New Civil Liberties Alliance

July 5, 2023

The Honorable the Members of the Special Committee of the
Judicial Council for the Federal Circuit
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

VIA EMAIL

Re: In re Complaint No. 23-90015 (Complaint Against Circuit Judge Pauline Newman)

Your Honors:

This letter responds to the Special Committee's previous orders which "directed Judge Newman to file a brief by July 5 and set oral argument, closed to the public, for July 13."[1] Order of June 20, 2023 at 1. The Committee further directed that the response be "limited to addressing the question whether Judge Newman's refusal to undergo examinations, to provide medical records, and to sit for an interview with the Committee as described in the May 16 Order constitute misconduct and the appropriate remedy if the Committee were to make a finding of misconduct." Order of June 1, 2023 at 6. Consistent with that directive, this submission does not address any other issues that are or may become pending before the Committee. However, this limitation is honored without prejudice to Judge Newman's rights to interpose any defenses or objections to these issues or investigations in the future and in appropriate proceedings.

Furthermore, and as discussed in more detail in Parts II-III, *infra*, Judge Newman renews and restates her objections to the Judicial Council of the Federal Circuit ("Judicial Council") continuing with this investigation instead of requesting a transfer of this matter to another circuit's judicial council as provided by Rule 26 of Rules for Judicial-Conduct and Judicial-Disability Proceedings ("Conduct Rules."). Judge Newman also objects to the hearing scheduled for July 13, 2023, being closed to the public. This letter should not be construed as a waiver of those objections.

[1] Pursuant to Rule 23(b)(7) of Rules for Judicial-Conduct and Judicial-Disability Proceedings, we respectfully request, and Judge Newman explicitly consents to, the public release of this letter and any Order or communication issued in response thereto.

Additionally, we highlight the fact that Judge Newman was recently evaluated by Ted L. Rothstein, MD—a qualified neurologist and a full Professor of Neurology and Rehabilitation Medicine at the George Washington University School of Medicine & Health Sciences. This examination revealed no significant cognitive deficits and led that expert to conclude that Judge Newman's "cognitive function is sufficient to continue her participation in her court's proceedings." This examination should obviate the need for any further testing and bring these proceedings, that should never have been started in the first place, to a speedy conclusion.[2]

I.

As an initial matter, Judge Newman rejects the Committee's characterization of her position as having "refus[ed] to undergo examinations, to provide medical records, and to sit for an interview with the Committee." Quite the contrary. From the moment Judge Newman acquired legal representation, she exhibited willingness to *cooperate* to resolve these unfounded and baseless accusations.

For example, with respect to medical testing, in the very first communication to the Committee on April 21, 2023, Judge Newman unequivocally stated that she "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." April 21, 2023 Letter to Special Committee at 2. In the letter sent to the Special Committee on May 9, 2023, Judge Newman repeated her willingness to work *together* with the Special Committee to find an appropriate solution to the Committee's request. *See* May 9, 2023 Letter to Special Committee at 4-5. Judge Newman reiterated her position once again in a letter on May 25, 2023, in which Judge Newman stated that she remained willing

> to undergo necessary testing, provide necessary records, and meet with a special committee provided that she is immediately restored to her rights and duties as a judge and further provided that this matter is promptly transferred to a judicial council of another circuit, which is unmarred by the prior unlawful decisions and which is willing to "work[] or operat[e] *together*" with Judge Newman, including on selecting medical providers and setting the appropriate parameters of any examination.

May 25, 2023 Letter to Special Committee at 3.

Second, with respect to the requested medical records, the Special Committee has not even established that such records exist, much less their relevance to anything that it could plausibly be investigating. For instance, the Committee requested records of Judge Newman's alleged heart attack and alleged hospital admission for stent placement; however, it never established that Judge Newman actually suffered a heart attack or had a stent placed. Indeed, the Committee did not even provide

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[2] It goes without saying that such a conclusion requires fully restoring Judge Newman to the argument calendar, restoring her ability to employ the full complement of staff, and returning any equipment that was originally housed in her office but may now be in the possession of the other offices within the Court.

any basis for forming its belief that Judge Newman had these medical problems. Judge Newman never suffered a heart attack nor had a coronary stent placed. The same problems appear in the Committee's request regarding Judge Newman's alleged, yet non-existent, fainting episode. Nor has the Committee ever explained on what basis it suspected that Judge Newman has "hospital, medical, psychiatric or psychological, or other health-professional records from any treatment provider in the last two years regarding mental acuity, attention, focus, confusion, memory loss, fatigue, or stamina." May 16, 2023 Order at 4. It is hard to understand how Judge Newman could meet the Committee's requests with respect to records that do not exist.

Furthermore, the Committee (after initially requesting to see the records for itself without explaining what information it expected to, given its utter lack of expertise in medical matters, glean from these records) directed Judge Newman to "supply such records to ... the neurologist whom the Committee has selected to conduct an evaluation of Judge Newman." *Id.* at 6. It necessarily follows that the propriety of this request rises and falls with the propriety of the request that Judge Newman subject herself to examination by medical providers selected by the Committee without any consultations with Judge Newman. Because, as discussed further below, *see* Parts II-IV, *infra*, the requirement that Judge Newman submit to such examinations was improper, it follows that so too was the request for her to turn over her records. Of course, just as with testing, Judge Newman was willing to "provide necessary records," May 25 Letter at 3, had the investigatory process met basic constitutional and statutory requirements.

Much the same can be said with respect to the request that Judge Newman "participate in a videotaped interview with the Committee." May 16 Order at 24. Leaving aside the fact that at no point did the Committee identify topics on which it sought clarifications from Judge Newman, or the purpose of the interview, again, Judge Newman indicated a willingness to meet with a properly constituted investigatory committee. *See* May 25 Letter at 3. The peculiarity and opacity of the Committee's request is further highlighted by the apparent tension between the request that Judge Newman sit for an interview and the prior assurances by the Committee that unlike members of other judicial councils who may have a disadvantage of laboring under a "'relative ignorance' ... of 'local circumstances and personalities might make them less able to gauge what corrective action would be effective and appropriate,'" the members of the Special Committee suffer no similar disability. May 3, 2023 First Order at 10-11 (quoting Implementation of the Judicial Conduct and Disability Act of 1980, Report to the Chief Justice of the Judicial Conduct and Disability Act Study Committee, 239 F.R.D. 116, 215 (Sept. 2006) ("Breyer Report")). But if the members of the Committee are intimately familiar with Judge Newman, then there ought to be no need to "interview" her. Finally, it is not Judge Newman's burden to refute baseless allegations, including completely fabricated ideas about her prior medical history. Rather, it is the Committee's obligation to have a legitimate basis before leveling such accusations, including claims of prior heart attacks, cardiac stents, etc. *Cf.* Fed. R. Civ. P. 11(b)(3).

To reiterate, Judge Newman has made several attempts to resolve the unwarranted allegations and charges leveled against her. Despite these efforts to remove an unjustified cloud over her ability to continue her storied judicial career, Judge Newman never received any cooperation from the Committee. Not only did the Committee refuse to even discuss any sort of cooperative approach to the investigation, it (as discussed further below) persevered in unlawful actions without even acknowledging Judge Newman's repeated attempts to have the illegality rectified. It is emphatically

not Judge Newman who refused to cooperate—to the contrary, Judge Newman offered cooperation at every turn—it is the Special Committee that refused to work together with Judge Newman. In short, Judge Newman disputes and rejects the very premise of the June 1, 2023 Order. And since Judge Newman did not refuse to cooperate, it is unnecessary to show "good cause" for something that (much like her alleged maladies) never happened in the first place. In any event, Judge Newman has multiple justifications for refusing to submit to the Special Committee's unreasonable demands, and each of these reasons provides sufficient "good cause" for her responses to the Committee's requests.[3] These reasons are detailed below.

II.

As indicated in prior letters to the Special Committee, Judge Newman objected, and continues to object to this investigation being conducted by the Judicial Council or any of its committees, because these bodies suffer from irreconcilable conflicts of interest or at the very least suffer from bias or appearance of bias—certainly Judge Newman perceives bias in how she is being treated, as do numerous public commentators. An improperly constituted tribunal is a sufficient "good cause" for resisting that tribunal's demands. *See, e.g.*, *Axon Enter. v. FTC*, 597 U.S. 175 (2023). As the Supreme Court explained just a few short months ago in *Axon*, the harm of "being subjected" to "unconstitutional agency authority" is a "'a here-and-now injury.'" *Id.* at 191 (quoting *Seila Law LLC v. CFPB*, 591 U. S. ___, ___ (2020) (slip op., at 10)). It is Judge Newman's contention that the investigation by the Judicial Council violates due process guarantees. The investigation also violates the statutory command that any judge "*shall* ... disqualify himself ... [w]here he has ... personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1). In fact, the tribunal has already admitted knowledge of local circumstances and personalities. *See* May 3, 2023 First Order at 10.[4] These circumstances and personalities are part of the disputed evidentiary facts that will come into play and thus disqualify this entity from hearing this matter.

It is well settled that due process requires, at a minimum, a "neutral decisionmaker." *See Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004). This requirement is so fundamental that it applies even to enemy combatants. *Id. A fortiori*, it applies to federal judges accused of misconduct or suspected of disability. There are multiple reasons why the members of the Judicial Council cannot, even if they wanted to, be "neutral decisionmakers," and why disqualification of all members of the Judicial Council (including, of course, those who were designated to serve on the Special Committee) is required. First, Chief Judge Moore is, in essence, the complainant here. The Special Committee resists this obvious fact; in an order dated May 16, 2023, it averred that "Chief Judge Moore did not file a complaint nor is she a complainant. Instead, Chief Judge Moore identified a complaint pursuant to Rule 5, which allows a Chief Judge to initiate the complaint when others have presented allegations establishing probable cause to believe a disability exists." Respectfully, that is a distinction without a difference. The relevant point is that there were no formal complaints lodged against Judge Newman

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[3] We do not concede that Judge Newman's multiple offers to engage in a truly cooperative process are somehow insufficient, or that her entirely reasonable requests can be fairly characterized as "failure to cooperate" within the meaning of Rule 4(a)(5).

[4] There is, of course, a word for prior knowledge of "local circumstances and personalities"—bias.

by anyone, until Chief Judge Moore decided to initiate these proceedings. Second, in Chief Judge Moore's own telling, Judge Newman's fellow Federal Circuit judges are sources for at least some of the various grievances that were communicated to Chief Judge Moore. *See, e.g.*, March 24, 2023 Order at 2. These very judges who have found it (for legitimate or illegitimate reasons) "difficult" to work with Judge Newman and have informally complained about her cannot, consistent with the constitutional due process guarantees, also then adjudicate the question of whether their stated concerns and complaints are or are not legitimate. It is an ancient maxim, going back to Roman times, if not earlier, that "no man can be a judge in his own case." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016); *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); *Dr. Bonham's Case*, 77 Eng. Rep. 638, 646, 652 (C.P. 1610). Yet, having the complaint against Judge Newman adjudicated before the Judicial Council would necessarily be an instance of the prohibited "self-adjudication."

This concern is not tempered by the fact that Federal Circuit judges may have no personal interest in whether Judge Newman does or does not continue serving (though as explained further below, such an interest is indeed present). What matters is that Judge Newman's colleagues, as recounted in Special Committee orders themselves, have already formed some opinions regarding Judge Newman's abilities. It is well-known psychological phenomena that individuals process new information through the lens of their pre-existing knowledge and biases—phenomena known as "confirmation bias" and "anchoring bias." *See, e.g.*, *Duncan v. Bonta*, 19 F.4th 1087, 1122 (9th Cir. 2021) (*en banc*) (Berzon, J., concurring), *vacated on other grounds* by 142 S. Ct. 2895 (2022) ("Cognitive biases ranging from confirmation bias to anchoring bias, can cloud a judge's analysis."). Any new data received by Judicial Council members is thus likely to be processed through the lens of prior knowledge, beliefs, of impressions. This is not a matter of bad intent, but of basic human psychology.

Next, even assuming that neither Chief Judge Moore, nor other members of the Judicial Council can be fairly classified as "complainants" for whatever reason, they still claim to be and are *witnesses* to Judge Newman's allegedly problematic behavior. Indeed, with respect to some of the allegations, they are *sole* witnesses. For example, as alleged in the order that launched this investigation, Judge Newman's colleagues "stated that Judge Newman routinely makes statements ... *during deliberative proceedings* that demonstrate a clear lack of awareness over the issues in the cases." March 24 Order at 2 (emphasis added). The only individuals present during the "deliberative proceedings" are the judges themselves, and thus they are the only ones who could testify to what was said therein. Of course, these statements have not yet been subject to cross-examination, but would have to be, were this matter to proceed further. *See* R. 15(c). Judge Newman has previously indicated that she intended to avail herself of this opportunity. *See, e.g.*, April 21, 2023 Letter from Mark Chenoweth to the Special Committee at 3; May 9, 2023 Letter from Gregory Dolin to the Special Committee at 5. Unfortunately, in the present posture, the cross-examination would not serve its purpose. The point of cross-examination is for the decision-maker to be able to judge the credibility of a witness, and then weigh the testimony of that witness against other testimonies and documents. It is through this comparison and exposure of weaknesses in various witnesses' statements that the truth emerges. *See California v. Green*, 399 U.S. 149, 158 (1970) ("[C]ross-examination [is] the 'greatest legal engine ever invented for the discovery of truth.'") (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)). However, one cannot fairly weigh his or her own credibility and the strength and weaknesses

of one's own testimony.[5] Thus, whether Judge Newman's colleagues are properly classified as complainants or witnesses, the outcome remains the same—they cannot dispassionately evaluate the evidence for and against Judge Newman, and consequently cannot (even leaving aside any constitutional concerns) constitute an appropriate tribunal to adjudicate her fitness for the bench.

Other judicial councils have recognized this inherent risk. For example, in the *Adams* case, when fellow District Judges complained about Judge Adams's behavior, none of his colleagues from the same district participated at the "special committee" stage, nor in the final deliberations of the judicial council. *See In re Complaint of Judicial Misconduct*, No. 06-13-90009 (6th Cir. June 27, 2018) at 1 and 3 n.3. Additionally, since the publication of the Breyer Report, *supra*, *every single* complaint of misconduct against a circuit judge that was not summarily dismissed has been transferred to another circuit's judicial council for investigation.[6] *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 Complaints under the Judicial Conduct and Disability Act*, Nos. 10-18-90038-67, 10-90069-107, 10-90109–122 (resolution of the complaint against Circuit Judge (by then-Justice) Brett M. Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit by the Judicial Council of the Tenth Circuit); *In re Complaint of Judicial Misconduct*, Nos. 18-90204-jm, 18-90205-jm, 18-90206-jm, 18-90210-jm (resolution of the complaint against Circuit Judge Maryann Trump Barry of the U.S. Court of Appeals for the Third 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); *In re Complaint of Judicial Misconduct*, 575 F.3d 279 (2009) (resolution of the complaint against Chief Circuit Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit by the Judicial Council of the Third Circuit). As Professor Arthur Hellman noted, "over the last few years, chief judges have *consistently* followed the practice of requesting a transfer when serious allegations have been raised about a judge of the court

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[5] Additionally, any evidence that might contradict one's own pre-existing views is likely to get short shrift. *See Duncan*, 19 F.4th at 1122. Instead of seeing weaknesses and shades of grey in the testimony, in such a situation, the decisionmaker can actually become more entrenched in the initial position. *See, e.g.*, Enide Maegherman, *et al.*, *Law and Order Effects: On Cognitive Dissonance and Belief Perseverance*, 29 Psychiatry, Psychology and L. 33, 34 (2022) ("[J]udges who had been given more incriminating information prior to trial were more likely to convict the defendant than judges who were given the same case file, but less incriminating prior information. Therefore, judges also appear to be prone to belief perseverance despite the need for impartiality."); *id.* ("One way in which people try to escape cognitive dissonance is to adopt, and adhere to, one of the beliefs, while refuting or downplaying the other.").

[6] The Conduct Rules were adopted in response to the Breyer Report. Prior to the Breyer Report there was no formal mechanism to request a transfer, though Illustrative Rules did suggest that such a transfer, as well as "intercircuit assignment procedures under 28 U.S.C. § 291(a)" may be available. *See Illustrative Rules Governing Complaints of Judicial Misconduct and Disability*, R. 18(g) (Admin. Office of the Courts, 2000).

of appeals." Arthur D. Hellman, *An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings*, 32 Geo. J. Legal Ethics 341, 404 (2019) (emphasis added). In refusing to seek a transfer of this matter, the Judicial Council for the Federal Circuit stands alone, and it stands athwart Congressional intent in crafting the Disability Act.

But these concerns that apply to all circuits are not the only ones present in this case. As the recent study by Dr. Ron Katznelson shows, members of the Judicial Council stand to materially benefit should Judge Newman be removed from the bench. *See* Ron D. Katznelson, Ph.D., *Is There a Campaign to Silence Dissent at the Federal Circuit?* at 34-35, *available at* https://ssrn.com/abstract=4489143. As Dr. Katznelson explains, given Judge Newman's high rate of dissent, were she replaced by a less dissent-prone judge, the work of her colleagues would be reduced by over 5%. It is irrelevant that Judge Newman's colleagues may or may not be purposefully attempting to remove her from the bench for the sole purpose of having to do less work. As the Supreme Court explained, the Due Process Clause abhors procedures that "offer a *possible* temptation to the average man as a judge." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (emphasis added). The Due Process Clause is offended when a decisionmaker has a strong "motive" to reach a particular result. *Id.* at 533-34. And whatever the intentions of the Judicial Council members may be, it cannot be seriously debated that they will have an easier time accomplishing their work if a colleague who forces them to respond to criticism (as dissents always do) were removed from the Court. This "possible temptation" is, in and of itself, sufficient basis for all the members of the Judicial Council to recuse themselves. *See* 28 U.S.C. § 455(a), (b)(4), (b)(5)(iii).

There are two additional reasons why an investigation of Judge Newman, if conducted by her Federal Circuit colleagues, would not meet the requirements of due process. Most of the testimony and information gathered by the Committee prior to and in the course of its investigation comes from employees of the Federal Circuit. These individuals' ability to continue working in normal conditions depends on their continued good relationship with Chief Judge Moore and other judges of the Court. For example, it is hard to imagine that the Clerk of the Court, even if he could not be easily fired, could long continue with his duties were the judges of the Court to lose complete confidence in him. Again, we do not suggest that Chief Judge Moore or other members of the Judicial Council explicitly exerted pressure on any of the witnesses to provide false or misleading testimony. However, it is entirely possible, indeed (given what is known about human psychology) likely, that witnesses may have structured and shaded their testimony to more perfectly align with what they may have perceived their superiors wanted to hear. *See, e.g., Dellums v. Powell*, 660 F.2d 802, 808 (D.C. Cir. 1981) ("In contrast to a witness at trial, a police officer making out-of-court statements is not subject to the rigors of cross-examination or the threat of a perjury conviction. Unlike a judge, a police officer is not insulated from the political process or from pressures to please superiors."); *cf. Chicago & R.I.R. Co. v. Still*, 19 Ill. 499, 507-08 (1858) (a neutral trier of fact must be able "to judge of the effect that bias or prejudice, a fear of losing employment, a desire to avoid censure, a fear of offending or a desire to please employers, or any other circumstances in testimony, operating, in the opinion of the jury, to warp the judgment and pervert the truth, has upon the human mind....") Thus, not only are the members of the Judicial Council faced with insurmountable difficulties when it comes to weighing evidence in this case, but they cannot even be sure that the key evidence that is presented to them is in any way reliable, rather than tainted by the allegiances and personal concerns of employees-witnesses. In contrast, had this matter been transferred to a judicial council of another circuit, these very same witnesses, given that their testimony would remain sealed and thus off-limits to everyone,

including the judges of this Court, would be able to speak freely. To be sure, it is possible that the content of their testimony would not change, but that is beside the point. The question is whether the proceedings in *this* Judicial Council comport with due process of law when they depend in large part on testimony that is inherently unreliable. The answer to that question is self-evident.

Additionally, the Federal Circuit is a specialized court with a specialized bar. *See* Daniel R. Cahoy & Lynda J. Oswald, *Complexity and Idiosyncrasy at the Federal Circuit*, 19 Colum. Sci. & Tech. L. Rev. 216, 226 (2018). Many, if not most, of the attorneys who litigate before this Court practice only in the areas that are within this Court's exclusive jurisdiction. In other words, the very livelihood of these attorneys depends on being able to maintain good standing and a trusted reputation with judges of the Court when it comes to representations made in their various cases. Given this reality, attorneys who could serve as witnesses regarding Judge Newman's conduct during oral argument (and perhaps in other settings) are actually placed in a position that is not that different from the Court's employees. In other words, the attorneys who regularly practice before this Court may be reticent about coming forward with their impression of Judge Newman's conduct or opinion quality, which in turn will have the effect of undermining Judge Newman's ability to mount a defense against these unwarranted charges. This reticence is already evident from the fact that multiple law firms with patent practices declined to be involved in this matter in any capacity citing "conflict of interest." None of this would be a problem were the investigation conducted by a judicial council of another circuit. Attorneys providing testimony could remain anonymous and thus not worry about whether their involvement in this matter would affect their ability to continue practicing in the Federal Circuit. Indeed, even the identity of attorneys acting in an attorney (rather than witness) capacity could have been kept confidential, thus allaying any concerns that anyone may have had about representing Judge Newman.[7]

The Special Committee's citations to the matter of alleged judicial misconduct by Judge John Adams as proof positive that inter-circuit transfer is not necessary, *see* May 3 First Order at 12 (citing *In re Complaint of Judicial Misconduct*, No. 06-13-90009 (Judicial Council of the Sixth Circuit Feb. 22, 2016)), misses the mark. In that case, *not a single member* of either the Judicial Council nor the investigative committee was Judge Adams's colleague on the District Court for the Northern District of Ohio. In the present case, *every single member* of the Special Committee and the Judicial Council is Judge Newman's colleague on her own court. In this sense, the two cases could not be more different.

At bottom then, it is not and never was possible for Judge Newman to receive a fair process from the Judicial Council of the Federal Circuit, *even if* the Judicial Council members attempted their very best to provide such a process. Judge Newman's participation in this process would have simply legitimated, without warrant, proceedings that do not and cannot comport with constitutional and statutory requirements. All of these concerns were ignored when we previously brought them to the Special Committee's attention. In these circumstances, it was and remains entirely justifiable for Judge

[7] To be clear, the New Civil Liberties Alliance is proud to represent Judge Newman and we are confident that our representation is and will be second to none. The point, however, is that by keeping the proceedings within the confines of the Federal Circuit, the Judicial Council created circumstances which limited Judge Newman's abilities to mount a full-throated defense against the accusations leveled against her. Whether the Judicial Council deliberately created these constraints or not, the fact that multiple law firms declined to represent Judge Newman demonstrates that they are indeed real.

Newman to decline to submit to the Special Committee's demands. There is no good reason for the Judicial Council to retain this matter, and a host of good reasons to transfer it. As the tribunal is wrongfully constituted, Judge Newman has no choice but to object.

Indeed, submitting to the Special Committee's demands would vitiate Judge Newman's right to avoid a proceeding before a tribunal that is unable to adjudicate the matter consistent with the requirements of the Due Process Clause and statutory commands. *See Will v. Hallock*, 546 U.S. 345 (2006) ("It is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest that counts."); *cf. Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Without question, a trial conducted by Article III judges against an Article III judge, but one that would violate both constitutional and statutory commands "would imperil a substantial public interest" in maintaining confidence in the judiciary generally and disciplinary processes in particular, given that "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case," *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). This, in turn, would "imperil a substantial public interest" in having cases resolved by judges whose character and fitness to serve are not impugned by dubious findings.

Perhaps most importantly, any proceedings that might result in what essentially amounts to a forced retirement of an Article III judge against her will would "imperil a substantial public interest" in judicial independence that is guaranteed by the existence of a *purposefully* difficult constitutional method of removing judges—impeachment by the House of Representatives and conviction in the Senate. *See* U.S. Const. art. I, § 2, cl. 5; *id.* § 3, cl. 6; *id.* art. II, § 4. Any proceedings that undermine Congress' *sole* role in removing Article III judges from the bench "imperil[s] a substantial public interest" in maintaining the constitutional structure of government.

All of these principled objections constitute "good cause" for refusing to submit to the Special Committee's unprecedented demands.

III.

The Special Committee's and/or Judicial Council's conduct throughout these regrettable events fully justifies the objections adumbrated in Part II, *ante*.

To begin with, the Judicial Council unlawfully suspended Judge Newman from hearing cases and participating in the work of the Court before any finding of disability or misconduct, with the disqualification apparently set to last "until these proceedings are resolved." *See* April 6, 2023 Order at 4 (quoting an email of April 5, 2023, from Chief Judge Moore to Judge Newman). As we have indicated in several prior letters, *see, e.g.*, April 21 Letter at 2; May 9 Letter at 6; May 25, 2023 Letter from Gregory Dolin to the Special Committee at 1-2, such a suspension contravenes not only the Constitution, but the very Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-64 ("Disability Act") and the Conduct Rules which govern this entire process.

The Disability Act requires that whenever a special committee is appointed to investigate a judicial complaint, such a committee "shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit ... present[ing] both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit." 28 U.S.C. § 353(c). "Upon the receipt of the report," the judicial council may choose to

impose sanctions including "ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint." *Id.* 354(a)(2)(A)(i). The Conduct Rules place yet further procedural limitations on the imposition of such sanctions. Specifically, the Conduct Rules afford the accused judge "21 days after the filing of the report of a special committee [to] send a written response to the members of the judicial council." R. 20(a). Furthermore, the accused judge "must also be given an opportunity to present argument, personally or through counsel" to the judicial council. *Id.* Not one of these requirements was met before suspending Judge Newman. At the time the Judicial Council allegedly voted "not to assign [Judge Newman] to sit on any new cases pending the results of the investigation into potential disability/misconduct," April 6 Order at 4, no "report of a special committee" had been filed, no finding of misconduct had been made, and most certainly, Judge Newman had not been afforded "an opportunity to present argument, personally or through counsel, written or oral, as determined by the judicial council." That the Judicial Council refused to even *acknowledge* (much less correct) this problem, despite our repeated attempts to bring it to the Judicial Council's attention indicates that the members of the Judicial Council were and are not neutrally administering the law, but were and are acting with bias against Judge Newman.

The Judicial Council's belated attempt to justify this suspension on the basis of the authority granted by 28 U.S.C. § 332(d)(1), *see* June 5, 2023 Judicial Council Order at 4-6 (raising this idea for the first time), fares no better. First and foremost, that order was issued unlawfully, because Judge Newman, though a member of the Judicial Council was not even notified of any meeting of the Judicial Council, much less invited to participate. (The same is true about the alleged meeting of the Judicial Council on March 8, 2023). In fact, not even the minutes of either meeting were provided to Judge Newman. The Conduct Rules make clear that a judge is not automatically suspended from her position on a judicial council merely because a misconduct complaint is pending against her. The commentary to Rule 25(e) stated that the disqualification of the judge under investigation "relates *only* to the subject judge's participation in any proceeding arising under the Act or the[] [Conduct] Rules." R. 25(e), cmt. (emphasis added). The commentary is explicit— the exclusion of the subject judge from all Judicial Council decisions while a complaint against that judge is pending "is undoubtedly not the intent of the [Disability] Act." *Id.* Furthermore, even if the Conduct Rules authorized a wholesale suspension of a judge being investigated from her position on a judicial council—and they do not—*there was no complaint pending or even impending on March 8*, when the Judicial Council allegedly first met and voted to remove Judge Newman from hearing cases. Thus, no plausible legal basis existed for excluding Judge Newman from the work of the Judicial Council at least as of March 8, 2023. Yet, the Judicial Council saw fit to exclude Judge Newman from its work and meetings. It did so, despite the statutory command that "*[e]ach member* of the council *shall* attend *each council meeting* unless excused by the chief judge of the circuit." 28 U.S.C. § 332(a)(6) (emphasis added).[8] The Judicial Council's cavalier attitude to its governing statute and the Conduct Rules are yet additional pieces of evidence that this process has become infected with actual bias.

[8] Needless to say, Judge Newman did not seek to be "excused" from attending the meetings of the Judicial Council, and this language does not permit a chief judge to secretly excuse someone *sua sponte.*

There are, of course, other problems with the June 5 Order. On its face, it contradicts the April 5 email from Chief Judge Moore that directly tied Judge Newman's suspension to the ongoing investigation and its conclusion. In contrast, the June 5 Order changed the rationale for the suspension. These glaring inconsistencies suggest that the Judicial Council is grasping at whatever theory suits its momentary needs in order to achieve a predetermined result. This too indicates that the Judicial Council is not acting as a neutral decisionmaker.

Next, the June 5 Order simply misstates facts. Thus, it claims that Judge Newman's "backlog had placed her in violation of Federal Circuit Clerical Procedures #3, ¶ 15." June 5 Order at 2. In fact, on February 6, 2023, Judge Newman had *zero* cases that were subject to the rule. Two cases on Judge Newman's docket were pending for over one year. However, [redacted] which at that point had been pending for 424 days, was stayed pending Congress's consideration of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, Pub. L. 117-168, 136 Stat. 1759 (codified at 38 U.S.C. §§ 1116 and 1710) (signed Aug. 10, 2022 and effective Oct. 1, 2022).[9] Because the case was stayed pending further developments in the law, it was not subject to Clerical Procedures #3, ¶ 15. The second case that had been pending for more than a year was [redacted] However, Judge Newman was a *dissenting* judge on that case. *Id.* The majority opinion by Judge [redacted] circulated on [redacted] 2022, and the case (including Judge Newman's dissent) issued on [redacted] 2023, [redacted], *i.e.*, within six months. *Id.* In other words, Judge Newman took *three fewer* months to draft her dissent than Judge [redacted] took to draft his opinion. *Id.* No other cases that were over a year old remained with Judge Newman, and only one case that was over six months old was among the cases assigned to her as of the February 6 date. Thus, the assertions contained in the June 5 Order are demonstrably false. That the Judicial Council made them, despite the ease with which they could check their allegations against the factual record, provides additional evidence that the Judicial Council cannot be trusted to act neutrally with respect to Judge Newman.

The June 5 Order also appears to be of indefinite duration, unlike the order in the case cited by the Judicial Council. *See* June 5 Order at 5 (citing *United States v. Colón-Muñoz*, 318 F.3d 348 (1st Cir. 2003)); *id.* at 6 (setting no end date to the suspension). In *Colón-Muñoz*, the order reassigning cases from Judge Carmen Cerezo was limited in time and was issued only after consulting with Judge Cerezo and taking her views into account. No similar courtesy was extended to Judge Newman. There is also no indication that Judge Cerezo (unlike Judge Newman) objected to this order. The June 5 Order is thus unprecedented, and appears to have been issued, contrary to its assertions, *see* June 5 Order at 5, as a "censure" rather than as a result of any concerns regarding "expeditious administration of justice." Such premature "censure" further indicates that the Judicial Council has prejudged the matter, which means that it should be incompetent to continue the investigation any longer.

There are additional instances where the Judicial Council and/or the Special Committee have misstated facts or the law in a seemingly results-oriented way. For example, in the May 3 First Order, the Special Committee asserted that "[i]n the twelve-month period ending September 30, 2022, there

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[9] Indeed, the Court requested additional briefing on the impact the newly enacted statute had on the litigation. See [redacted]. The supplemental briefs were filed on [redacted], 2022. The decision issued on [redacted], 2023, six months and one week after the filing of supplemental briefs.

were 375 complaints involving circuit judges, but only 2 complaints involving judges at any level were transferred from one circuit to another." May 3 First Order at 11 (citing Table S22, Judicial Complaints—Complaints Commenced, Terminated, and Pending with Allegations and Actions Taken Under Authority of 28 U.S.C. 351-364 During the 12-Month Period Ending Sept. 30, 2022, *available at* https://tinyurl.com/47jkz6t2). However, out of those "375 complaints" only *three* proceeded to the "special committee" stage, and out of those three, *two* were transferred. The egregiously misleading statistic provided by the Special Committee looks like little more than an attempt to fit the data into a predetermined conclusion. Similarly, in several orders, the Special Committee, in an attempt to justify the haste with which orders were entered and compliance demanded, cited to S. Rep. No. 96-362 for the proposition that judicial complaints should be resolved within 90 days. *See* May 22, 2023 Order at 3; May 16 Order at 24. The problem is that this report accompanied the Senate bill that was never enacted and was instead replaced by the House version which did not set similar deadlines or even expectations.[10] *See* H. Rep. 96-1313 at 4; Hellman, *supra* at 352-54. Of course, anyone, including federal judges, is capable of making legal errors and misciting sources. However, in combination with other actions taken by the Judicial Council and the Special Committee, something beyond sloppiness or negligence appears to be at work here. The Special Committee's repeatedly-displayed willingness to rely on authority, no matter how tenuous or even outright erroneous, bespeaks a desire to reach a predetermined outcome.[11]

The Judicial Council's and Special Committee's demonstrated lack of neutrality constitutes sufficient "good cause" for Judge Newman's refusal to comply with the Special Committee's unlawful orders.

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[10] There may be a good reason for the difference. The rejected Senate bill envisioned the Judicial Council investigation being merely a first step, with the ultimate determination being made by "a national 'Court on Judicial Conduct and Disability' with broad powers, including the power to conduct de novo hearings." Hellman, *supra* at 352. In fact, "because of the central role of this 'special, national court,' the Judicial Conference opposed the measure." *Id.* The Disability Act that was actually adopted by Congress expects the entire process to be conducted by judicial councils. So, understanding the necessity of thorough and complete investigations, Congress never suggested any sort of artificial deadlines, much less ones as compressed as the Special Committee appears to have adopted.

[11] The Special Committee's other actions have also sent an unmistakable message of animosity to Judge Newman and her legal position. From a refusal to undertake any cooperative discussions with Judge Newman regarding medical testing, despite such negotiation being within the contemplation of the Conduct Rules, *see* R. 13(a), cmt., to a rejection of a reasonable request for a short extension of time and ordering a response on the morning of a major Jewish holiday, *see* May 20, 2023 Letter from Gregory Dolin to Special Committee and May 22, 2023 Order, to setting extraordinarily short deadlines for Judge Newman to respond to the Special Committee's proliferating orders, despite being aware that at the time Judge Newman did not have legal counsel, all bolster Judge Newman's belief in the Judicial Council's partiality.

IV.

Aside from all of the aforementioned general problems with permitting the Judicial Council of the Federal Circuit to continue with this investigation, its specific orders are themselves highly problematic both procedurally and substantively.

It should first be noted that the order for psychiatric and neurological testing is simply unprecedented. The Special Committee's reliance on the *Adams* case is once again misplaced. It is true that the Judicial Council of the Sixth Circuit ordered Judge Adams to submit to similar testing. However, once Judge Adams filed suit, the Sixth Circuit receded from its demands. At no point did Judge Adams undergo unwanted testing. *See Adams v. Jud. Council of Sixth Cir.*, 2020 WL 5409142, at *5 (D.D.C. Sept. 9, 2020) ("On June 27, 2018, the Judicial Council issued an order discontinuing any further investigation and withdrawing the requirement that plaintiff submit to a mental health evaluation."). Thus, the *Adams* case provides no support for the Special Committee's attempt to have Judge Newman submit to a forced mental health examination. This comprises yet another miscited legal authority. While Judge Newman has been a trailblazer her entire life, she does not wish to be the first federal judge in the history of this country to submit to forced, unwanted, and unwarranted medical testing.

Second, as already mentioned, the Special Committee, contrary to the guidance provided by the commentary to Rule 13(a), did not even attempt to enter into any sort of negotiation with Judge Newman about the selection of providers or the scope of the examination, despite Judge Newman's invitations to do so. This again stands in contrast to the *Adams* case. There, "[t]hroughout the investigation, the S[pecial] I[nvestigating] C[ommittee] ... negotiated with Judge Adams and his counsel in an attempt to reach a mutually agreeable conciliation plan that would resolve the Complaint without requiring action by the Judicial Council. The discussions began in the fall of 2013 and continued through the winter of 2015."[12] *In re Complaint of Judicial Misconduct*, No. 06-13-90009, *supra* at 12. Nothing of the sort happened here (save for attempts by Chief Judge Moore to strong-arm Judge Newman into senior status as the only possible "informal resolution" of the complaint).

In requesting that Judge Newman submit to medical examination by providers of its own choosing, the Special Committee never even attempted to explain on what basis these providers were chosen or what are the providers' qualifications to conduct this specific type of examination. Nor has the Special Committee explained on what basis it chose its "expert consultant." There has been no opportunity to vet these individuals as required by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Absent these basic procedural safeguards, it follows that none of the medical professionals has been properly qualified as an expert, and therefore, there exists no basis or reason for Judge Newman to rely on the skills or opinions that these individuals allegedly possess. In other words, failure of any of the medical providers selected by the Special Committee to qualify as experts constitutes a sufficient and independent "good cause" for refusing to submit to a medical examination by these providers.

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[12] This timeline is yet another piece of evidence that no other judicial council understands the Disability Act or the Conduct Rules to impose, formally or informally, an arbitrary "90 day" deadline on the resolution of the complaints.

The same can be said about Special Committee's request for medical records. Since the records (which again, don't even exist, because the events that the Special Committee "identified" did not actually happen) had to be made available to one of the medical providers identified by the Special Committee, *see* May 16 Order at 6, a necessary precondition for such a request is that this provider has to be properly qualified as an expert. As discussed in the preceding paragraph, none of the providers (including the person whom the Special Committee expected to review Judge Newman's medical records) was so qualified. This lack of qualification provides sufficient "good cause" for refusing to provide medical records to thse medical professionals.

V.

In its June 1 Order, the Special Committee asserted that it had "a reasonable basis for ordering [Judge Newman] to undergo examinations and to provide medical records," given "the evidence on which the Committee based its determinations." June 1 Order at 5. To prove the point, the Special Committee provided Judge Newman with a number of affidavits that allege all sorts of shortcomings by Judge Newman. Respectfully, these documents cannot bear the weight assigned to them.

This letter has already discussed the significant problems with the testimony provided by the Court's employees to their own supervisors, and we will not belabor the point here. However, there are additional reasons why none of the documents relied on by the Special Committee justifies the massive invasion of privacy that forced psychiatric testing by providers with unknown qualifications and provenance would necessarily entail.

One of the key pieces of evidence that the Special Committee relied on in support of its allegation that Judge Newman is unfit to continue her judicial service is the alleged "extensive delays in the processing and resolution of cases." March 24 Order at 2; *see also* May 3 First Order at 7; May 16 Order at 5; June 1 Order at 3. According to the Special Committee, these delays are evidence of Judge Newman's alleged cognitive decline. Amazingly, the Court's own data *directly contradicts* the Special Committee's assertions. The speed of Judge Newman's opinion-writing is a matter of some dispute. *See, e.g.*, Katznelson, *supra* at 18-23. However, even the Judicial Council's own data, as stated in one of the provided affidavits, fails to substantiate the Special Committee's claims. The provided data show that between October 1, 2020 and September 30, 2021 (when there were no concerns about Judge Newman's abilities to discharge her duties), it took Judge Newman 249.11 days to publish an opinion.[13] According to the same affidavit, between October 1, 2021 and March 24, 2023 (when concerns about Judge Newman's abilities began to be voiced), it took Judge Newman 198.75 days to publish an opinion. That is an **over 25% increase** in speed during the time that Judge Newman allegedly became *less able* to fulfill the duties of her office. This evidence is provided by the Judicial Council itself and it refutes the allegations made. This fact alone eviscerates the allegations leveled

[13] The affidavit does not seem to differentiate between majority and separate opinions, even though it is self-evident that a concurring or dissenting opinion, which by definition *responds* to the majority opinion, will take more time to prepare. *See* Katznelson, *supra* at 19 ("[D]issents have an average pendency that is 143 days longer than the average pendency of majority/unanimous opinions, but comparable to the average pendency of concurring opinions. Opinions including both concurrence and dissent take the longest—an average of 213 days longer than the mean for majority/unanimous opinions.")

against Judge Newman, and given this fact, any demand for forced medical testing is perforce unreasonable.

Other affidavits also do not provide any support for the Special Committee's demands. Without delving into the minutia of these affidavits, they all ultimately reduce to petty grievances about working with Judge Newman. But even assuming that Judge Newman's behavior has caused "emotional stress and discomfort, including loss of sleep and heightened anxiety," as described in one of the affidavits, that doesn't even approach probable cause to believe that Judge Newman is mentally and/or physically disabled. Nor does the fact (assuming, *arguendo*, the truth of the matter asserted) that it has taken Judge Newman longer to be trained on new technology than other judges. Judge Newman, just like her other colleagues on the Court, has adopted and adapted to new technology. This is yet another evidence of her full competency and ability to fulfill the functions and duties of her offic.

Some other complaints presented by the affidavits, are hardly worth responding to, as they essentially constitute complaints not about Judge Newman's abilities, but disagreements with her approach to the proper procedural way of resolving cases. For example, testimony that Judge Newman has allowed oral arguments to run longer than previously is nothing more than a staff member's opinion that oral arguments should be run in a different way than the presiding judge believes is appropriate. With all respect to said staff member, it is Judge Newman who was confirmed to a seat on the Federal Circuit and not that staff member. It is therefore Judge Newman's prerogative (being the most senior judge on all panels that do not include the Chief Judge) how the arguments are run. Thus, this complaint cannot serve as a basis to demand that Judge Newman undergo a forced medical examination.

Moreover, a number of affidavits on which the Special Committee relies as justification for forced medical examination describe events that have occurred *weeks after* the Committee ordered Judge Newman to undergo these procedures. As such, they cannot be used to justify the Special Committee's demands and did not supply "probable cause" to believe that such examinations were warranted in the first instance.

Finally, we also note with some dismay, that the Special Committee does not appear to have recorded (and therefore did not turn over to Judge Newman) statements by any individuals who provided information favorable to Judge Newman. For example, the Special Committee interviewed at least three of Judge Newman's law clerks. Yet, only *two* records of these interviews were provided—one of which was a transcript of a deposition and another an affidavit by a law clerk who was reassigned to a different chambers. For reasons unknown, the interview with a third law clerk was either not memorialized, or worse still, memorialized but not shared with Judge Newman. The inference we are forced to draw is that this third interview undermined any claims of Judge Newman's disability. This witness's statements do not appear to have been taken into account in deciding whether or not Judge Newman should undergo forced medical testing. This failure to weigh all the various testimony[14] fatally undermines the Special Committee's claim that it had "a reasonable basis

[14] We, of course, do not know if there are additional witnesses who also failed to support the Special Committee's narrative and had their testimony similarly ignored.

for ordering [Judge Newman] to undergo examinations and to provide medical records." The absence of such reasonable basis is sufficient "good cause" for Judge Newman's refusal to submit to these baseless demands.

VI.

The Special Committee has directed Judge Newman to address "the appropriate remedy if the Committee were to make a finding of misconduct." June 1 Order at 6. As should be evident from the preceding portions of the letter, we do not believe that Judge Newman engaged in any misconduct whatsoever, and therefore no sanction of any kind is appropriate. Nevertheless, if the Special Committee were to conclude that Judge Newman is guilty of misconduct (though, again, she is not), we respectfully submit that nothing more than a reprimand is warranted. Most certainly, any suspension from hearing cases is entirely unwarranted, even if it were constitutional. The unlawful suspension she has already served more than satisfies any penalty. If Judge Newman has not already been restored to the bench with a full complement of cases by the time the Special Committee renders judgment, then the Committee should restore her to the bench to hear new cases immediately.

It should be kept in mind that as the Breyer Report noted there are "*no instances* in which the council ordered a suspension in the assignment of new cases." 239 F.R.D. at 143. To the extent that the Special Committee believes that the *Adams* case is persuasive authority, it should be pointed out that the Committee on Judicial Conduct and Disability of the Judicial Conference vacated the suspension imposed on Judge Adams. *See In re Complaint of Judicial Misconduct*, No. 17-01 (C.C.D. April 14, 2021). Following the remand of the case to the Judicial Council of the Sixth Circuit, and Judge Adams's continued refusal to submit to a forced psychiatric examination, the Special Investigation Committee recommended a six-month suspension from being assigned new cases; however, the Judicial Council of the Sixth Circuit rejected the recommendation. *See In re Complaint of Judicial Misconduct*, No. 06-13-90009 (6th Cir. June 27, 2018); *Adams*, 2020 WL 5409142, at *5. Ultimately then, Judge Adams was not suspended from his judicial duties. Thus, if the Special Committee wishes to rely on the *Adams* precedent, it should follow that precedent fully, and conclude that suspending Judge Newman from the functions and duties of her judicial office is entirely unwarranted and oversteps the remedial of the Special Committee and the Judicial Council.

CONCLUSION

We end where we began on April 21, 2023—neither the Judicial Council of the Federal Circuit nor this Committee is an appropriate boy to investigate these (meritless) allegations against Judge Newman because the risk of bias is simply too high to be constitutionally tolerable. Not only that, but at every step of this investigation, the Special Committee and the Judicial Council slipped into conduct that makes bias in this case far more than a theoretical concern.

Nor has the Special Committee come close to meeting its burden to show why a forced medical examination is warranted. To the contrary, the numerical data provided by the Special Committee supports Judge Newman's position that she is fully capable of performing the job constitutionally assigned to her—and has been doing so all along.

In light of all of the above, we wish to make two things clear. First, Judge Newman will *not* retire or take senior status in the face of threats and an ignoble smear campaign against her. She

intends to continue carrying out the duties that were entrusted to her by the President of the United States and the United States Senate. Second, nor will Judge Newman, though willing to *cooperate* with a neutral tribunal, *submit* to baseless demands from a body that could not, even under the best of circumstances, appear impartial—and has not acted impartially.

Judge Newman is a federal Article III judge in the United States of America. Her loyalty is to the Constitution which she swore to uphold. She will continue to be loyal to that oath and will not endorse, dignify, or engage in a process that fails to comport with constitutional or statutory requirements.

Respectfully submitted,
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NEW CIVIL LIBERTIES ALLIANCE