

No. _____

**In the
SUPREME COURT
OF THE UNITED STATES**

HENRY E. GOSSAGE,
Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD (MSPB),
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the 60-day filing deadline is subject to equitable tolling beyond the control of the Petitioner or under "Unique or Personal Circumstances" is warranted for "Want of Service" or OPM's misconduct in OPM Investigation Case 01-904-277?
2. Whether Congress intended the "60 day filing period" as Jurisdictional and "Notwithstanding any other provision of law" (5 U.S.C. § 7703(b)(1)(A)) is a claim processing rule subject to the equitable doctrine of tolling?
3. Whether 5 C.F.R. § 1201.3 Subject matter jurisdiction overrules the "60 day filing period deadline" on the Merits, 5 U.S.C. § 7703(b)(1)(A)?
4. Whether OPM's December 27, 2004, Final Decision in OPM Investigation Case 01-904-277 removed Federal Jurisdiction in SE-0731-01-0261-M-1, F. Circuit 2005-3155, and SE-0731-01-0261-I-2?
5. Whether Due Process is violated, when Petitioner is denied the right to appeal or challenge the Courts jurisdiction on unavailable exculpatory and undisclosed new and material evidence, removing the Lower Court's Jurisdiction?

Given every appellate court has a special obligation to satisfy itself not only of its jurisdiction but also that of the lower courts in a cause under review and the Constitution is the paramount law. The Federal Circuit has jurisdiction to review all aspects of Petitioner's Constitutional claims and under 5 U.S.C. §§'s 702, 704, 7701, 7703; 28 U.S.C. § 1295(a)(9); 5 CFR § 300.104, 5 C.F.R. § 731.501, 5 C.F.R. § 1201 et seq., and Federal Rules of Civil Procedure 60. The Federal Circuit HELD, "Notwithstanding any other provision of law" under "5 U.S.C. § 7703(b)(1)(A) is not applicable and "60 day filing period is jurisdictional and not subject to equitable tolling".

This petition centers on newly discovered evidence affecting the Lower Courts Jurisdiction and outcome of the case, new and unavailable evidence obtained from Petitioners Freedom of Information Act (FOIA) to Office of Personnel Management (OPM) on May 26, 2011. OPM Lead Suitability Specialist Kimberly Truckley's Amended, Overturned, and Vacated Karen McCue's May 16, 2001 (which is the basis of this appeal), initial negative suitability determination on December 27, 2004 (undisclosed new evidence), removing the Lower Courts subject matter jurisdiction. "Notwithstanding any other provision of law" or "Inequitable Conduct and/or Equitable Tolling" is appropriate to reopen or reconsider the Lower Court's 5 C.F.R. § 1201 et seq. Subject Matter Jurisdiction and Timeliness Jurisdiction on new evidence or fraud. The Federal Circuit HELD, "Notwithstanding any other provision of law" under "5 U.S.C. § 7703(b)(1)(A) is not applicable and "60 day filing period is jurisdictional and not subject to equitable tolling".

PARTIES TO THE PROCEEDINGS

Petitioner, Henry E. Gossage was the Petitioner in the Merit Systems Protection Board in OPM Investigation Case No. 01-904-277 and MSPB appeals in SE-0731-01-0261-I-2, SE-0731-01-0261-M-1; and in the U.S. Court of Appeals for the Federal Circuit in USCA Case No. 2005-3155 and 2021-1559.

The Merit Systems Protection Board and Office of Personnel Management were the Respondent in the same cases and actions noted above. No other relevant parties are represented in the instant matter.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Henry Eugene Gossage respectfully petitions for a writ of certiorari to review “lack of jurisdiction”, the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Federal Circuit ORDERS: April 20, 2021 (Appendix A-1) and February 24, 2021 (Appendix A-2) is unreported. The Merit Systems Protection Board (MSPB) August 25, 2006 (Appendix B-1), initial decision is unreported. The Federal Circuit 2005-3155, January 24, 2005 (Appendix A-3), remand decision and USDCWWa 2004-5669RJB, March 24, 2005 (Appendix A-4), transfer order is unreported. The MSPB September 27, 2004 (Appendix B-2, B-3), initial decision became its final decision is reported at 97 M.S.P.R. 366.

JURISDICTION

The Order of the Court of Appeals dismissed for “jurisdictional timeliness” and its pending “Motion to Vacate” as Moot was entered on April 20, 2021. The petition for a writ of certiorari was filed on May 20, 2021. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

See Appendix, *infra*, for pertinent text of statutes and regulations are reproduced at Petitioner’s Appendix E. U.S. Constitution V; 5 U.S.C. §§’s 702, 704, 1204, 2302(b), 7701-7703; 28 U.S.C. §§’s 1254, 1295, 2106, Appendix (FRCP 60); 5 U.S.C. §§’s 3318,

3330a (a)(1)(A); 38 U.S.C. §§'s 4311, 4324; 5 C.F.R. § 300.103-104, 5 C.F.R. § 332.406, 5 C.F.R. §§'s 731, 1201, 1208 et seq.

I. STATEMENT

A decision made “with blinders on, based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process.” *Covington v. Department of Health and Human Services*, 750 F.2d 937, 943 (F.Cir.1984). A Court Judgment on the Merits without Federal Jurisdiction is a legal nullity and void in violation of the U.S. Constitution.

This Court stated, “that most time bars, even if mandatory and emphatic, are non-jurisdictional”. The Federal Circuit's attempt to disarm the Pro se Petitioner due process rights through the Circuit's self-serving “60-day deadline”¹ is a Court-made Jurisdictional Rule in conflict with Congressional intent is disturbing. Nowhere in 5 U.S.C. § 7703(b)(1)(A)² has Congress made a clear statement that this petition is time-barred or the Courts lacked authority to hear untimely suits or Petitioners “Motion to Vacate”. *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006); *Hamer v. Neighborhood Housing v. Neighborhood Housing Servs. of Chicago*, 138 S. Ct. 13 (2017).

¹ “Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider”. *Bowles v. Russell*, 551 U.S. 205 (2007).

² 5 U.S.C. § 7703(b)(1)(A)-“**Notwithstanding any other provision of law**, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.”

The Lower Courts intentionally ignored Petitioners' "Federal Jurisdiction" Objection to hear the case, based on OPM's December 27, 2004, final decision, removing MSPB and Federal Circuit Appellate jurisdiction. "Jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the *controversy*." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009).

While OPM Investigation Case 01-904-277 was pending on appeal before the Lower Courts, OPM Overturned and VACATED Karen McCue's May 16, 2001, (Appendix D, p. a59), negative suitability decision on December 27, 2004 (Appendix C, p. a48-58). OPM's Kimberly Truckley's December 27, 2004, decision removed the Lower Courts Federal Jurisdiction on "Suitability"³, the judgments below are erroneous because it is void, because of an invalid judgment entered without Federal Jurisdiction (Appendix A 3-4, p. a6-27). *Ex Parte Lange*, 85 U.S. 163, 174, 176 (1874). Without Jurisdiction, the Lower Courts entered a "default judgments" in favor of OPM. *See Klapprott v. United States*, 335 U.S. 601 (1949); *McGean v. National Labor Relations Board*, 5 M.S.P.R. 49 (1983).

³ 5 C.F.R. § 731.501 Appeal to the Merit Systems Protection Board. (a) Appeal to the Merit Systems Protection Board. An individual who has been found unsuitable for employment may appeal the determination to the Merit Systems Protection Board. If the Board finds that one or more charges are supported by a preponderance of the evidence, it shall affirm the determination. If the Board sustains fewer than all the charges, the Board shall remand the case to OPM or the agency to determine whether the action taken is still appropriate based on the sustained charge(s). This determination of whether the action taken is appropriate shall be final without any further appeal to the Board. (b) Appeal procedures. The procedures for filing an appeal with the Board are found at part 1201 of this chapter.

The Constitutional Questions presented, whether undisclosed new and material evidence affecting Jurisdiction and outcome of the case is sufficient for the Lower Court to Reopen or Open as a New and Independent Appeal for “Want of Jurisdiction” versus “Lack of Jurisdiction” and its authority to make a judgment on the MERITS in favor of OPM, where the Lower Courts had NO Federal Jurisdiction over the subject matter in question. These prior judgments in favor of OPM are the product of the agency’s concealment, fraud, collusion, or misrepresentation that may be set aside. See Restatement (Second) of Judgments §§ 69-72 (1982); *Griffith v. Bank of New York*, 147 F.2d 899, 901 (CA2) (Clark, J.), cert. denied, 325 U.S. 874 (1945).

The Federal Jurisdiction Question before this Court and the Lower Court’s in OPM Investigation Case 01-904-277, 5 U.S.C. § 3318⁴, is the result from Two OPM conflicting 5 C.F.R. § 731.3042,^{2,5} suitability and pass-over administrative decisions, McCue’s May 16, 2001⁶, and Truckley’s December 27, 2004⁷, resulting in two separate and distinct “subject matter jurisdiction” scenarios. Federal Jurisdiction² cannot be waived or overcome by an agreement. The Lower Courts failed to reconcile

⁴(c)(1) When the Office has completed its review of the proposed pass-over, it shall send its findings to the appointing authority and to the preference eligible. The appointing authority shall comply with the findings of the Office.

⁵ The decision regarding the final suitability action will be in writing, be dated, and inform the respondent of the reasons for the decision and that an unfavorable decision may be appealed in accordance with subpart E of this part. OPM will also notify the respondent's employing agency of its decision.

⁶Appendix D-1, Ineligible on Suitability, Cancel all Applications/Eligibilities.

⁷Appendix C (p. a52, a57), Eligibility Reinstated and Debarment rescinded during MSPB appeal. Final Determination Acceptable on all Suitability matters.

Overtaken/Vacated Cancel all Applications/Eligibilities, Ineligibility on Suitability, and Debarment.

the two OPM decisions and the relevant facts to correct the Lower Courts' "lack of federal jurisdiction" in entertaining OPM's unfavorable and favorable decisions.

The Lower Courts Federal Jurisdiction was based on OPM's May 16, 2001^{5,8} decision, 5 C.F.R. § 731.202 charges and 5 C.F.R. § 731.304 unfavorable decision^{4,8} was appealed to the MSPB on June 8, 2001.

OPM notified OSHA of its December 27, 2004, final decision, but DID NOT notify Petitioner.^{3,4,6} "DO NOT DISCLOSE OUTSIDE OF OPM" (App. C, a-53, 58). OPM did not notify Petitioner of its amended and final employment suitability decision (Appendix C, p. a-52, a-57) on December 27, 2004, removing Federal Jurisdiction from the Lower Court's 5 C.F.R. § 1201.3(7)⁹, 28 U.S.C. § 1295(9)¹⁰.

The MSPB and Federal Circuit long-standing refusal to acknowledge OPM's December 27, 2004, Final 5 C.F.R. § 731.501 OPM decision, Overturning and Vacating Karen McCue's May 16, 2001 (Appendix D-1, p. a-56), initial negative suitability decision, removing 5 C.F.R. § 1201.3(a)(7) appellate jurisdiction. Without Federal Jurisdiction, Petitioners Constitutional Rights were violated, when the Lower Courts substituted its Judgment for OPM's December 27, 2004, Final

⁸5 C.F.R. § 731.501-(a) OPM under this part takes a suitability action against a person, that person may appeal the action to the MSPB. (c) Appeal procedures. The procedures for filing an appeal with the Board are found at part 1201 of this title. ⁹(a) The Board has jurisdiction over appeals (7) Disqualification of an employee or applicant because of a suitability determination (5 CFR 731.103(d) and 731.501). 5 U.S.C. § 2302(b)(13) implement or enforce any nondisclosure policy, form, or ¹⁰(9) Federal Circuit has exclusive jurisdiction of an appeal from a final order or final decision of the MSPB, pursuant to sections 7703(b)(1) and 7703(d) of title 5.

Decision⁴. The Courts Original (initial) Jurisdiction attaches at the time an appeal was filed and remains open throughout the litigation.

Petitioner has the Constitutional right to judicial review, "Not on the Merits", but on "Want of Federal Jurisdiction" in this cause of action from this Court and Lower Courts. *See* U.S. Constitution, 5 U.S.C. § 702, § 704, § 706, § 7701, § 7703, Federal Rules of Civil Procedure 60, 5 U.S.C. § 4324, 5 C.F.R. § 1201 et seq.

A question of judicial bias from the Lower Courts when their judgments have been predicated on OPM recommendations, its staff attorney, and without argument. Without Federal Jurisdiction in the FIRST instance, OPM substituted a VACATED agency decision (App. D-1, p. a59) in Federal Circuit 2005-3155^{5,6} (Appendix A-3, p. a-11) to obtain a favorable judgment,

"thus we agree with OPM that remand is now appropriate, for determination of whether OPM's May 2001 decision was an appealable constructive negative suitability determination and, if so, whether OPM's decision is supported by substantial evidence."

In the SECOND instance, Pro se Petitioner submitted OPM's December 27, 2004, new, material, concealed, and previously unavailable final decision (App. C, p. a52, a57), Removing Federal Jurisdiction²⁻⁸ by Vacating the agency's May 16, 2001, 5 C.F.R. § 731.202(b) charges and initial decision establishing Petitioner's actual innocence. The Federal Circuit in 2021-1026 agreed with OPM's recommendation,

"We agree with OPM petitioner has not shown the court has Jurisdiction over his petition",

in OPM Investigation Case 01-904-277 and Lead suitability Specialist Kimberly Truckley's December 27, 2004, final OPM decision. The Federal Circuit's jurisdiction inconsistency towards the pro se litigants, utilizing a claim processing

procedure under 5 U.S.C. § 7703(b)(1)¹, 28 U.S.C. § 1295(a)(9), and Fed. R. App. P. 25(a)(2)(A) to circumvent Jurisdiction Review by the Appellate Court and Lower Court's in this cause of action, is in direct conflict with Petitioner Constitutional 5th Amendment due process rights. Review is not on the Merits, Review is on the Question of "Federal Jurisdiction" or "Want of Jurisdiction", which cannot be waived.

Petitioner presented a Constitutional due process and jurisdiction question to the Lower Courts, which failed to develop the relevant facts, based on the OPM's illegal conduct. The Lower Courts have a special obligation to NOTICE this fundamental DEFECT in "Federal Jurisdiction". *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

First and Foremost, when a Constitutional Question over Federal Jurisdiction has been presented, this Court has a duty to satisfy itself of "subject matter jurisdiction" and an obligation to notice any jurisdictional DEFECTS from the Lower Court. This Court emphasized in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)¹¹.

¹¹ "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

The Lower Courts failed to review and insured the Courts still had 5 C.F.R. § 1201 et seq. “subject matter federal jurisdiction” at each level from OPM’s Kimberly Truckley’s December 27, 2004, final 5 C.F.R. § 731.501 decision (App. C, p. a52, a5) in OPM Investigation Case 01-904-277, Federal Rules of Civil Procedure 60, and Petitioner’s 5th Amendment due process violations. *See Cushman v. Shinseki*, 576 F.3d 1290 (F. Cir. 2009).

II. FACTUAL AND LEGAL BACKGROUD

Henry E. Gossage is an honorably discharged, service-connected disabled Vietnam Era veteran with a 1992 felony conviction. On January 27, 1998, OPM (OPM Case 97-900-648) disqualified and debarred Gossage until July 2000, from Federal Employment for (5 C.F.R. § 731.202) the 1992 conviction. After serving OPM’s 1998 debarment, Petitioner reapplied for initial federal employment with OSHA. On May 16, 2001 (Appendix D-1, p. a59-62), OPM’s Suitability Specialist Karen McCue notified Petitioner^{3,4} in OPM Investigation Case 01-904-277 was disqualified and debarred for a second time from federal employment, on the same 1992 conviction and OPM’s 1998 suitability charges.

Petitioner appealed OPM’s May 16, 2001², negative suitability determination to the MSPB (SE-0731-01-0261-I-1). MSPB SE-0731-01-0261-I-2 (Appendix B-2,3, p. a31, a44) initial decision on April 22, 2002, became the split Board final decision on September 27, 2004.

ON April 21, 2011, Petitioner submitted a second Freedom of Information Act Request (FOIA) to OPM (Appendix C). On May 25, 2011, OPM Supervisory FOIA

Specialist released new evidence, OPM Lead Suitability Specialist Kimberly Truckley December 27, 2004 (Appendix C, p. a48-53), VACATING OPM's Karen McCue's May 16, 2001, initial negative suitability determination.

OPM's Lead Suitability Specialist Kimberly Truckley amended (Appendix C; p. a52, a57) Suitability Specialist Karen McCue's May 16, 2001, 5 C.F.R. § 731.404 initial decision (Appendix D-1, p. a59). The agency concealed Kimberly Truckley's December 27, 2004, amended 5 C.F.R. § 731.404 and final OPM determination, "**Do Not Disclose Outside of OPM**" (Appendix C, p. a53, a58).

AFTER ELEVEN years of unnecessary litigation and TWO Freedom of Information Act Requests (FOIA) to OPM and Two FOIA request to USDOL(OSHA), Truckley's new and final OPM suitability decision was DISCOVERED through Petitioner's April 21, 2011, FOIA to OPM. On May 25, 2011, OPM Supervisory FOIA Specialist released OPM Lead Suitability Specialist Kimberly Truckley (Appendix C-1, p. a48-53) amended OPM's Karen McCue's Investigation Record, including OPM document "DO NOT DISCLOSE OUTSIDE OF OPM". Truckley amended OPM's McCue's May 16, 2001, 5 C.F.R. § 731 et seq. suitability determination, vacating its two 5 C.F.R. § 731.202 charges. OPM DID NOT provide Petitioner notification^{3,4} of Truckley's December 27, 2004, new and final suitability determination:

- a. OPM December 27, 2004, new suitability determination for OSH-00-87 and OSH-00-87-S-1 (Appendix C-1, p. a48-53):
 - i. Final Determination Acceptable
 - ii. Eligibility reinstated during MSPB appeal
 - iii. Debarment rescinded during MSPB appeal

- b. OPM notified OSHA on December 27, 2004, of OPM's Truckley's new and final OPM determination (Appendix C-2, p. a54-58):
- i. Vacating Karen McCue's May 16, 2001, negative suitability decision and reinstating eligibility to all federal employment;
 - ii. Vacating OPM's Mark Enterline's November 30, 2000, pass over;
 - iii. Vacating OSHA November 17, 2000, request to pass over Gossage, a preference eligible veteran, 5 U.S.C. § 3318.

Petitioner appealed SE-0731-01-0261-M-1 to the Federal Circuit on "Federal Jurisdiction" and not on the underlying Merits based on OPM Lead Suitability Specialist December 27, 2004, final decision, vacating OPM's Karen McCue's May 16, 2001, initial negative suitability decision in OPM Investigation Case 01-904-277.

The Constitutional question is whether "Federal Jurisdiction" takes precedence over Timeliness or Jurisdiction on the Merits?

The Federal Circuit stated, "We agree with OPM that Mr. Gossage has not shown that this court has jurisdiction over the petition" (Appendix A-1) on the MERITS and not over "Federal Jurisdiction".

**A. September 27, 2004 - MSPB SE-0731-01-0261-I-2^{12,13}
 July 8, 2008 - MSPB SE-0731-01-0261-I-5¹⁰
 February 14, 2013 - MSPB SF-0731-13-0252-I-1**

¹² OPM December 27, 2004, Final decision was concealed by OPM and OSHA and unavailable at the time OPM's May 16, 2001, decision was pending appeal. Lead Suitability Specialist Kimberly Truckley's New and Final OPM decision was discovered through Petitioner's April 21, 2011, Freedom of Information Act Request (FOIA) to OPM. On May 25, 2011, OPM Supervisory FOIA Specialist released OPM's December 27, 2004, Amended New and Final Decision, VACATING and reinstating Petitioner's Eligibility to all federal employment, including OSHA position OSH-00-87, and "DO NOT DISCLOSE OUTSIDE OF OPM". See Appendix C-1, p. a45-50. OPM notified OSHA of its final December 27, 2004, VACATING Karen McCue's May 16, negative suitability decision.

¹³ The decisions from the Lower Courts are based on Karen McCue's VACATED May 16, 2001, initial negative suitability decision.

Petitioner appealed OPM's May 16, 2001, negative suitability determination to the MSPB (SE-0731-01-0261-I-1). MSPB SE-0731-01-0261-I-2 (Appendix B 1-2) initial decision on April 22, 2002, became the split board MSPB final decision on September 27, 2004, this decision was appealed to the United States District Court Western District of Washington at Tacoma on October 8, 2004 (04-5669RJB).

OPM argued and submitted to the USDCWWa, Karen McCue's May 16, 2001, in support of its 5 C.F.R. § 1201 et seq. jurisdiction transfer from USDCWWa to the Federal Circuit (2005-3155) on March 24, 2005.

On January 25, 2006, OPM's request remand for a second suitability decision, The Federal Circuit Court of Appeals stated, "We agree that remand of this appeal is appropriate. The dismissal is vacated and the case is remanded to the MSPB for further proceedings consistent with this opinion".²

On August 25, 2006, on remand from the Federal Circuit 2005-3155, the MSPB dismissed SE-0731-01-0261-M-1 (Appendix A-3, a-6) without prejudice to its refiling. Based on Petitioners' May 25, 2011 FOIA documents (Appendix C, p. a54-58) obtained from OPM and unavailable at the time of the MSPB decision, disclosing for the first time, new and material evidence affecting the Outcome of the Case and Federal Jurisdiction, Petitioner Appealed MSPB SE-0731-01-0261-M-1 Dismissal to the Federal Circuit on December 26, 2020.^{1,6,11}

REASONS FOR GRANTING THE PETITION

OPM's December 27, 2004, decision removed the Lower Courts Federal Jurisdiction. SE-0731-01-0261-M-1, F. Circuit 2005-3155, USDCWWa 2004-5669RJB, and SE-0731-01-0261-I-2, and SF-0731-13-0252-I-1 is a legal nullity and void on Federal Jurisdiction. Original Jurisdiction is dependent on the merits of Petitioners' negative suitability and ineligibility for appointment to federal employment, 5 C.F.R. § 731 et seq. Without a "negative suitability decision", the Lower Courts Lacked subject matter Federal Jurisdiction, which can be challenged at any time. Timeliness jurisdiction is Void, without initial (original) subject matter jurisdiction. *McCarley v. MSPB*, 757 F.2d 278 (F.Cir.1985). "We set aside the MSPB's decision that it had no jurisdiction and remand to the MSPB for further proceedings." *Clifton L. Goodrich v. U. S. Department of the Navy and Merit Systems Protection Board*, 686 F.2d 169 (CA3 1982).

"Federal Jurisdiction" or "Want of Jurisdiction" at every stage of litigation may be challenged at any time and Jurisdiction cannot be waived. Which Jurisdiction takes precedence, Federal Subject Matter Jurisdiction, Timeliness Jurisdiction, or Jurisdiction on the Merits? "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause". *Marbury v. Madison*, 5 U.S. 137, 175 (1803); *Brown v. Keene*, 33 U.S. 112 (1834).

OPM's usurpation of the power of the Lower Court's Jurisdiction was obtained through trickery, deception, or fraud by substituting the agency's

vacated decision^{5,6} to obtain a favorable judgment that is void. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

Federal Jurisdiction is the threshold issue before the court and thus has broader power to decide its right to hear the case than it has when the merits of the case are reached. *Bellecourt v. United States*, 994 F.2d 427, 430 (CA 8 1993). The federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review". *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 95 (1998); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884). If the record discloses that the lower courts was without jurisdictions⁴⁻⁸, this court will notice the DEFECT.

The Lower Court's waived and **did not** raise or consider 5 C.F.R. § 1201.3(a)(7) (2001) Federal subject matter jurisdiction in its dismissal, this Jurisdictional DEFECT¹⁴ remains, violating Petitioner's due process rights.

This court has jurisdiction to "set aside any agency action"¹⁵. *Billy G. Asberry v. U.S.P.S.*, 692 F.2d 1378 (F.Cir. 1982). Concealment of material

¹⁴ "may not confer subject matter jurisdiction upon the federal courts by stipulation, and lack of subject matter jurisdiction cannot be waived by the parties or ignored by the court." *Pacific Nat'l Ins. Co. v. Transport Ins. Co.*, 341 F.2d 514, 516 (CA8), cert. denied, 381 U.S. 912 (1965). See also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 25, (1989) (Stevens, J., concurring) ("may not waive a defect in subject-matter jurisdiction or invoke federal jurisdiction simply by consent," *Mitchell v. Maurer*, 293 U.S. 237, 244, (1934).

¹⁵ U.S. Code § 7703(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;(2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence;

evidence by the prevailing party, OPM's Truckley's December 27, 2004, final decision, resulting in a Judgment tainted by fraud, *Callen v. Penn. Railroad Co.*, 332 U.S. 625, 630 (1948); *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238 (1944).

IF the Lower Courts DID NOT have knowledge of OPM's December 27, 2004, 5 C.F.R. § 731.501 Final Decision, THEN OPM's "**Inequitable Conduct**" perpetrated Fraud on the Court. *Therasense, Inc. v. Becton, Dickinson and Co.*, 649 F.3d 1276 (F.Cir. 2011). The "Inequitable Conduct Doctrine" was developed by this Court, where OPM acted knowingly and deliberately with the purpose of defrauding the Petitioner and the Lower Courts. See *Precision Co. v. Automotive Co.*, 324, 324 U.S. 806, 815-16 (1945) (assertion of patent known to be tainted by perjury); *Hazel-Atlas*, 322 U.S. 238, 245 (1944) (a "deliberately planned and carefully executed scheme to defraud" the PTO involving both bribery and perjury); *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 246-47 (1933), (bribery and suppression of evidence).

IF the Lower Court had prior knowledge, reviewed the "Official Record", and OPM's December 27, 2004, 5 C.F.R. § 731.501 decision, **then** the Lower Courts are in **error** in substituting its judgment for that of the agency. The Lower Court, "**may not** supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). The reviewing court MAY NOT "substitute its judgment for that of the agency." Due Process is violated, when

the Lower Court substituted its judgment for that of OPM's Lead Suitability Specialist Kimberly Truckley's December 27, 2004, 5 C.F.R. § 731.501 decision. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

The Appellate Court failed to consider ALL bases for Federal Circuit, MSPB, and USDC Federal Jurisdiction or lack thereof, resulting from OPM's December 27, 2004 decision. *Consolidation Coal Co. v. United States*, 351 F.3d 1374, 1378 (F.Cir.2003); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); "we must be satisfied that the transferee court has jurisdiction to hear the case" *Gonzales & Gonzales Bonds and Insurance Agency v. Dept. Of Homeland Security*, 490 F.3d 940, 944 (F.Cir. 2007). The Appellate Court erred in failing to look beyond the inartful substance in Pro se pleadings to circumvent Federal Jurisdiction. *Brazos Elec. Power Coop. v. United States*, 144 F.3d 784, 787 (F.Cir.1998).

This Court has strongly implied that certain due process protections apply to the adjudicative administrative proceedings, *Richardson v. Perales*, 402 U.S. 389, 401-02 (1971). The Lower Courts' unexplained inconsistency between its OPM's McCue's May 16, 2001, and OPM's Truckley's December 27, 2004 decisions is an arbitrary and capricious change from agency practice under the Administrative Procedure Act. *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1983). OPM is bound to follow and abide by its regulations. *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

Due process is violated when **altered evidence**^{5,6,16} is submitted in a proceeding where it infects the jurisdiction and proceedings with fundamental unfairness is supported, “Do Not Disclose Outside of OPM”, 5 U.S.C. § 2302(b)(13). Concealment evidence is sufficient to take a second look at Henry Gossage’s administrative records and judgment of the Lower Court in OPM Investigation 01-907-277 and 98-900-645. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Cushman v. Shinseke*, 576 F.3d 1290, 1300 (F. Cir. 2009). *Cleveland Bd. of Educ. v Loudermill*, 470 U.S. 532, 541, 546 (1985).

A fundamentally fair adjudication within 5 C.F.R. § 731 et seq. framework is constitutionally required in all cases, and not just in the large majority. *Cf. Romano v. Oklahoma*, 512 U.S. 1, 12-13 (1994).

The Lower Courts Denying Petitioner’s Constitutional “Right to review” (5 U.S.C. § 702) and Reopen (5 C.F.R. § 1201.117-118, 5 U.S.C. § 7703(c)) OPM’s Kimberly Truckley’s December 27, 2004, 5 C.F.R. § 731.501 decision. *Califano v. Sanders*, 430 U.S. 99, 109 (1977). This is not one of those rare instances where the Lower Courts’ denial of an appeal is challenged on jurisdiction and constitutional grounds.

CONCLUSION

For all of the above reasons, this Court must assume jurisdiction to decide whether OPM’s December 27, 2004, decision states a cause of action on which the

¹⁶OPM’s McCue’s May 16, 2001, negative suitability decision was substituted for Truckley’s December 27, 2004, final decision, including “DO NOT DISCLOSE OUTSIDE OF OPM” *see* Appendix C and D

court can grant relief as well as to determine issues of fact arising in the controversy. A cursory review of the jurisdiction in the Lower Court's Judgment has NO mention of OPM's December 27, 2004, final suitability decision. The Lower Courts basis for its jurisdiction is OPM's May 16, 2001, initial determination, VACATED by OPM. The Appellate Court has a special obligation to notice this fundamental defect in Federal Jurisdiction from the Lower Courts. "If the record discloses that the lower court was without jurisdiction this court will notice the DEFECT. When the Lower Federal Court lack[s] jurisdiction, **we have jurisdiction on appeal**, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440 (1936). Every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction but also that of the lower courts in a cause under review", *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). See *Juidice v. Vail*, 430 U.S. 327, 331-332 (1977) (standing).

Clarification from this Court on the "60-day" appeal deadline overrules Federal Jurisdiction and/or subject to tolling, based on the misconduct of the prevailing party.

In considering Writ for Certiorari, procedural latitude is appropriate in Pro se Veteran pleading are held "to less stringent standards than formal pleadings drafted by lawyers." *Matthews v. United States*, 13-5109 (Fed. Cir. 2014); *Roche v. United States Postal Serv.*, 828 F.2d 1555, 1558 (Fed. Cir. 1987) ("Pro se petitioners are not expected to frame issues with the precision of a common-law

pleading."); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). The Federal Circuit jurisdiction conflicts with this Court's recent decision *Perry v. Merit Systems Protection Bd.*, Docket 16-399; 2017 U.S. LEXIS, 4044.

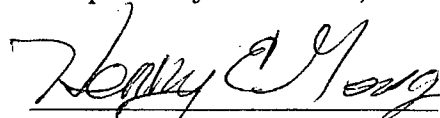
This Court has jurisdiction to review or reopen any Lower Court decision at any time. *see* FRCP 60(b), 5 U.S.C. § 7701(e)(1)(B)¹, 5 C.F.R. § 1201.117-120 (2000). *Vesser v. Office of Personnel Management*, 67 M.S.P.R. 239, 242, 244, *aff'd*, 73 F.3d 381 (F. Cir.1995); *Postal Service v. Gregory*, 534 U.S. 1 (2001). The Lower Courts previous affirmance does not preclude consideration of Kimberly Truckley's December 27, 2004, final decision showing OPM perpetrated a fraud, where reopening, or reconsideration is appropriate. *Standard Oil Co. v. United States*, 429 U.S. 17, 19 (1976) (*per curiam*).

The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *Camreta v. Greene*, 563 U.S. 692 (2011); *Bancorp v. U.S. Bonner Mall*, 513 U.S. 18 (1994).

For the foregoing reasons, the petition for a writ of certiorari should be granted.

May 20, 2021

Respectfully submitted,



Henry Eugene Gossage
Pro se Veteran