No. FC-23-90015

In the Judicial Council of the United States Court of Appeals for the Federal Circuit

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

RESPONSE TO THE SPECIAL COMMITTEE'S SHOW CAUSE ORDER OF MAY 29, 2024

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INTRODUCTION[1]

These proceedings are now over a year old. Not only should they never have begun, as at no point did the Committee or Judge Newman's individual colleagues have anything approaching a reasonable basis to suspect any sort of disability, but they also could and should have been terminated months ago in light of clear evidence of Judge Newman's continued ability to exercise the functions of her life-tenured office. Had the Committee, at any point, wished to resolve the underlying question rather than seek to simply remove Judge Newman from hearing cases, the matter could have been resolved in a manner Judge Newman suggested over a year ago. Unfortunately, the Committee does not appear to be interested in a good-faith, cooperative resolution. Accordingly, Judge Newman has no choice but to reiterate her position. *See* R. 20(a) Response of Aug. 30, 2023 at 2-3.

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[1] Pursuant to Rule 23(b)(7) of Rules for Judicial-Conduct and Judicial-Disability Proceedings, Judge Newman requests and consents to the release of *all* filings to date. Judge Newman reminds the Committee that the Commentary to Rule 23 states that "[o]nce the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent *only* to the extent necessary to protect the confidentiality interests of the complainant or of witnesses." R. 23. Comm. (emphasis added). There is therefore *no reason* to withhold from publication the Committee's prior orders and Judge Newman's responses, including the present one.

Additionally, Judge Newman continues to object to the Committee's order to have the hearing closed to the public or even the staff of Judge Newman's law firm. At this point, there is no additional non-public information that is likely to be discussed at the hearing, as by the Committee's own directive, the hearing will focus solely on Judge Newman's continued refusal to submit to the Committee's demands, rather than any predicates (including affidavits by various staff) for those demands. Thus, the Committee's orders do not appear to serve any defensible purposes.

Furthermore, it is important to once again remind the Committee and the Judicial Council that the issues at stake are bigger than Judge Newman. At issue is the very independence of the federal judiciary and the meaning of our Constitution—specifically what "hold their Offices during good Behaviour," U.S. Const. art. III, § 1, means and the powers of the courts themselves to limit the exercise of the "judicial power" by duly nominated, confirmed, and appointed Article III judges. Judge Newman is not being obstinate for the sake of being obstinate or merely to spite this Committee. She is defending the very structure of our Constitution. *See* Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. Cal. L. Rev. 673, 701 (1999) ("[T]he possibility of the suspension of a judge's caseload … is tantamount to removal from office …. [T]he fact that it is the Judicial Councils, rather than Congress, that impose the loss of tenure should make no difference for purposes of Article III: Both situations give rise to the very threats to judicial independence that Article III's tenure protection was designed to avoid.").

Under our Constitution, there are only three ways for an Article III judge to leave office—death, resignation/retirement, and impeachment. *See Nixon v. United States*, 506 U.S. 224, 235 (1993) ("In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch ….") (emphasis in original); The Federalist No. 79 (Alexander Hamilton) at 442 (Clinton Rossiter ed., 1999) ("The precautions for their responsibility are comprised in the article respecting

impeachments. They are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges."). Passing a mental fitness exam is not a constitutional requirement for continuing in the life-tenured office to which Judge Newman was appointed.

For these reasons, Judge Newman will not "change course," Order of May 3, 2024 at 2, and no amount of sanctions will cause her to do so. And while she remains willing to resolve this matter in a cooperative fashion, pure submission will never be forthcoming. *See* R. 20(a) Response at 3; *id.* at 120; Letter Br. of July 5, 2023 at 16-17. It is certainly not going to be forthcoming considering the indignities and restrictions visited on Judge Newman which themselves were not authorized by any formal order of the Committee or the Judicial Council. Nevertheless, and as Judge Newman stated previously, even despite all of her constitutional objections, she is willing to resolve this matter in front of a body free from bias and the poisonous atmosphere that has materialized over the past 18 months. *See* R. 20(a) Response at 1; May 25, 2023 Letter to Special Committee at 3; May 9, 2023 Letter to Special Committee at 4-5.

I. NEW INFORMATION SUPPORTS JUDGE NEWMAN'S CONTINUED FITNESS TO SERVE

Since last summer, several additional pieces of information have shed further light on Judge Newman's abilities to continue to carry out the functions of her office.

All these facts point to one inescapable conclusion—Judge Newman remains fit to serve as a federal judge.

A. The Supreme Court's Endorsement of Judge Newman's Legal Reasoning Shows that She Is Fully Competent to Serve as an Appellate Judge

First and foremost, among the new facts since Judge Newman's last communication with the Committee, was the Supreme Court's decision in *Rudisill v. McDonough*, 601 U.S. 294 (2024). In *Rudisill*, the Supreme Court reversed, by a vote of 7-2, a decision by the Federal Circuit sitting *en banc*, which was joined by all but Judge Newman and one other Federal Circuit judge. *See Rudisill v. McDonough*, 55 F.4th 879 (Fed. Cir. 2022) (*en banc*). Judge Newman authored both the panel majority opinion, *Rudisill v. McDonough*, 4 F.4th 1297 (Fed. Cir. 2021), which was vacated when the Federal Circuit granted *en banc* rehearing, *Rudisill v. McDonough*, 2022 WL 320680 (Fed. Cir. Feb. 3, 2022), and a dissent from the *en banc*'s majority.

Judge Newman penned her *en banc* dissent between October 6, 2022 (date of the *en banc* oral argument) and December 9, 2022 (date of the decision), *i.e.*, during the exact timeframe when she allegedly was experiencing a decline in her mental and physical capacity. *See* March 24, 2023 Order. Yet, it was her opinion that the Supreme Court found persuasive. The Court adopted not just the *outcome* that Judge Newman (and Judge Reyna) thought to be correct, but also the *reasoning* of the opinion which she authored when she was supposedly mentally deteriorating.

It is worth emphasizing that one of the pieces of evidence on which this Committee previously relied to bolster its claim that Judge Newman's fitness could reasonably be called into suspicion was the fact that she would often author "opinions

that no other member of the panels would join." Judicial Council Order of June 5, 2023 at 2. In light of the Supreme Court *once again* adopting Judge Newman's views over those of her colleagues, perhaps a better explanation for this phenomenon is not Judge Newman's disability, but her colleagues' incorrect approach to resolving legal issues. Rather than cast aspersions on Judge Newman's abilities, this Committee and Judge Newman's other colleagues should look to and learn from her exemplary judicial craftsmanship.

The same can be said regarding Judge Newman's alleged "delays" in opinion production. Certainly, given the large number of appeals every circuit court (including the Federal Circuit) is facing, and the general agreement that "justice delayed is justice denied," *Campos v. Cook Cnty.*, 932 F.3d 972, 976 (7th Cir. 2019), judges do not have the luxury of pondering each appeal *ad infinitum*. At the same time and equally certainly, there is a trade-off between speed and accuracy. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 716 (1991) (Scalia, J., dissenting) ("Any adjudication of claims necessarily involves a tradeoff between the speed and the accuracy of adjudication."). The less time a judge spends on a matter, the greater the likelihood of that such judge errs. There is room for reasonable disagreement as to where to strike that balance. Judge Newman prioritizes getting her opinions right, even at the (arguable) cost of delays. Her colleagues appear to prioritize speed, even at the (arguable) cost of getting more cases "wrong."[2] Neither choice is particularly

[2] For another example *see Vidal v. Elster*, 602 U.S. 286 (2024) (unanimously reversing *In re Elster*, 26 F.4th 1328 (Fed. Cir. 2022)).

unreasonable, and neither suggests one's inability to continue serving as a federal judge.[3]

The Supreme Court's most recent vindication of Judge Newman's legal reasoning and approach should allay any fair-minded person's concern about Judge Newman's continued ability to perform the work of a federal judge—the work of construing statutes and legal precedent and applying such construction to cases before her.[4]

B. Judge Newman's Intellectual Contributions over the Course of the Past Year Further Undermine Any Claims of "Disability"

Over the course of the last year, Judge Newman participated in a number of public events where her mental capacity could be judged by hundreds of attendees—none of whose job depends on the good graces of the Chief Judge of the Federal Circuit.

For example, on October 13, 2023, Judge Newman spoke at length as a keynote

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[3] That said, getting matters wrongs can exact significant costs on the parties and be injurious to the reputation of the tribunal. Indeed, these very proceedings illustrate the principle. In its rush to sideline Judge Newman, this Committee had to, following the filing of a lawsuit, *see Newman v. Moore*, No. 23-cv-01334 (D.D.C.), create new, *post hoc* justifications and rationalizations for prior, legally unjustified actions. *Compare* Judicial Council Order of June 5, 2023 (entered following Judge Newman's suit and stating that Judge Newman's suspension is predicated on the authority granted the Council under 28 U.S.C. § 332(d)(1)), *with* April 6, 2023 Order at 4 (stating "that the judicial council voted unanimously not to assign you to sit on any new cases pending the results of the investigation into potential disability," but citing no legal authority or precedent for such a *pendente lite* suspension).

[4] There is also no indication that any of Judge Newman's opinions issued in 2023 suffer from low quality, poor writing or reasoning, nor that they differ in any way from the opinions she delivered prior to the alleged onset of disability.

presenter at the American Bar Association Intellectual Property Section's 2023 IP Fall Institute. *See* https://tinyurl.com/2p5xh5pn. The remarks were presented in the form of an interview and lasted for an hour. The clarity of this presentation and Judge Newman's ability to engage are self-evident. Just a day earlier, Judge Newman presented entirely extemporaneous remarks to a roomful of patent litigators, law professors, government officials and former judges at the George Mason University Center for Intellectual Property x Innovation Policy's Annual Conference. *See* https://tinyurl.com/4ayrhfpj. Again, her presentation showed a remarkable presence of mind.

On April 4, 2024, Judge Newman served as a panelist/moderator at the annual Fordham University Law School Intellectual Property Conference. Her role included not only delivering her own remarks, but also providing real-time commentary and follow-ups on other speakers' presentations. As expected, she performed superbly. Three weeks later, on April 25, 2024, Judge Newman was a panelist at Paragraph IV Conference, where she spoke on the legislative history, evolution, and present-day efficiency of the Hatch-Waxman Act. These examples show that Judge Newman is fully in control of her faculties, is able to engage with complicated issues, and can think on the spot, much like a federal judge would be expected to do at oral argument and during case discussion. Furthermore, attendees at these meetings, none of whom has any "skin in the game" with respect to these proceedings, continue to be impressed with Judge Newman's acuity and continue to invite her to additional events as a featured speaker. Surely, were Judge Newman so disabled as to be unable

to engage in hard legal analysis, she would not continue to receive such speaking invitations or awards.

Independent journalists also continue to confirm Judge Newman's abilities and vigor. For example, on January 4, 2024, Judge Newman met with David Lat in her chambers for four hours and on January 12, 2024, she was formally interviewed by him over the course of another hour. As Mr. Lat recounts, she was "completely lucid and sane—and [he] ha[s] reason to disbelieve or at least question much of what [he has] read in the takedowns of her." *See* David Lat, *'Integrity': An Interview With Judge Pauline Newman*, Original Jurisdiction (Jan. 17, 2024), https://tinyurl.com/mrcj38un.

Thus, over the course of the last year, in addition to the Supreme Court's endorsing Judge Newman's legal acumen, a wealth of information accumulated from neutral observers, all of which points to Judge Newman's continued vitality and ability to discharge her duties. In the meantime, no one, including her regular treating physicians and other medical professionals, save for members of this Committee, has suggested that Judge Newman's behavior or medical data would indicate need for any neuropsychological or psychiatric examinations. In light of these data, only one plausible conclusion can be drawn—no such testing is medically necessary nor indicated. Until such testing is *necessary*, Judge Newman will not entertain the Committee's idle curiosity. And as she has publicly stated on numerous occasions, if such testing does become necessary and shows that she is no longer able to perform the functions of her office, she will voluntarily retire the very same day.

See, e.g., Bloomberg Law, *Judge Newman Speaks: 96-Year-Old Fights Push to Oust Her (Podcast)* at 09:05 mark, (July 18, 2023), https://tinyurl.com/4atttw46; Regina M. Carney, M.D., *Independent Medical Evaluation of Hon. Pauline Newman* at 3-4 (Aug. 25, 2023) (quoting Judge Newman).[5]

II. Actions by the Chief Judge, the Committee, and/or the Judicial Council over the Course of the Past Year Raise Further Partiality Concerns

Judge Newman reiterates all of her previous concerns with lack of neutrality, *see, e.g.*, Rule 20(a) Response at 69-99; July 5 Letter Br. at 4-9, and incorporates them by reference. However, in the past year the conduct of the Chief Judge, the Special Committee, and/or the Judicial Council has raised further concerns regarding this issue.

First, the Chief Judge's statements during this investigation have been inconsistent with subsequent orders and positions taken in the District Court litigation. For example, during the oral argument held on July 13, 2023, when Judge Newman's counsel attempted to explain that Judge Newman's "reduced sittings" (which have been used as evidence of her disability, *see, e.g.*, May 16 Order at 16) are entirely the product of the Chief Judge's assignment choices, the Chief Judge flatly denied having *any* input into such assignments.

> CHIEF JUDGE MOORE: Counsel -- Counsel, her sittings were reduced. She sat 65 cases through the second period where the average judge sat 128. She sat closer to the normal level of everyone else in the earlier period. So the explanation, with all

[5] The report was previously submitted as Attachment B to Judge Newman's August 31, 2023, R. 20(a) Response to the Committee's July 31, 2023, Report and Recommendation.

> due respect, to why she might have been able to get the same number of opinions out quicker is because she sat on, like, half the cases than she had the previous time period compared to how -
>
> MR. DOLIN: Of course, Judge Moore, but that was not her choice. You -- it's hard -- it's hard for me to understand how
>
> CHIEF JUDGE MOORE: You say that was not her choice? None of the time period that we measured, just to be clear, was any period of time in which she was prevented from sitting by any of us.
>
> MR. DOLIN: My understanding, based on my time in clerking on the Court and my conversations with Judge Newman, is that judges don't just pick their cases, that the assignment -- and also reviewing the clerical procedure -- the assignment is done by the Chief Judge together working with the Office of the Clerk. Maybe I'm wrong.
>
> CHIEF JUDGE MOORE: **Completely false.**
>
> MR. DOLIN: So...
>
> CHIEF JUDGE MOORE: **The Chief Judge has no input whatsoever** -
>
> MR. DOLIN: Not assignment, but assignment to the panels, assignment to the panels, for how many -
>
> CHIEF JUDGE MOORE: **That's completely false. The Chief Judge has no input whatsoever.** Every judge does their own selection.

July 13 Hearing Transcript at 41:7-42:13 (emphasis added).

In marked contrast, in both the Committee's Report and Recommendation (R&R) and the final Judicial Council's action, as well as in the District Court litigation, the Chief Judge admitted *direct input* into case assignments. For example, the R&R explicitly stated that it was the Chief Judge's decision to (prematurely) invoke Clerical Procedure # 3 ¶ 15. *See* R&R at 79 ("There is no bright line date on which the time periods in CP #3 are applied, and *the Chief Judge's chambers* appropriately relied on the email from Judge Newman's chambers in concluding that

Judge Newman did not anticipate issuing the *Brewer* opinion before paneling was finalized and that she was subject to CP #3.") (emphasis added). The Judicial Council's own decision of September 20, 2023, confirmed this. *See* Sept. 20 Order at 65 ("*The Chief Judge* followed the view communicated by Judge Newman's chambers.") (emphasis added).[6] The Chief Judge, in her capacity as a defendant in *Newman v. Moore*, also admitted, contrary to her statement at the July 13 hearing, that she is directly involved in paneling decisions. *See Newman v. Moore*, ECF 25-5 (Affidavit of Jarrett B. Perlow) ¶4. A neutral observer could readily conclude that such statements were misleading. That a Chief Judge who, presumably, knows the functions of her own office exceedingly well, would make these statements in an ostensible effort to undercut Judge Newman attorney's attempt to rebut the

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[6] That Judge Newman "never objected" to such reduced assignments is irrelevant, as she does not nor is required to track how many cases other judges sit on. Indeed, this is, by the Chief Judge's own admission, the responsibility of the Chief Judge herself. *See Newman v. Moore*, ECF 25-5 (Affidavit of Jarrett B. Perlow) ¶4 ("*The panels are sent back to the Chief Judge's chambers* for comparison to the judges' submitted availability before finalization. In rare circumstances, *the Chief Judge will ask the Clerk's Office to rerun the panel assignment* generator to ensure a more equitable distribution of judges across panels.").

Additionally, in defending Judge Newman's reduced assignments, the Committee mischaracterized her monthly requests for assignments. Judge Newman has always phrased these requests to state that she will sit "as needed." The Judicial Council interpreted these statements to mean that Judge Newman requested to be assigned to panels *only if* needed. *See* Sept. 20 Order at 39. However, as has been her practice for *decades*, Judge Newman phrased her emails this way to indicate that she is willing to sit *for more panels* than she was requested if such *additional* assignments were needed. To the extent that there was any ambiguity in Judge Newman's phraseology, surely the current and the immediate past Chief Judge of the Federal Circuit (both members of this Committee), could have sought clarification in response to Judge Newman panel assignment requests.

Committee's key evidence is yet further evidence of potential bias, which in turn leads Judge Newman to doubt that she will never get a fair hearing in front of this Committee.[7]

Next, during the course of the last year, the Chief Judge (with or without approval of the rest of the Judicial Council) has, without notice to Judge Newman, taken additional steps against her, despite lack of authorization for such steps in the September 20 Order. For instance, Judge Newman, though an active member of the Federal Circuit with a lifetime commission, has been excluded not just from hearing cases (which though unlawful, is at least authorized by the Judicial Council's order), but also from almost all intra-court communications. Judge Newman has been excluded from nearly every intra-circuit email distribution list and all court-related events. Similarly, despite her decades of experience and unlike every other colleague of hers, Judge Newman was not invited to substantively participate in the most

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[7] These inconsistent statements are *in pari materia* with the Chief Judge's erroneous claims that Judge Newman fainted on May 3, 2022. *See* March 24 Order at 1. When repeatedly pressed on the basis for such a claim (which Judge Newman has always denied), the Committee eventually produced an affidavit by Judge Newman's former judicial assistant. However, that affidavit only states that he "*was told* … that [Judge Newman] fainted." Aff. at 2, ¶6 (emphasis added). The only two people who could have been the source of this information are the judges who sat on the same panel—Chief Judge Moore and Circuit Judge Stoll. (While it is possible that a staff member, *e.g.*, court security officer, may have witnessed the alleged fainting episode, in that scenario, one would expect an affidavit from such a witness, rather than reliance on a hearsay statement by Judge Newman's judicial assistant). Yet, although the Chief Judge likely was (and remains) a key witness to one of the disputed episodes that gave rise to this entire saga, she has steadfastly refused not only to recuse, but even to *identify* herself as such a witness, instead relying on the second- or third-hand affidavit of Judge Newman's former judicial assistant—an affidavit that provides information for which the Chief Judge herself is the likeliest actual source.

recent Judicial Conference of the Federal Circuit. Along the same lines, the Chief Judge and/or Judicial Council denied Judge Newman's request to hire an administrative assistant and a law clerk.[8]

These actions constitute a tacit admission that Judge Newman has been suspended not just from hearing cases, but from her *office*. *See United States v. United Steelworkers of Am.*, 271 F.2d 676, 680 n.1 (3d Cir.), *aff'd*, 361 U.S. 39 (1959) (distinguishing between "hold[ing] office" and receiving compensation); *National Commission on Judicial Discipline and Removal, Report*, 152 F.R.D. 265, 284 (1993) ("Under Article III, federal judicial office has *two consequences*. *First, a judge is legally eligible to exercise judicial power*, because the judicial power of the United States is vested in courts made up of judges. Second, a judge is entitled to receive undiminished compensation.") (emphasis added); *Newman v. Moore*, ECF 25 (Def. Br. in support of Motion to Dismiss) at 29 (acknowledging that continuance in office consists of *both* receiving undiminished salary *and* performing routine judicial functions). And a suspension from *office* is beyond the purview of the Judicial Council.

In short, the Committee's approach to this case over the past year further undermine a reasonable observer's confidence the process is free from partiality and

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[8] In contrast, when the Fifth Circuit Judicial Council chose to suspend Judge G. Thomas Porteous pending impeachment inquiry, it explicitly ordered that his "authority to employ staff be suspended for the period of time encompassed" by the suspension order. *In re Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr.*, No. 07-05-351-0085 (5th Cir. Sept. 10, 2008) at 4.

bias.[9] This erosion of confidence further supports Judge Newman's refusal to submit to the Committee's unreasonable demands.

III. THE COMMITTEE NEVER HAD AND STILL HAS NO LEGITIMATE REASON TO DEMAND AN "INTERVIEW" WITH JUDGE NEWMAN

In addition to all of the objections previously expressed in this brief and prior filings, Judge Newman notes that throughout these proceedings, the Committee has never explained the purpose of the "requested"[10] interview with Judge Newman. Indeed, the very request runs contrary to the Committee's claims that what it needs to determine Judge Newman's competence is a medical evaluation. Judge Newman's ability or disability to carry on her functions as a federal judge is purely a question of medical science and not of anything else. Nothing the Committee might ask would shed any light on this question. Perhaps this is why the Committee has never explained the purpose of such an interview (or the purpose of videotaping it), the scope of the inquiry, or even the proposed length of the interview.

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[9] Even social courtesies have not been observed. Thus, none of Judge Newman's colleagues (with perhaps one exception) even bothered to acknowledge, much less congratulate her on, her 40th anniversary on the Federal Circuit's bench—an unmatched accomplishment for that Court and a rarely achieved milestone in the entire federal judiciary. And while no rule obligates anyone to extend social courtesies to one's coworkers, even within the tight-knit community of federal judiciary, this behavior, in combination with the above-recited facts, strongly suggests that Judge Newman's colleagues have set out not merely to punish her or even convince her to "cooperate," but to deprive her of all functions of her office and humiliate her.

[10] It is worth noting that in contrast to the medical examination which the Committee "ordered," the interview was merely "request[ed]," May 16 Order at 25; April 17 Order at 2, and Judge Newman was "*invited* … to meet with the Committee," May 16 Order at 23 (emphasis added). That "invitation" and "request" are declined.

In any event, any sanction for refusing to appear at the interview is entirely premature on its own terms since by virtue of the Committee's and Judicial Council's own orders, Judge Newman retains the right to renew her transfer request after submitting medical evidence and *before* any other proceedings (including the interview). *See* May 3 Judicial Council Order at 1; May 3 Committee Order at 14; May 16 Order at 26. Thus, refusal to sit for an interview which, again, by virtue of the Judicial Council's and Committee's own orders, may never occur, cannot be deemed to be a "refusal to comply … without good cause," May 16 Order at 25, and therefore cannot be subject to sanctions.

Finally, Judge Newman simply has no interest or desire to speak with any members of the Committee now or in the future except as an equal and on matters within the jurisdiction of the Federal Circuit, *i.e.*, on matters such as the Court's opinions, the administration of the business of the Court, and other topics on which she had engaged with her colleagues for nearly 40 years. Judge Newman does not wish to and will not engage with anyone other than her physicians (or other close confidantes) on matters of her health. She will not permit this Committee to intrude on these private matters. All of that having been said, if the Committee does have any specific and pertinent questions, it is welcome to submit them in writing to Judge Newman's attorney, and Judge Newman will answer them to the extent appropriate.

IV. THE ONGOING LITIGATION PROVIDES SUFFICIENT REASON TO DECLINE THE COMMITTEE'S REQUESTS

As the Committee is well aware (since each member of the Committee is a named defendant), Judge Newman has challenged the Committee's authority to

proceed against her, the sanctions imposed, and the overall structure of the Act under which the Committee operates in the United States District Court for the District of Columbia. *See Newman v. Moore*, No. 23-cv-01334 (D.D.C.). Like any other American, Judge Newman is entitled to test, in a judicial tribunal, the validity of administrative orders directed at her. *See Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115, 1119 (2d Cir.1975) (holding that the Constitution requires "an opportunity for testing the validity of statutes or administrative orders without incurring the prospect of debilitating or confiscatory penalties."); *see also Ex Parte Young*, 209 U.S. 123, 147 (1908) (holding that "when the penalties for disobedience are … so enormous and … so severe as to intimidate [litigants] from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."); *cf. Sackett v. EPA*, 566 U.S. 120 (2012) (rejecting the argument that citizens must first comply with EPA's administrative order and only thereafter seek judicial review).[11]

It is fairly obvious that if Judge Newman were to comply with the Committee's (unwarranted) requests, she would lose her opportunity to challenge these requests (and the system under which these requests are made) as unlawful. Were Judge

[11] Unfortunately, the Committee and the Judicial Council have failed to adhere to these basic principles because, in an unprecedented manner (and contrary to the case of Judge Adams, *see infra*), it chose to enforce its suspension order while it was still on appeal to the Judicial Conference, not to mention while the challenge remained and remains pending in the District Court.

Newman to comply with the Committee's demands and thereafter a court of competent jurisdiction were to conclude that the requests were unlawful, it would be able to provide no relief to Judge Newman. In contrast, awaiting the outcome of litigation does not impose any burden on the Committee or anyone else. Judge Newman fully intends to vigorously litigate her rights in federal courts. Regrettably, the Committee has been unwilling to engage in any sort of cooperative or collaborative process with Judge Newman or seek a way to settle the litigation. Consequently, Judge Newman has no choice but to stand on her rights and principles and see the litigation process to its end. She will not unilaterally give up her rights as an Article III judge and as an American citizen.

V. NO FURTHER SANCTIONS ARE APPROPRIATE

Assuming *arguendo* that Judge Newman's refusal to undergo medical testing is "misconduct," she has already been punished for that "misconduct." It is inappropriate to impose *additional* punishment for the same conduct. It is doubly inappropriate to do so when it is undisputed that the Council is without power to *permanently* suspend Judge Newman *even if she were* disabled.

First, the statute permits the Council to suspend Judge Newman only "on a temporary basis for a time *certain*," not until "compliance" is achieved. *See* 28 U.S.C. § 354(a)(2)(A)(i); *see also* S. Rep. 96-362, at 10, *reprinted at* 1980 U.S.C.C.A.N. 4315, 4323-24 ("It is important to point out the committee's clear intention to use the word 'temporary' in this subsection. Serious constitutional questions may be raised concerning the power of the Circuit Council to prohibit the assignment of further cases to the judge in question. The use of the word 'temporary' is designed to convey

the clear intention of the committee that this sanction is to be used only on rare occasions and only *as an interim sanction*. For example, the refusal of the council to allow a judge to accept further cases while undergoing treatment for alcoholism or until the reduction of an excess backlog of cases are examples where this sanction may be invoked.") (emphasis added). This provision is meant to "cleanse" the court and the subject judge of whatever misconduct may have occurred through the passage of time. For example, in the proceedings against Judge G. Thomas Porteous, then-Judge Porteous was suspended from hearing "bankruptcy cases or appeals or criminal or civil cases to which the United States is a party." *In re Complaint of Judicial Misconduct Against United States District Judge G. Thomas Porteous, Jr.*, No. 07-05-351-0085 (5th Cir. Dec. 20, 2007) at 6. That limitation on Judge Porteous was consistent with the finding that he committed perjury in his own bankruptcy filings. Given the taint that Judge Porteous caused to bankruptcy proceedings generally and given that his conduct resulted in a grand jury investigation, it made sense to limit his participation in certain types of proceedings so as not to compound the problem. Similarly, in the case of Judge Colin S. Bruce, the Judicial Council of the Seventh Circuit, after finding that Judge Bruce engaged in *ex parte* communications with federal prosecutors from a specific office, ordered that he not be assigned cases involving *that* U.S. Attorney's office for several months. Again, this temporary suspension from a specific and limited universe of cases was clearly meant to remove any taint occasioned by Judge Bruce's misconduct. *See In re Complaints Against*

District Judge Colin S. Bruce, Nos. 07-18-90053, 07-18-90067 (7th Cir. Jud. Council May 14, 2019).

Even where sanctions were imposed purely as *punishment*, they were always imposed a single time as a *remedy* for past conduct. *See In re: Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002*, No. 05-1490120 (5th Cir. Jud. Council Dec. 3. 2015); *In re Complaint of Judicial Misconduct*, Nos. 99-6-372-48, 00-6-372-66 (6th Cir. Jud. Council Nov. 2, 2001). Indeed, even where a judge continued to "not understand the gravity of [his] inappropriate behavior and the serious effect that it has on the operations of the courts," the sanction was a one-time event. *See Complaint Against Judge Smith*, *supra* at 2.

In contrast, the present Committee attempts to suspend Judge Newman not to remedy past misconduct or remove any taint that such misconduct may have created, but to force submission to its inappropriate edicts—something that Judge Newman has repeatedly explained, and now repeats, will not be forthcoming. Thus, the sanction will not serve its intended purpose because any misconduct was already punished and coercion simply will not work now or at any point in the future.

Additionally, Judge Newman's suspension has already been the longest in the history of the federal judiciary (or at least will become so as of the anniversary of the September 20 Judicial Council order).[12] As of September 20, 2024, Judge Newman

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[12] Technically, Judge Porteous's suspension lasted a total of 25 months, but (a) during that time Congress was actively pursuing an impeachment inquiry and trial, and (b) the suspension order was entered without objection by Judge Porteous who was

would have been excluded from any new cases for 18 months. Whatever the true nature of her "misconduct" (and Judge Newman denies and rejects that she has engaged in any) surely, it is not the most significant case of judicial misconduct that this Nation has seen in its 235 years, nor even the 44 years since the adoption of the Judicial Conduct and Disability Act of 1980.

The Judicial Council can once again look to the *Adams* case for guidance. In *Adams*, the Judicial Council for the Sixth Circuit (before being vacated by the Judicial Conference and eventually receding from the demands in the face of litigation) ordered that Judge Adams be suspended from hearing cases for two years *total*. *See In re Complaint of Judicial Misconduct*, No. 06-13-90009 (6th Cir. Feb. 22, 2016) at 30. On remand, when the only issue before the Sixth Circuit was Judge Adams's continued refusal to comply with the mental health examination order, the sanction was set at only *six months*, with *no mention* of any renewal. *See In re Complaint of Judicial Misconduct*, No. 06-13-90009 at 3 (6th Cir. June 27, 2018). Judge Newman's conduct does not differ in any material way from Judge Adams's conduct, and the Judicial Conference previously cautioned that there should not be "major disparities in sanctions among the various circuits." *In re Complaint No. 05-89097*, No. 08-02 at

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engaged full-time with his (ultimately unsuccessful) defense against impeachment charges. If the Judicial Council believes that Judge Newman's "misconduct" rises to the same level as Judge Porteous's, it should have the fortitude to certify this belief to the Judicial Conference and recommend impeachment proceedings. *See* 28 U.S.C. § 354(b)(2). If the Judicial Council does not believe that Judge Newman's actions merit impeachment, then it should not treat her worse than a judge who actually was impeached and removed from office.

12 (C.C.D. Jan. 14, 2008). It therefore follows that under no circumstances should Judge Newman's punishment be more severe than that contemplated for (though never imposed on) Judge Adams.

The Committee should also keep in mind that in *Adams*, the Sixth Circuit's Judicial Council contemplated that Judge Adams may not comply with its order for medical examination even after the sanction had run. Yet, the Sixth Circuit's Judicial Council did not suggest (in either its 2016 Order nor in its 2018 Order), nor did it attempt to, impose recurring suspensions. Instead, in the 2016 Order it stated that "[s]hould Judge Adams refuse to undergo a mental-health evaluation by a psychiatrist chosen by the Special Investigating Committee, the Judicial Council intends to request that Judge Adams voluntarily retire, waiving the ordinary length-of-service requirements." *In re Complaint of Judicial Misconduct*, No. 06-13-90009 at 30 (6th Cir. Feb. 22, 2016).[13] The Judicial Council of the Sixth Circuit abjured recurring sanctions precisely because (a) such sanctions are contrary to the language of the statute which require suspensions to be "temporary" and for a "time *certain*," 28 U.S.C. § 354(a)(2)(A)(i) (emphasis added); (b) a suspension is meant to be corrective rather than coercive, and (c) at some point even a coercive sanction becomes

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[13] The Sixth Circuit receded from the suggestion of voluntary resignation by 2018, even though its Special Committee concluded that continued failure to undergo mental health examination constituted misconduct. *See In re Complaint of Judicial Misconduct*, No. 06-13-90009 at 3 (6th Cir. June 27, 2018).

The Judicial Council of the Federal Circuit is also welcome to request that Judge Newman "voluntarily retire." She would take such a request under advisement, though of course, she is not obligated to accede to any such request.

ineffective at securing compliance. To the last issue, the Eleventh Circuit's pronouncements on coercive contempt powers of the federal courts is instructive. As that court explained, courts are required to abate civil contempt orders when such "sanctions lose their coercive effect." *In re Lawrence*, 279 F.3d 1294, 1300 (11th Cir. 2002) (quoting *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1530 (11th Cir.1992)). The Seventh Circuit reached a similar conclusion noting that "[i]f after many months, or perhaps even several years, the district judge becomes convinced that, although the [contemnor] is able to [comply with the court's order] he will steadfastly refuse to yield to the coercion of incarceration, the judge would be obligated to release [him] since incarceration would no longer serve the purpose of the civil contempt order—coercing payment." *U.S. ex rel. Thom v. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985). The same logic holds here. Assuming, *arguendo* (and *dubitante*) that the Judicial Council can use the § 354 powers to force compliance (rather than to punish past misconduct), there must come a point where it ought to realize that irrespective of the pressure brought to bear, compliance will not be forthcoming. That time has been reached in this case. As explained in prior submissions and in this brief, Judge Newman will not submit to this Committee's baseless demands (though she continues to extend her offer of working through this process following a transfer). Therefore, it will serve no purpose to extend the suspension.

This Committee's and Judicial Council's own orders recognize that the purpose of the sanction is "to convey the seriousness of misconduct." Sept. 20 Order at 69; *see*

also R&R at 110 (sanction must "appropriately impress upon Judge Newman the seriousness of this matter."). Judge Newman has been duly "impressed," but remains steadfast in her assertions (which are still being litigated, *see ante* Part IV) that a) the entire process is tainted, b) is contrary to both the Judicial Disability Rules and the 1980 Act, and c) is wholly unconstitutional. Despite the "impression" that the Judicial Council has made on Judge Newman, she will not recede from her position, and intends to litigate this matter to completion. Any further sanctions will not make Judge Newman any more "impressed," nor will they change the content of her "impressions" of this process.

Finally, it should be reemphasized that even were Judge Newman to be found to be permanently disabled, the Judicial Council would have no power to preclude her from hearing cases. After all, the very nature of a *permanent* disability cannot be resolved by an "order[] that, on a *temporary* basis for a time certain, no further cases be assigned to" the disabled judge. 28 U.S.C. § 354(a)(2)(A)(i) (emphasis added); *see also* S. Rep. 96-362, at 10. The Judicial Council should not be able to circumvent this limitation by forever focusing on the procedural aspects of these proceedings and indefinitely suspending Judge Newman for what it deems to be a violation of procedural requirements.

Accordingly, any additional sanctions of suspension will be futile, and if imposed, will only provide further evidence that the Committee is simply counting on

Judge Newman to die prior to the conclusion of litigation, thus avoiding having to deal with her as their (now-unwanted) colleague.[14]

CONCLUSION

By now it should be beyond peradventure that Judge Newman and her colleagues have reached an impasse. On one hand, no amount of additional sanctions will force Judge Newman to retreat from her well-considered and constitutionally sound position. On the other hand, at least taking the Committee and the Judicial Council at their word, Judge Newman's colleagues do wish to assure themselves and the public of Judge Newman's continued competence. There remains a way to satisfy both positions, and Judge Newman has proposed several avenues to resolve this conflict. Sadly, she has consistently been met with the Committee's refusal to seek a mutually acceptable and constitutionally permissible resolution. Instead, the Committee has taken a "my way or the highway" approach. Lest there be any doubt, these undignified bullying tactics will not work.

Judge Newman's proposals still remain open to the Committee. The Judicial Council is also free to inform Congress that it believes that Judge Newman should be impeached, and have Congress make the ultimate determination as the Constitution

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[14] Of course, if the Judicial Council (or even a majority of it) truly believes that Judge Newman is disabled, it remains free to certify such a disability under 28 U.S.C. § 372(b). But even in that case, the Judicial Council will not have the power to remove Judge Newman from office, as the only consequence of such a certification is the ability of a President to appoint a supernumerary judge and to treat Judge Newman "as junior in commission to the other judges of the circuit … court." *Id.*

contemplates. Short of that, the Committee should bring this sorry chapter in the history of the Federal Circuit and the entire federal judiciary to a close.

Respectfully submitted,

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