

 New Civil Liberties Alliance

April 21, 2023

The Honorable Kimberly A. Moore
Chief Circuit Judge
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

HAND DELIVERED

Re: Complaint Against Circuit Judge Pauline Newman

Dear Chief Circuit Judge Moore:

The New Civil Liberties Alliance (“NCLA”) is a nonpartisan, nonprofit civil rights organization dedicated to defending constitutional rights from unlawful administrative power. NCLA’s CEO is Philip Hamburger, the Maurice & Hilda Friedman Professor of Law at Columbia Law School. NCLA’s Board of Advisors includes both retired federal appellate and trial judges, law school professors, former senior federal department and agency executives, prominent law firm partners, corporate counsel, and policy experts in the fields of constitutional and administrative law.

It has come to NCLA’s attention that you, in your capacity as the Chief Judge of the Federal Circuit, have “identified a complaint” against Circuit Judge Pauline Newman. *See* 28 U.S.C. § 351(b); *see also* R. Jud. Conduct & Disability Proceedings 5. Circuit Judge Newman has engaged NCLA to represent her interests in the above-referenced investigation.

We understand that either you, in your capacity as Chief Judge, or the “special committee” ordered that no new cases be assigned to Circuit Judge Newman pending conclusion of the “special committee” investigation. Your order of March 24, 2023 is ambiguous as to whether Circuit Judge Newman was afforded even an opportunity formally to respond to the “identified complaint” prior to your selection of the “special committee” as required by Rule 11(f) of the Rules for Judicial Conduct and Judicial Disability Proceedings. The order also contains basic errors of fact. For example, contrary to the order’s page-one allegation that Circuit Judge Newman’s Summer 2021 “sittings were reduced compared to her colleagues,” Circuit Judge Newman served on ten different panels of the Court—more than any other judge but two.

Furthermore, your order of April 13, 2023 alleges that Circuit Judge Newman has failed to cooperate in these proceedings. The basis for this allegation appears to be Circuit Judge Newman's failure to respond within *three days* to a prior order that directed her to submit to a medical examination by an expert of the "special committee's" choosing. Leaving aside significant legal questions that such an order raises, three days is not sufficient time to obtain counsel and receive legal advice in responding to this order—protections to which Circuit Judge Newman is entitled under the governing statute and the rules. See 28 U.S.C. § 358(b)(1); see also Jud. Conduct & Disability Proceedings 15(f). By way of comparison, the Federal Rules of Civil Procedure afford a defendant 21 days to answer the complaint, whereas the Federal Rules of Appellate Procedure set the response deadline at 30 days. See Fed. R. Civ. P. 12(a)(1)(A)(i); Fed. R. App. P. 31(a). Surely, a federal judge responding to a complaint should be afforded no less due process. Your order of April 17, 2023, directing that Circuit Judge Newman respond to a request to "provide hospital records, medical, psychiatric or psychological, and other health-professional records" by April 21, 2023 (*i.e.*, within *four days*) sets similarly unreasonable deadlines. While we certainly appreciate the efforts to resolve this matter expeditiously, the deadlines established by these two orders do not provide sufficient opportunity to answer the requests, obtain and consult with counsel, or engage in negotiation as to the scope of the requests as provided by the Commentary to Rule 13 of the Rules for Judicial Conduct and Judicial Disability Proceedings.

Now that Circuit Judge Newman has obtained representation, she can properly respond to the requests that she undergo medical examination, provide medical records, and "sit down with the Committee for a video-taped interview." However, in light of our request (explained in more detail below) to transfer the matter to a judicial council of another circuit, we believe that such a response would be premature. Nevertheless, we wish to make clear that Circuit Judge Newman did not, has not, and will not fail to cooperate with any investigation that is conducted consistent with the limits that the Constitution, the Judicial Disability Act of 1980, and the Rules for Judicial Conduct and Judicial Disability Proceedings place on such investigations. Accordingly, we will reply to your orders of April 7, 2023 and April 17, 2023 once the transfer request is resolved.

We also note that the decision to preclude Circuit Judge Newman from being assigned new cases *prior* to the adjudication of your "identified complaint" fails to state any legal authority or basis for such an action. Instead, on April 5, 2023, you sent an email to Circuit Judge Newman (copying all other members of the Court) stating that she "will not be assigned any new cases until these proceedings are resolved." Absent impeachment proceedings, resignation, or imposition of sanctions under the Judicial Disability Act, there are no legal bases to deny the functions of an Article III judicial office to an individual who has been duly appointed to hold such an office "during good behaviour." U.S. Const. art. III, § 1.

Indirect interference with Circuit Judge Newman's judicial functions such as withdrawing her support staff or equipment is equally problematic, especially if one of the bases for proceeding against her is delay in the disposition of cases. We understand that Circuit Judge Newman has been deprived of her secretarial assistance, one of her clerks, and had her ability to use the Court's communication systems restricted. She cannot be expected to complete her duties in a timely fashion if, unlike the other judges on the Court, she lacks the necessary access to communications and administrative and research support.

Of even more pressing concern, however, is the ability of the “special committee” or *any* Federal Circuit Judicial Council to investigate or render any determination, without creating the appearance of prejudice—if not actual prejudice.

As you are aware, the Rules for Judicial Conduct and Judicial Disability Proceedings authorize a “special committee” to conduct an evidentiary hearing, and the rules afford the subject judge the ability to compel the testimony of witnesses. *See* R. Jud. Conduct & Disability Proceedings 14(b), 15(c). In this case, such witnesses likely would include not only members of the “special committee,” but also current and former members of the Circuit (who could and would testify regarding the allegations in your “identified complaint” against Circuit Judge Newman). It is evident that members of the “special committee” and of any Federal Circuit Judicial Council could not serve as adjudicators of the complaint against Circuit Judge Newman while also serving as fact witnesses in the proceeding.

Moreover, because other witnesses also may include members of the bar who practice exclusively before the Federal Circuit, members of the Office of White House Counsel, former law clerks, and others who may have an interest in the “special committee” investigation and recommendation, the investigation can fairly be described as “highly visible and [one where] a local disposition may weaken public confidence in the process.” Commentary on R. Jud. Conduct & Disability Proceedings 26. This concern is supported by leading judicial ethics experts. *See* Riddhi Setty and Michael Shapiro, *Federal Circuit Chief Moore Takes Action to Unseat Judge Newman*, Bloomberg News (April 13, 2023) (“The fact that you have a chief judge initiating a complaint against a long-time colleague would suggest this ought to be handled by the chief judge and circuit council’ of another federal appeals court.”) (quoting Professor Arthur Hellman).

Of course, a proceeding of this sort by any judicial council would raise a host of constitutional questions, but at the very least this complaint needs to be transferred. Indeed, transferring a complaint about a Circuit Judge appears to be standard practice within regional circuits. *See, e.g., In re Charges of Judicial Misconduct*, No. 21-90142-JM (resolution of the complaint against Circuit Judge William Pryor of the U.S. Court of Appeals for the Eleventh Circuit by the Judicial Council of the Second Circuit); *In re Charges of Judicial Misconduct*, No. DC-13-90021 (resolution of the complaint against Circuit Judge Edith Jones of the U.S. Court of Appeals for the Fifth Circuit by the Judicial Council of the District of Columbia Circuit); *In re Charges of Judicial Misconduct*, No. 12-90069-JM (resolution of the complaint against Circuit Judge Boyce F. Martin of the U.S. Court of Appeals for the Sixth Circuit by the Judicial Council of the Second Circuit). The practice of other courts over the years strongly suggests that a request for transfer is not only appropriate, but necessary.

For these reasons, NCLA respectfully requests that you or the “special committee” (acting pursuant to Rule 26 of the Rules of Judicial Conduct and Judicial Disability Proceedings, and in the interests of justice and public confidence in the judicial system) request that the Chief Justice of the United States transfer this investigation to the judicial council of another circuit. We additionally request that consistent with the Constitution, the Judicial Disability Act of 1980, and the Rules for Judicial Conduct and Judicial Disability Proceedings, you immediately restore Circuit Judge Newman to the regular rotation on the Court’s calendar and that you cease interfering with Circuit Judge Newman’s operation of her own chambers and immediately restore her full access to the Court’s communication systems and her complement of administrative and legal support staff so as to permit

her to discharge her judicial duties in the same manner as other judges on the United States Court of Appeals for the Federal Circuit and throughout the federal judiciary.

Sincerely,

/s/ *Mark Chenoweth*

President and General Counsel, NCLA

cc: The Honorable John G. Roberts, Jr.
The Chief Justice of the United States

The Honorable Robert M. Dow, Jr.
Counselor to the Chief Justice of the United States

The Honorable Sharon Prost
Circuit Judge, United States Court of Appeals for the Federal Circuit

The Honorable Richard G. Taranto
Circuit Judge, United States Court of Appeals for the Federal Circuit