged through another label or characterization, as a device to avoid Board review. *Dillingham, supra.*

The framework articulated in *Crumpler* would institutionalize the option to replace suitability determinations and Board review with eligibility determinations and no Board review in non-national-security contexts that are irrelevant to classified information. As noted, agencies already are exploiting this approach to circumvent due process through creative labeling. In *Grimes*, for example, the agency removed clearance eligibility for a paralegal who neither had a security clearance nor needed access to classified documents, based on alleged misconduct actionable under Chapter 75.

The Board also canceled a significant Whistleblower Protection Act right when Chairman McPhie redefined security clearance actions to include background investigations. By modifying a position and triggering a new background investigation, agencies can engage without restraint in the most common, ugly form of retaliation against whistleblowers. Congress specifically established a mandate against retaliatory investigations in the 1994 amendments, a policy choice that before *Crumpler* the Board and Federal Circuit Court of Appeals have respected. There is

no authority in *Egan* for the Board to disregard Congress and cancel protection against retaliatory investigations.

Currently, retaliatory investigations are actionable under the WPA as threatened personnel actions. Threatened personnel actions are as illegal as actual personnel actions, because of their deep chilling effect. The 1994 legislative history for that provision highlights "retaliatory investigations, threat of or referral for prosecution, defunding, reductions in force and denial of workers compensation benefits" to illustrate "threatened" personnel actions, because they are a prelude to or create a precondition for more conventional reprisals. The primary criterion for a prohibited threat is that alleged harassment "is discriminatory, or could have a chilling effect on merit system duties and responsibilities." *H.R. Rep. No. 103-79,* at 15; 140 *Cong. Rec.* 29, 353 (statement of Rep. McCloskey).

Case law has been consistent with the legislative history. In *Guyer v. Department of Justice*, BN-1221-92-0310-B-1, as summarized in 116 F.3d 1497, p. 2 (Fed Cir 1997), the Board permitted the appellant to challenge an investigation as pretextual. In *Russell v. Department of Justice*, 76 MSPR 317, 324-25 (1997) the Board explained,

> When, as here, an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant will prevail on his affirmative defense of retaliation for whistleblowing. That the investigation itself is conducted in a fair and impartial manner, or that certain acts of misconduct are discovered during the investigation, does not relieve an agency of its obligation to demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure. *See* 5 U.S.C. § 1221(e)(2). To here hold otherwise would sanction the use of a purely retaliatory tool, selective investigations.

Accord: Johnson v. Department of Justice, 104 MSPR 624, 631 (2007).

Retaliatory investigations to build a record against whistleblowers are the most common foundation for harassment. Many are openly initiated after whistleblowing to send a message that frightens the initial and any potential supporting whistleblowers into silence. While current law does not impede ministerial investigations, the *Crumpler* analysis would cancel a significant merit system defense against pretexts and create maximum chilling effects over indefinite periods, frequently extending for years.

CONCLUSION

For the above reasons, *amicus* recommends that in the *Conyers* and *Northover* cases the Board address the faulty analysis in *Crumpler* and reinstate the Supreme Court's original boundary in *Egan* -- Board authority to enforce full merit system rights for all but subjective national security assessments when evaluating access for classified information. At the same time, the Board should restore clear access to Chapter 75 appeal rights in all other contexts, and to the Whistleblower Protection Act against retaliatory investigations.

Respectfully submitted this 1st day of March, 2010,

Thomas M. Devine, Esq.
Legal Director
Government Accountability Project
1612 K St NW, Suite 1100
Washington, DC 20006
Counsel for the Amicus

On this brief: Kasey Dunton